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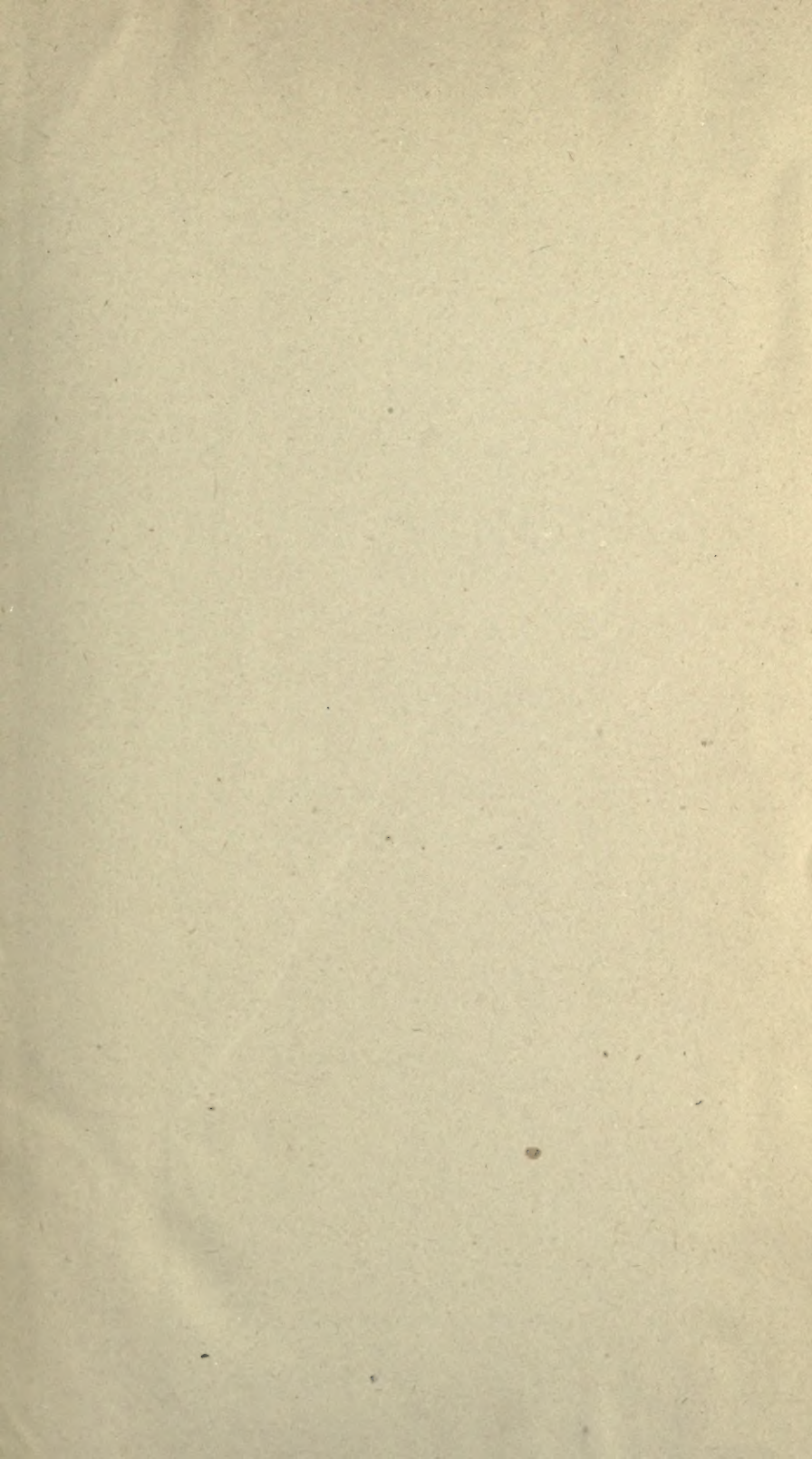


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CITATIONS

TO THE

CODE OF VIRGINIA.

BY

ABRAM C. EBY,
OF THE RICHMOND BAR.

RICHMOND, VIRGINIA,
J. W. RANDOLPH & COMPANY.

1895.

CITATIONS

CODE OF VIRGINIA.

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PREFACE.

THE preparation of these "Citations" for publication was undertaken because of the obvious need of a work of this character, as a ready means of determining the construction of Virginia Statute Law. Chronological order has been observed throughout the entire work, save where interfered with by the arrangement of references in the margin of the Code, which are strictly followed, and always noted, though not given in full, even when they are erroneous, as is sometimes the case.

Mere cumulative authorities have been avoided as far as practicable, as the value of a work of this kind will depend upon its concise statement of an authoritative decision on each point which has been questioned, and not upon a mere inchoate mass of precedents; for its purpose is to define the meaning and illustrate the principles of our statute law, as determined by the Supreme Court of the United States, the Supreme Court of Appeals, and the now abolished General Court of Virginia.

The references having all been verified, the "Citations" are now given to the tender mercies of a critical profession, with the hope that they will prove a reliable method of saving much valuable time.

RICHMOND, VA., *February*, 1895.

MISS ALICE

CITATIONS

TO

THE CODE OF VIRGINIA.

CONSTITUTION.

ARTICLE 1, SECTION 21.

In *Ruffin vs. Commonwealth*, 21 Grat., 790, decided November 11, 1871, it was held: The bill of rights, though made a part of the Constitution, has the same force and authority as before, and no more than it always had. And the principles which it declares have reference to freemen and not to a convicted felon; that a convicted felon has only such rights as the statutes may give him.

(In this case the prisoner, a convict, had killed a guard not employed by the State, but by a contractor to whom the said convict was hired by the State; in Bath county, the question was, Could he be legally tried in the Richmond Circuit Court in accordance with the statute and contrary to the bill of rights?)

ARTICLE 4, SECTION 5.

In the case of *Lee (Sergeant) vs. Murphey*, 22 Grat., 789, decided December 4, 1872, it was held: The Governor of Virginia has authority under the Constitution to grant a conditional pardon to a prisoner convicted of a felony.

The condition annexed to a pardon must not be impossible, immoral, or illegal, but it may, with the consent of the prisoner, be any punishment recognized by statute or by the common law as enforced in this State. Though the warrant of the governor speaks as commuting the punishment, yet, as it substitutes a less for a greater punishment, and is intended to be done and is done with the consent of the prisoner, it will be considered a pardon, and not a commutation of the punishment.

(This case distinguishes the case of *Commonwealth vs. Fowler*, 4 Call, 35, in which the punishment substituted in the pardon was illegal. And *Ball vs. Commonwealth*, 8 Leigh, 726, was disregarded on the ground that it was a mere *obiter dictum*.)

In *Wilkinson (Sheriff) vs. Allen*, 23 Grat., 10, decided Jan-

uary 22, 1873, it was held: The governor has no authority to remit a fine.

In *Blair vs. Commonwealth*, 25 Grat., 850, decided March 12, 1874, it was held: Under the Constitution of Virginia, the governor has authority to pardon a person convicted of a felony by the verdict of the jury before the sentence is passed upon him by the court.

In the case of *Edwards vs. Commonwealth*, 78 Va., 39, decided November 15, 1883, it was held: The governor's pardon relieves the offender not only of the punishment annexed to the offence whereof he was convicted, but of all penalties and consequences, including the additional punishment, impossible not by reason of the sentence for the second offence alone, but in consequence of that sentence, and the sentence in the former case, except, however, political disabilities growing out of his conviction and sentence.

ARTICLE 4, SECTION 8.

In the case of *Wolf et als. vs. McCall, Clerk, etc.*, 76 Va., 876, decided July, 1882, it was held: Where the legislature has passed a bill and presented it to the governor, the legislature cannot recall it. The governor has no power to return a bill except with his veto and objections. In this case it was returned, and not having been vetoed it became a law.

ARTICLE 5, SECTION 14.

In the case of *Perry vs. Commonwealth*, 3 Grat., 632, decided December, 1846, it was held: The constitutional provision forbidding *ex post facto* laws relates to crimes and punishments, and not to criminal proceedings.

No person is incapacitated from being a witness on account of his religious belief.

In *Plecker vs. Rhodes*, 30 Grat., 795, decided October 3, 1878, it was held: The General Assembly has the power to authorize an individual to build a toll-bridge over a river.

ARTICLE 5, SECTION 15.

In the case of *Anderson vs. Commonwealth*, 18 Grat., 295, decided February 20, 1868, it was held: A charter reserving to the General Assembly the power to modify or repeal the charter, the modification was effectually done by the act for the assessment of taxes, and is not a violation of this section of the Constitution.

In the case of *Crawford vs. Halsted & Putnam*, 20 Grat., 211, decided January 9, 1871, the act of February 7, 1867 (Acts, p. 615), was held to conform with this section, though the judges did not agree in defining exactly what was the meaning of this section, some holding it to be merely directory, but care-

fully avoiding a decision which would affect more than the case at bar.

In the case of *Price's executor et als. vs. Harrison's executor et als.* 31 Grat., 121, decided November 28, 1878, it was held: No inference of an intended retroactive operation is to be drawn from the mode of amendment, that is, by re-enacting the existing statutes as amended so as to read, etc.: This mode of amendment was adopted pursuant to requirements of the Constitution of the State.

In the case of *Board of Supervisors vs. McGruder*, 84 Va., 828, decided May 3, 1888, it was held: This section ordains that no law shall embrace more than one subject, which shall be expressed in its title. Act of November 27, 1884, entitled, "An act to allow further time for the treasurer of Henrico county to make returns of delinquent taxes," provides that the "late treasurer of Henrico county be allowed until the first day of February, 1885, to make his supplementary returns for the years 1879, 1881, 1882, and 1883," and is repugnant to said section of the Constitution, in that the title thereof is not only misleading, but embraces an object wholly variant from the object expressed in the body of the act.

In the case of *Fidelity Insurance, Trust and Safe Deposit Company et als. vs. Shenandoah Valley R. R. Co. et als.*, 86 Va., 1, decided April 11, 1889, it was held: The act of March 21, amended April 21, 1879, entitled, "An act to secure the payment of wages and salaries of certain employees of railroad and other transportation companies," providing that employees and persons furnishing to such companies supplies, cars and engines, is, as to the cars and engines, void, being repugnant to Section 15, Article 5, Virginia Constitution.

In the case of *Powells vs. Supervisors of Brunswick County*, 88 Va., 707, decided January 28, 1892, it was held: The intent of Article 5, Section 15, Constitution of Virginia, was to prevent in one act the union of objects having no connection, and is effectual where an act has but one general aim fairly indicated in its title, as "to incorporate a railroad company," and such act may embrace the necessary details, such as authorizing counties to aid by their subscriptions and the like. An act approved April 21, 1882, entitled, "An act to incorporate the A. & D. Railroad Company," is not repugnant to said section.

In the case of *Lascallett vs. Commonwealth*, 89 Va., 878, decided April 20, 1893, this section provides that no law shall embrace more than one object, which shall be expressed in its title; but where the act has but one general object, and that is the suppression of certain kinds of betting or gambling, and makes it an offence (1), to bet in any of the prohibited modes, and (2), to keep any house for the purpose of betting therein.

Held: The act does not violate said section, as the latter provision is merely one of the measures adopted for the accomplishment of the general object expressed in the title.

ARTICLE 5, SECTION 17.

In the case of *Trustees vs. Guthrie et als.*, 86 Va., 125, decided June 13, 1889, it was held: The creation of a corporation for the purpose of carrying on Foreign Missions is not the incorporation of a church or religious denomination, which is forbidden, but which provides that the legislature may secure the title to church property.

ARTICLE 5, SECTION 22.

In the case of *Meredith, ex parte*, 33 Grat., 119, decided April 1, 1880, it was held: A judge of a county court, who has been elected to fill a vacancy occasioned by the death of a former judge, is elected for the full term of six years, and not for the unexpired term of the former judge; and this is equally true of judges of the Court of Appeals and circuit courts.

In the case of *Burks vs. Hinton*, 77 Va., 1, decided January 15, 1883, it was held: The joint resolution of December 28, 1872 (Act 1872-'73, p. 1), providing that all elections by the General Assembly to fill vacancies in the office of judge shall be for the unexpired term of his predecessor is constitutional. The decision of this court *in re Meredith*, 33 Grat., 119, declaring the joint resolution unconstitutional, is sustained neither by contemporaneous or legislative construction, nor by the reason of the judge who delivered the opinion, and is erroneous.

In the case of *Vaughan vs. Johnson (Sergeant)*, 77 Va., 300, decided March 22, 1883, it was held: The General Assembly is authorized by the Constitution to declare the cases in which any office shall be deemed vacant and the mode of filling vacancies in cases not therein especially provided for. The Constitution does not declare the causes for which the office of mayor shall be declared vacant, nor the mode of filling the vacancy, nor his term of office.

ARTICLE 6, SECTION 2.

See *Post*, Section 3455.

In the case of *Harman vs. City of Lynchburg*, 33 Grat., 37, decided March 11, 1880, it was held: The term "matter in controversy," as used in reference to the jurisdiction of the court of appeals, in Article 6, Section 2, of the Virginia Constitution, means the subject of litigation, the matter for which suit is brought and upon which issue is joined. The Appellate Court must show the right of the court to entertain jurisdiction.

In the case of *Fink Brothers & Co. vs. Denney et als.*, 75 Va.,

663, decided September term 1881, it was held: A suit to set aside several deeds on the ground of alleged fraud, and to subject the lands thereby conveyed to the debt of the complainants, is not in the category of controversies concerning the title or boundaries of land within the meaning of the Constitution of the State. In such a case it is the debt which is the matter in controversy, and as a general rule it is the amount claimed by the complainant in the court below which determines the jurisdiction of the court where he is appellant.

In the case of *Butchelder & Collins vs. Richardson & Co.*, 75 Va., 835, decided November term 1881, it was held: Where on a money demand the difference between the amount decreed to the appellant in the court below and the amount of the claim asserted by him in that court is not sufficient to give this court jurisdiction, his appeal will be dismissed, and if the actual amount in dispute does not otherwise appear, the court will look to the whole record for the purpose of determining the jurisdiction.

In the case of the *Southern Fertilizing Co. vs. Nelson*, 6 Va. Law Journal, 162, decided January, 1882, it was held: The onus of showing that the appellate court has jurisdiction of a case is always on the appellant or plaintiff in error. The property levied on does not constitute the matter in controversy so as to give the court jurisdiction of the case.

In the case of *Buckner vs. Metz et als.*, 77 Va., 107, decided February 1, 1883, it was held: Where A secures a judgment against B for an amount greater than five hundred dollars, and B conveys his only property, worth less than five hundred dollars, to a third person, upon which A brings suit to subject the said property to the payment of his judgment against B, that the suit brings for the value of the property, that value determines the jurisdiction.

In the case of *Updikes's administrator et als. vs. Lane*, 78 Va., 132, decided December 6, 1883, it was held: Where for debt of decedent there is no decree *in solido* against his personal representative, but severally against each distributee for his proportion of the debt, which exceeds five hundred dollars, substantially it is a decree against the decedent's estate, and as it exceeds in the aggregate the minimum jurisdictional sum, an appeal lies from the decree in behalf of the distributees. This point has, however, been ruled upon by the United States Supreme Court.

In *Henderson's executor vs. Wadsworth*, 115 U. S., 264, decided November 2, 1885, it was held: Where suit is brought against heirs to enforce their liability for the payment of a note on which their ancestor was bound, and they plead neither counter claim nor set off, and ask no affirmative relief, and separate

judgments are rendered against each for his proportionate share, the court has jurisdiction in error only over those judgments which exceed five thousand dollars.

In the case of *Peters & Reed vs. McWilliams et als.*, 78 Va., 567, decided February 7, 1884, it was held: Where the amount in controversy exceeds the minimum jurisdictional sum this court hath jurisdiction, though the judgment complained of be not in form *in solido* for that amount, but be divided into lesser sums, payable to the persons respectively entitled thereto; in form, the judgment is several in substance; it is *in solido*.

In the case of *Cox vs. Carr et als.*, 79 Va., 28, decided April 3, 1884, it was held: Where jurisdiction depends upon the amount in controversy, if plaintiff, in his declaration or bill, claims money or property of greater value than five hundred dollars, he is entitled to his appeal or writ of error, though the judgment be for less; but not so the defendant if the judgment be for less.

In the case of *McCrowell vs. Burson*, 79 Va., 290, decided August 7, 1884, it was held: To give this court jurisdiction, save in certain cases, the judgment must amount to five hundred dollars, principal and interest, at its date, except when plaintiff's demand exceed the sum and he applies for the appeal. This is in affirmation of *Gage vs. Crocket*, 27 Grat., 734, and *Tebbs vs. Lee*, 76 Va., 744.

In the case of *Smith et ux vs. Rosenheim*, 79 Va., 540, decided October 7, 1884, it was held: The test of jurisdiction in this court to entertain an appeal from a decree of the court below, enforcing on land the lien of a judgment is the amount or value of the judgment. If such amount or value fall below five hundred dollars, this court has no jurisdiction to review such decree.

In the case of *McIntosh (Treasurer) vs. Braden et als.*, 80 Va., 217, decided February 5, 1885, it was held: The act of March 12, 1884, is constitutional so far as it confers upon this court jurisdiction in all cases of coupons arising under act of January 14, 1882, without regard to the amount in controversy being in conflict with Article 6 of the State Constitution, fixing minimum jurisdictional amount in cases purely pecuniary at five hundred dollars.

In the case of *Kahn vs. Kerngood*, 80 Va., 342, decided March 19, 1885, it was held: Where a deed conveys property alleged therein to be worth over five hundred dollars, and is assailed as fraudulent by a creditor whose debt is less than five hundred dollars as between the grantee and the assailing creditor, the matter in controversy is the value of the property and not the amount of the debt, and in the absence of proof to the contrary, the alleged must be deemed the actual value of the property.

In the case of *Duffy & Bolton vs. Figgatt*, 80 Va., 664, de-

cided September 17, 1885, this ruling in the case of *Cox vs. Carr et als.*, 79 Va., 28, quoted *supra*, was reiterated.

In the case of *Whitmer's heirs vs. Spitzer et als.*, 81 Va., 64, decided October 8, 1885, where a decree was rendered in the court below requiring Spitzer to pay nine hundred and seventy-five dollars to equalize four other heirs with his wife, he paid the money. Later, an inquiry resulted in a decree that the wife of Spitzer was entitled to an equal share of that sum, and that the four other heirs refund to Spitzer one-fifth thereof. The court of appeals held: This is a decree for payment of a less sum of money than constitutes the minimum jurisdictional amount, and the appeal must be dismissed.

In the case of *Cralle vs. Cralle*, 81 Va., 773, decided April 25, 1886, pending a divorce suit, the trial court decreed alimony. From the decree, appeal was taken and supersedeas awarded. Pending the appeal, trial court decreed to the woman an allowance of one hundred and fifty dollars to enable her to defend the suit in this court, and twenty-five dollars a month for her maintenance during the pending of the suit. The Supreme Court of Appeals held: The court below was authorized to make the decree last appealed from. 2nd. The amount decreed, however, being less than the minimum jurisdictional sum, the appeal must be dismissed. 3rd. The appellants remedy is by writ of prohibition from this court to the execution of the decree.

In the case of *Witz vs. Osburn*, 11 Va., Law Journal, 585, decided April 21, 1887, it was held: Where the amount in controversy in an appeal is above the jurisdictional limit as to one of the appellants only, but the questions presented are identical as to all the appellants, and their interests cannot be severed. The appeal will not be dismissed as to those whose claims are below the jurisdictional amount.

In the case of *Thompson vs. Adams*, 11 Va. Law Journal, 217, decided December 9, 1886. Timberlake and J. A. Thompson have each a judgment against S. G. Thompson, neither of which amounts to five hundred dollars. The judgment debtor having conveyed his land to one Adams, these judgment creditors bring their bill to set aside the deed as fraudulent, and subject the land to the payment of their judgment, the bill being dismissed they appealed. The court held: 1st. The decree is to be considered severally as to each creditor, and neither judgment amounting to five hundred dollars, the limit fixed by the Constitution, the court has no jurisdiction to allow or hear an appeal from the decree. (This affirms the ruling in *Umberger vs. Watts*, 25 Grat., 167.) 2nd. The fact that one object of the bill was to set aside the alleged fraudulent conveyance does not alter the case that was merely an incident to the

main object, which was to subject the land to the payment of the judgments.

In the case of *Pannill vs. Coles*, 81 Va., 380, decided January 21, 1886, it was held: State Constitution, Article 6, Section 2, gives this court appellate jurisdiction in controversies concerning the title or boundaries of land, whatever the amount and whatever the element of title involved in the controversy, and consequently such jurisdiction extends to cases of unlawful entry and detainer.

In the case of *Board of Supervisors vs. Catlett's executor*, 86 Va., 159, decided June 13, 1889, it was held: A suit as to the right of the board of supervisors to levy a tax to pay a claim concerns a franchise, and this court hath jurisdiction.

ARTICLE 6, SECTION 3.

In the case of *Bolling vs. Lersner*, 26 Grat., 36, decided March 25, 1875, it was held: The act of February 28, 1872, to provide a special court of appeals to consist of three judges of the circuit courts, is constitutional, and the decisions of the court are valid and binding on the parties to the causes decided. The case referred to as 26 Grat., 45, is the case above cited.

ARTICLE 6, SECTION 8.

In the case of *Blair (Attorney-General) vs. Marye (Auditor)*, 80 Va., 485, decided May 7, 1885, it was held: By Section 8, Article 6, State Constitution, the election and commissioning of an attorney-general is provided for, and is directed that he shall perform such duties as the law may prescribe, it is not within the power of the legislature itself to withhold from him the salary which is prescribed by law, nor to delegate such power to the auditor.

The salary of the attorney-general is of constitutional grant and of public official right, and the doctrine of off-set cannot be applied to it. It is not liable to attachment, to garnishment, nor to assignment in bankruptcy, and upon principles of public policy it has absolute immunity from detention for debt or counter claims.

The act of General Assembly passed November 24, 1884, Acts (extra session) 1884, p. 90, requiring the auditor to withhold the salary of any officer who is indebted to the State for money collected by him, or improperly drawn by him, during his term of office, until the default is made good, is unconstitutional and void so far as it affects constitutional offices.

ARTICLE 6, SECTION 14.

In the case of *Chahoon vs. Commonwealth*, 21 Grat., 822, decided December 13, 1871, it was held: This was not intended to restrict, but to enlarge the jurisdiction of these courts, and to

elevate them to the dignity of circuit courts, and it was component for the legislature to give to the corporation courts jurisdiction to try cases of felony, though the jurisdiction in such cases is taken away from the circuit courts.

In the case of *Craft vs. Commonwealth*, 24 Grat., 606, decided December 11, 1873, it was held: The jurisdiction of corporation courts (save that of the city of Richmond) is the same as that of the circuit courts, and also such jurisdiction as the former hustings courts of the respective cities had under the laws as they existed on the 26th day of January, 1870.

ARTICLE 6, SECTION 20.

In the case of *Burche vs. Hardwicke*, 30 Grat., 30, decided March 14, 1873, it was held: Though under the Constitution of the State, Article 6, Section 20, the mayor has the authority to remove the officers of the municipality, the Constitution does not invest him with the power to remove State officers, though they are elected by the people of the municipality, or appointed by the municipal authorities, and are paid by them. The chief of police of a city is an officer of the State, and not of the municipality in which he exercises his office.

In the case of *Roche vs. Jones (Sergeant)*, 87 Va., 484, decided March 5, 1891, it was held: The legislature incorporating a town may appoint the officers to exercise their functions until a regular election, notwithstanding Article 6, Section 20, provides that town officers shall be electors of such town.

ARTICLE 6, SECTION 22.

In re Broadbuss, 32 Grat., 779, decided February 19, 1880, it was held: Where the term of a judge ended December 31, 1879, and his successor was elected January 12, 1880, his term commenced in January, 1880, and he is judge of the county from the time of his qualification, and authorized at once to exercise authority and discharge the duties of the office.

In re Fisher, 33 Grat., 232, decided April 29, 1880, it was held: Manchester was incorporated as a city in 1874, and having more than five thousand inhabitants, it was entitled to a judge of said court. This being the first judge of this court, under the Constitution, C.'s term of office commenced on the first of January, 1875, and would continue until the 31st of December, 1880, and he was, under the Constitution, authorized to act as judge from the time of his qualification to the commencement of his term.

In the case of *Foster vs. Jones*, 79 Va., 642, decided December 4, 1884, it was held: The General Assembly cannot, directly or indirectly, abolish any constitutional office, that is, one whose term is defined by the Constitution, but may, directly or indirectly, abolish any legislative office, that is, one created by

the General Assembly itself. Where a county judge has been elected for a judicial district composed of two counties, the legislature may curtail his jurisdiction, his territorial district having still at least eight thousand inhabitants. Such curtailment and consequent loss of additional compensation of twenty dollars for every thousand inhabitants over ten thousand provided for county judges by act approved March 12, 1878 (Acts 1877-'78, p. 172, sec. 10), did not violate Section 22, Article 6, of the Constitution.

ARTICLE 6, SECTION 25.

In the case of *Lawhorne*, 18 Grat., 85, decided January 15, 1868, it was held: This section applies to State offices, and the governor, whose term has expired, holds over until his successor is qualified.

In the case of *Broaddus*, 32 Grat., 779, decided February 19, 1880, it was held: When there is an election after the expiration of the predecessor's term, his authority dates from the time of his qualification.

In the case of *Johnson vs. Mann (Judge)*, and *Couch (Treasurer)*, 77 Va., 265, decided March 15, 1883, it was held: Under the Constitution and laws of this State, county, municipal, and district officers must qualify before the day whereon their terms respectively begin, else their offices are vacated, and the incumbents continue to discharge the duties of the offices after their terms of office have expired until their successors have qualified.

ARTICLE 7, SECTION 5.

In the case of *Bunting vs. Willis (Judge)*, 27 Grat., 144, decided February 10, 1876, it was held: The office of sheriff commences on the first of July. If a person holding an office of profit under the United States Government is elected to office of sheriff, which is an office of profit under the State government, and holds his office under the former government until any time during the first of July, he thereby vacates his election as sheriff, and is not entitled to qualify as such.

In the case of *Shell (Judge) vs. Cousins et als.*, 77 Va., 328, decided March 29, 1883, it was held: Any office is incompatible with that of sheriff. Sheriff's acceptance of any office actually vacates the sheriffalty, and no judgment of amotion is necessary where an office has been forfeited by a removal or the acceptance of an incompatible office. When the office of sheriff is thus made vacant, it becomes the duty of the county court judge to fill the vacancy in the mode prescribed by the law. The sheriff's resignation of the second office, after, by acceptance, he has vacated the first cannot restore him, or otherwise affect the first. As the law makes it the duty of the county court

judge to fill the vacancy in the sheriffalty, the circuit court has no authority to issue a writ of prohibition to restrain this exercise of his jurisdiction. If he exercises it erroneously, the remedy is by appeal. Prohibition lies only in case of transcending jurisdiction. This court has ever discouraged the employment of a writ of prohibition as a process to correct the error of inferior tribunals, and thus usurp the functions of the writ of error. (Article 8, Section 8.)

In the case of *Greenhow (Treasurer)*, vs. *Vashon*, 81 Va., 336, decided January 14, 1886, it was held: An act making school taxes payable only in lawful money of the United States is in accordance with the Constitution. No coupons can be received.

ARTICLE 10, SECTION 1.

In the case of *Commonwealth* vs. *Moore & Goodsons*, 25 Grat., 951, decided January 7, 1875, it was held: The act chapter 240, Section Acts of 1874, which imposes a license tax on merchants, is constitutional.

In the case of *Town of Danville* vs. *Shelton et als.*, 76 Va., 325, decided May 30, 1882, an ordinance imposing on every one engaged in purchasing leaf tobacco in Danville a tax of ten dollars and one per cent. on capital employed, and in addition fifteen cents per thousand pounds purchased monthly, was in question. Held: This feature is illegal. As a tax of fifteen cents on the thousand pounds, without regard to value, is unequal as a license, it is not warrantable, because the business could have been reached on the *ad valorem* principle.

In the case of *Peters* vs. *City of Lynchburg*, 76 Va., 927, decided April 13, 1882, has been quoted as an authority on this point, but it is mere affirmation of a decision of the lower court by a divided court, and the whole case is really *obiter dictum*, save as to a question as to whether the council of Lynchburg had authority to impose a tax on successions under its charter and Code 1873, Chapter 54, Section 33.

In the case of the *Norfolk and Western Railroad Company* vs. *Supervisors of Smyth County*, 87 Va., 521, decided March 19, 1891, it was held: County supervisors are authorized to levy a tax on railroad property in their county at any time after the passage of the act of February 27, 1880, based on the State assessment made previous to that act. And where the levy recites that fact the levy will be presumed legal.

ARTICLE 10, SECTION 4.

Case of *Town of Danville* vs. *Shelton et als.*, 76 Va., 325, quoted *supra*—Article 10, Section 1.

ARTICLE 10, SECTION 10.

In the case of *Dinwiddie County* vs. *Stuart, Buchanan & Co.*,

28 Grat., 526, decided April 26, 1877, it was held: The act of May 9, 1862, entitled an act to authorize the county courts to purchase and distribute salt amongst the people and provide payment for the same, is constitutional on the ground that the then government has been repeatedly recognized as a *de facto* government, and its contracts must be enforced.

In the case of *Pulaski County vs. Stuart, Buchanan & Co.*, 28 Grat., 872, the above case was affirmed and its principles reiterated.

ARTICLE 11, SECTION 1.

In the homestead cases, 22 Grat., 266, decided June 13, 1872, it was held: The Article 11, Section 1, of the Constitution of Virginia, and the act of June 27, 1870, ch. 157, passed in pursuance thereof in relation to homestead exemptions, are in conflict with Article 8, Section 10, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts so far as the Virginia Constitution went into operation.

In the case of *Hatorff vs. Wellford (Judge)*, 27 Grat., 356, decided March 30, 1876, it was held: A householder dying leaving a widow, without having had a homestead assigned him in his life-time, his widow remaining unmarried is entitled to claim the same and have it assigned to her.

In the case of *Commonwealth vs. Ford et als.*, 29 Grat., 683, decided January 17, 1878, it was held: The third exception in the proviso to the first section of Article 11, of the Constitution of the State, embraces the liability of a collector of taxes and also of his sureties in his official bond. And, therefore, said sureties are not entitled to their homestead exemption as against the Commonwealth in a proceeding against them and their principal to recover the amount of taxes for which the collector had failed to account.

In the case of *Reed vs. Union Bank of Winchester*, 29 Grat., 719, decided January 31, 1878, it was held: The act which authorizes the waiver of the homestead exemption is not in conflict with this article. And if a party executing his bond or note, waiving the homestead, neither he nor his wife can set up homestead exemption as against the said bond or note.

In the case of *Calhoun vs. Williams*, 32 Grat., 18, decided July 24, 1879, it was held: 1st. An unmarried man who has no children or other persons dependent on him living with him, though he keeps house and has persons hired by him living with him, is not a householder or head of a family within the meaning of these terms used in the Constitution and laws of Virginia, and, therefore, is not entitled to the homestead exemption as provided by the same. 2d. The terms householder and head of a family have the same meaning in the provision of the Constitution and statute relating to homesteads.

In the case of *Lindsay vs. Murphey*, 76 Va., 428, decided April 27, 1882, it was held: The privilege of homestead is accorded only to citizens of this State while they remain such.

2. Change of domicile from this State puts an end to the homestead privileges.

In the case of *Scott vs. Cheatham et als.*, 78 Va., 82, decided November 28, 1883, the ruling in *Hatorff vs. Wellford (Judge)*, 27 Grat., 356, quoted *supra*, was confirmed and reiterated, also held: This exemption is a privilege, and may be waived or claimed as the householder may elect.

In the case of *Burton, &c., vs. Mills et als.*, 78 Va., 468, decided March 13, 1884, it was held: The homestead exemption does not protect against a demand for damages for breach of promise to marry, which is not a debt contracted, but a *quasi tort*.

In the case of *Wray vs. Davenport*, 79 Va., 19, decided April 3, 1884, it was held: The Constitution (Art. 11) secures homestead, yet the legislature may prescribe the mode of setting it apart, only it cannot defeat or impair the benefit thereof. Chapter 183, Code of 1873, is within legislative authority, and to the availment thereof the householder must actually set it apart as prescribed.

In the case of *Wilkerson vs. Murville et als.*, 87 Va., 513, decided March 19, 1891, it was held: Where homestead exemption has been regularly set apart, it is for the benefit of the householder and his family, and is not ended by the latter's decease.

ARTICLE 11, SECTION 1, PROVISIO 2.

In the case of *Farinholt vs. Buchard*, 10 *Virginia Law Journal*, 213, decided February 11, 1866, it was held: One engaged in carrying the United States mail over a county post route is a laboring person within the meaning of those words as used in the Virginia Constitution, and the fact that he owns the horse and vehicle used by him for that purpose does not alter the case.

ARTICLE 11, SECTION 9.

In the case of *Scott v. Raub*, 88 Va., 721, decided January 28, 1892, the plaintiff was born in 1862 of parents living together as husband and wife from 1861 to 1864, he being a colored man, and she a slave, and dying then, and plaintiff was recognized as his child, and as such was reared to womanhood. The court held: Under the Constitution, Article 11, Section 9, and act of February 27, 1866, Section 2, she was his legitimate child, and entitled to share by inheritance in his real estate.

THE CODE OF VIRGINIA.

TITLE I. CHAPTER I.

TITLE II. CHAPTER II.

SECTION 3.

In the case of *Dykes & Co. vs. Woodhouse, Adm'r*, 3 Rand., 287, it was held: The process of *scire facias* is saved under this statute, whether it originated from the common law or by statute. 2 Westm., 45.

SECTION 5, PAR. 3.

In the case of *Booker vs. Young et als.*, 12 Grat., 303, decided April, 1855, it was held: A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving a majority of the votes cast is duly elected.

SECTION 5, PAR. 4.

In the case of *Pierce's executors et als. vs. Harrison's executors et als.*, 31 Grat., 114, decided November 28, 1878, on (page 118.) The court refers to this section as a definite and final definition of the words "personal representative."

The reference to 33 Grat., 267, is to the case of *Brown et als. vs. Lambert's administrators*, this case does not construe the statute, but the statute is cited as ruling the case.

SECTION 5, PAR. 8.

In the case of *Turnbull vs. Thompson et als.*, 27 Grat., 306, decided March 16, 1876, it was held: A summons in debt is served on a defendant on the third of February, and the judgment by default becomes final on the third of March. Under the statute the day of the service of the process may be counted, and therefore thirty days had elapsed between the service of process and the judgment, and it is a valid judgment.

The reference to 27 Grat., 318, is an error.

SECTION 5, PAR. 9.

In the case of *Michie vs. Michie's administrator*, 17 Grat.,

109, decided October 17, 1866, it was held: Sunday, being *dies non juridicus*, is not one of the days of the term of a court.

In the case of *Read vs. Commonwealth*, 22 Grat., 924, decided December 11, 1872, it was held: Sunday is not to be counted as one of the days of the term of a court.

In the case of *Bowles vs. Brauer et als.*, 89 Va., 466, decided December 8, 1892, it was held: In court-practice, Sunday is not to be reckoned. When a statute prescribes a certain number of days within which an act is to be done, and says nothing about Sunday, it is to be included, unless the last day falls on Sunday, in which case the act may generally be done on the succeeding day, but if the act may be lawfully done on Sunday, and the last day falls on Sunday, then Sunday is not to be excluded.

SECTION 5, PAR. 12.

In the case of *Clegg vs. Lemessurier*, 15 Grat., 108, decided April, 1859, it was held: A writing for the payment of money or other purpose, which is not required to be by deed, having a scroll at the foot thereof with the word seal written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument.

Evidence *aliunde* is not admissible to prove that a scroll at a foot of a writing was intended as a seal.

SECTION 5, PAR. 13.

In the case of *B. and O. R. R. Co. vs. Gallahue's administrator*, 12 Grat., 655, decided July, 1855, it was held: When the word person is used in a statute, corporations as well as natural persons are included for civil purposes.

In the case of *The Western Union Telegraph Company vs. The City of Richmond*, 26 Grat., 1, decided March 18, 1875, it was held: Though the ordinance of the city imposing taxes speaks only of persons or firms doing business in the city, yet it imposes a tax in terms on telegraph companies, and obviously intends to include incorporated companies as well as individuals. Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute.

In the case of *Miller's Ex'ors vs. Commonwealth*, 27 Grat., 110, decided February 3, 1876, it was held: Corporations are included under the term "persons" in a statute, unless they are exempted by its terms, or by the nature of the subject to which the statute relates. The reference to 27 Grat., 115, is to the case cited above from page 110.

In the case of *City of Lynchburg vs. Norfolk and Western Railroad Company*, 80 Va., 237, decided February 19, 1885, it was held: Section 5, of Charter of City of Lynchburg, grants authority to impose a license tax upon persons engaged in certain enumerative callings, and upon any other person or employment which it may deem proper; whether such person or employment be herein specially enumerated or not does not empower the city to impose such a tax upon a railroad corporation, which is neither a person nor an employment, within the ordinary acceptation of those words.

SECTION 6.

In the case of *Parramore vs. Taylor*, 11 Grat., 220, decided April 1854, it was held: In construing the Code the rule of construction is that the old law was not intended to be altered, unless such intention plainly appears.

In the case of *Crawford vs. Halsted & Putnam*, 20 Grat., 211, decided January 9, 1871, it was held: A deposition of a party to be read in a pending cause at law was commenced before the passage of the act of March 2, 1866 (Session Acts 1865-'66, p. 86), which required that parties should testify *ore tenus*, but it was not completed until that law went into effect. The deposition is inadmissible as evidence if objected to. *Inchoate* rights derived under a statute are lost by a repeal of the statute before they are perfected, unless they are saved by express words in the repealing statute.

The act, ch. 16, sec. 18, of the Code, edition 1860, does not save the right to a party to a suit to give evidence by his deposition where the taking of it was commenced before the passage of act of March 2, 1866, but it was not completed until that act was passed. The reference to 20 Grat., 223, is to the case above cited from page 211.

In the case of *Powers & Kellogg vs. Tazewells*, 25 Grat., 786, decided February 4, 1875, it was held: Though the act of April 18, 1874, repealed the act of April 1, 1873, the repeal could not defeat the interest in oyster-beds which had already vested, and on which the tax was paid before the repealing act was passed, though the beds were not staked off till after its passage. The reference to 25 Grat., 793, is to the case above cited from page 786.

In the case of *Pierce's Ex'ors et als vs. Harrison's Ex'ors et als.*, 31 Grat., 114, decided November 28, 1878, it was held (p. 120): By the terms, "right accrued or claim arising," could hardly have been intended rights and interests so vested as to be beyond legislative interference, for as to these no saving was necessary; but such rights and claims must have been intended as might be affected by ordinary legislation. If, therefore, as

contended, the rights of creditors of a decedent to payment of their debts in the order prescribed by the statute are not vested rights, they are, we think, within the rule of construction provided by the statute.

In the case of *White's Adm'r. vs. Freeman*, 79 Va., 597, decided December 4, 1884, it was held: If, by a new law repealing a former law, any penalty, forfeiture, or punishment be mitigated by any provision of the new law, such provision may, with the consent of the parties affected, be applied to any judgment pronounced after the new law takes effect, this applies to forfeitures in civil as well as criminal cases.

In the case of *Ryan vs. The Commonwealth*, 80 Va., 385, decided April 2, 1885, it was held: Unless a statute, by its language, expressly or by necessary implication, demands such construction, it will not be construed as repealing a previous statute, or as being retrospective.

SECTION 7.

In the case of *Booth vs. Commonwealth*, 16 Grat., 519, decided April 10, 1861, it was held: An act repealing a provision of the common law is itself repealed, the common law provision is revived, this section applies to statutes not to the common law.

The reference to 16 Grat., 529, is to the same case above cited from page 519.

In the case of *Insurance Company of the Valley of Virginia vs. Barley's Adm'r.*, 16 Grat., 363, decided February 18, 1863, it was held: When a statute changing the common law is repealed, the common law is restored to its former state.

In the case of *Crawford vs. Halsted & Putnam*, 20 Grat., 211, decided January, 1871, it was held: A deposition of a party, to be read in a pending cause at law, was commenced before the passage of the act of March 2, 1866, Session Acts, 1865-'66, p. 86, which required that parties should testify *ore tenus*, but it was not completed until that law went into effect. The deposition is inadmissible as evidence, if objected to. Inchoate rights derived under a statute are lost by repeal of the statute before they are perfected, unless they are saved by express words in the repealing of the statute.

TITLE III.

CHAPTER III.

SECTION 13, PAR. 8.

In the case of *Hendricks vs. Commonwealth*, 75 Va., 934, decided March, 1882, it was held, page 941: The effect of this

article is to give the State of Virginia concurrent jurisdiction with the State of Maryland, over the Potomac River from shore to shore, and over that part of the Potomac River which is within the limits of Virginia, to enact such laws with the consent and approval of Maryland as may be deemed necessary and proper for the preservation of fish in said waters. The power of the State to enact such laws carries with it the judicial power to enforce them.

CHAPTER IV.

CHAPTER V.

TITLE IV.

CHAPTER VI.

SECTION 43.

The cases cited from 2 Rand., 206-276, and 28 Grat., 69, are in construction of the acts previously in force, and have no relation to this act.

SECTION 49.

In the case of *McPherson vs. Commonwealth*, 28 Grat., 939, decided May 1, 1877, it was held: A woman whose father was white, and whose mother's father was white, and whose great-grandmother was of brown complexion, is not a negro in the sense of the statute.

In the case of *Greenhow et als. vs. James's executor*, 80 Va., 636, decided April 16, 1885, it was held: Code 1873 ch. 119, sections six and seven, providing, "that if a man had offspring by a woman, shall afterwards intermarry with her, such offspring if recognized by him before or after the marriage, shall be deemed legitimate," and that the issue of marriage, deemed null in law, or dissolved by a court, shall nevertheless be legitimate, does not apply to and legitimate the offspring of a co-habitation in this State between a white person and a negro, when the parents have subsequently between them celebrated a ceremony of marriage, outside of this State, in some place where marriage between such persons is lawful.

In the case of *Scott vs. Raub*, 88 Va., 721, decided January 28, 1892, it was held: This section applies to free negroes, not to slaves.

TITLE V.

CHAPTER VII.

CHAPTER VIII.

SECTION 83.

In the case of *Coleman vs. Sands*, 87 Va., 689, decided April 30, 1891, it was held: Where under this section, a voter appeals from refusal of registrar to register him, the answer of registrar that voter did not offer to qualify as to his right to vote, and that he is not entitled to vote, held: No defence to application for mandamus to compel registrar to transmit to the court the ground relied on by appellant, and the reasons of the refusal.

SECTION 84.

In the case of *Clay vs. Ballard*, 87 Va., 787, decided May 5, 1891, it was held: This section provides that those books be open at all times to public inspection, was intended as a safeguard against fraud, and must be liberally construed.

CHAPTER IX.

CHAPTER X.

SECTION 117.

In the case of *McDougal vs. Guigon (Judge)*, 27 Grat., 133, decided February 3, 1876, it was held: The county and corporation courts have authority to remove a judge of elections for malfeasance in office or gross neglect of duty, though he has not been convicted by the verdict of the jury of any offence.

CHAPTER XI.

SECTION 160.

In the case of *West vs. Ferguson et als.*, 16 Grat., 270, decided April 23, 1861, it was held: In cases of contested elections before the county court, the court has no authority to give a judgment for costs to either party. If in such case the county court does give a judgment for costs to either party, a writ of prohibition from a circuit court is a proper proceeding to arrest the judgment.

In the case of *Ellyson et als., ex parte*, 20 Grat., 10, decided November, 1870, it was held: Under section 69 of the act to provide for general elections, Session Acts 1870, page 97, the county and corporation courts have authority to vacate an election. Though a person voted for has received the return and has qualified and entered upon the discharge of the duties of the office, the court may vacate the election and direct another election to be held.

In the case of *Nelms vs. Vaughan*, 84 Va., 696, decided April

5, 1888, it was held: Writ of prohibition will be issued to restrain inferior court from exceeding its jurisdiction, but will never be allowed to usurp place of writ of error, especially where the law provides that no writ of error shall lie.

The provisions of the statute providing that county elections shall be subject to inquiry by county courts on petition of fifteen qualified voters, to which two shall take and subscribe an oath, are as to form merely directory, as it is not intimated that they must be complied with; else all will be vitiated, or no farther proceedings can be had.

In the case of *Richardson vs. Farrar*, 88 Va., 760, decided February 11, 1892: This statute commands that returns of county elections be, upon complaint of fifteen or more voters of undue election and false return, and counter-complaint if any be filed, subject to the inquiry, determination and judgment of the county court, which shall proceed, without a jury, and on the testimony, to decide the same upon the merits according to the Constitution and the laws. In such a contest the quashing and dismissal of a joint-complaint of undue election and false return against three at the same election on the ground of misjoinder of defendants, is error, because the statute does not limit the contest to one, and *mandamus* lies to compel the court to proceed to hear and determine the contest.

TITLE VI.

CHAPTER XII.

SECTION 162.

In the case of *Royal vs. Thomas*, 28 Grat., 130, decided February 1, 1877, it was held: Under the Constitution and Statute of Virginia, a party who has aided and assisted in a duel fought with deadly weapons may be removed from office by a proceeding by *quo warranto*, or, if that writ be not in use, by information in the nature of a *quo warranto*, though he has not been convicted of the offence in any criminal prosecution against him.

SECTION 163.

In the case of *Bunting vs. Willis (Judge)*, 27 Grat., 144, decided February 10, 1876, it was held: The office of sheriff commences on the first of July. If a person holding an office of profit under the Government of the United States is elected to the office of sheriff, which is an office of profit under the government of the State, and holds his office under the former government until any time during the first of July, he thereby

vacates his election as sheriff, and is not entitled to qualify as such.

The reference to 27 Grat., 152, is, to the case above cited, from page 144.

SECTION 165.

In the case of *The Commonwealth vs. Fugate*, 2 Leigh, 786, decided June, 1830, a justice of the peace is convicted of the felony of malicious stabbing, sentenced to the penitentiary, confined there and then pardoned, held: The conviction and judgment for this felony was a forfeiture of his office of justice, and incapacitated him from afterwards acting under his commission; and the pardon neither avoided the forfeiture, nor restored his capacity.

SECTION 167.

The reference to 22 Grat., 130, is an error.

TITLE VII.

CHAPTER XIII.

SECTION 168.

In the case of *Owens vs. O'Brien et als*, 78 Va., 116, decided December 6, 1883, it was held: School trustees are required to take and subscribe the oath of office as a condition precedent to entering on the discharge of their official duties, and their failure to take it within the prescribed time vacates their trusteeship. If the city council fails to act within the time prescribed, it becomes the duty of the board of education to appoint, and such appointees constitute the lawful trustees of the city.

In the case of *Branham vs. Long*, 78 Va., 352, decided January 24, 1884, it was held: Under the Constitution and laws of this State, county, municipal, and district officers must qualify by taking the several oaths required by law before the day whereon their terms respectively begin, else their offices are vacant, and the incumbents continue to discharge the duties of the offices after their terms of office have expired until their successors have qualified.

SECTION 177.

In the case of *Calwell vs. Commonwealth*, 17 Grat., 391, decided April 17, 1867, it was held: Upon the qualification of a sheriff, the record of the county court after reciting his election states: "That he appeared in court and took the several oaths prescribed by law, and entered into and acknowledged a bond in the penalty of sixty thousand dollars with (naming ten persons) his sureties, conditioned, etc. In the absence of fraud, the re-

cord is conclusive that the bond was properly executed by the parties whose names are to it."

Upon issue on the plea of *non est factum* by C., one of the parties to such bond, proof that his name is not in his handwriting, but in that of H., another party; that C. was not at the court-house the day the bond was taken, but was at his home ten miles off; that on the day before the bond was taken he asked H. who would sign it, and being told that D. with others would sign it, he told H. if D. signed it, H. might sign it for him, but D. did not sign it, is not sufficient to outweigh the record and sustain the defence.

In the case of *Barnum vs. Frost*, 17 Grat., 398, decided April 30, 1867, it was held (p. 422): The condition of the guardian's bond is to pay and deliver to the ward her estate, when thereto required by the justices. A creditor for necessities furnished to the ward may be substituted to the rights of the ward, upon the bond, against the guardian and his sureties, for the payment of her debt.

In the case of *Davis' Adm'r. vs. Snead et als.*, 33 Grat., 705, decided October 14, 1880, it was held (p. 710): Under this section a receiver's bond may, and ought to be made payable to the Commonwealth.

In the case of *Acker vs. A. & F. Railroad Co.*, 84 Va., 648, decided March 22, 1888, it was held: *Supersedeas* bond made payable to the Commonwealth is sufficient.

Bond reciting the judgment as that of "the Circuit Court of Alexandria," omitting the words, "the city of," is not vitiated by such omission.

A bond not containing a waiver of homestead may be insufficient, and may be made sufficient at any time on the motion of the defendant in error, but is not in itself a void bond.

SECTION 179.

In the case of *Sayers vs. Cassell*, 23 Grat., 525, decided June, 1873, it was held, A guardian of an infant having, when appointed, given a bond with sureties afterwards without a rule upon him or order of court requiring it, comes into the court and gives another bond with other sureties. The last bond is valid and relates back to his appointment as guardian; and the sureties in the first bond are discharged; and are not necessary or proper parties to a bill by the ward against the guardian and his sureties for the settlement of his accounts.

The reference to 32 Grat., 274-75, is to the case of *Campbell vs. Smith*, in which this section is not construed, but rules the decision.

SECTION 180.

In the case of *Sangster et als. vs. Commonwealth*, 17 Grat., 124,

decided October 29, 1866, it was held: A sheriff who takes the property of A. under an attachment against the property of B., thereby not only commits a trespass, but plainly violates the duty of his office, and breaks the condition of his official bond, and his sureties are liable for his act. Other actions may be maintained on an official bond, though in a previous action judgment has been rendered for the penalty, to be discharged by the payment of the sum assessed in that action, and of such further sums as might be afterwards assessed or be found due, upon *scire facias* assigning a further breach.

In an action on an official bond, the judgment is not entered for the penalty to be discharged, &c., but for the sum assessed or agreed as the damages in the case. When this is by agreement it is no error; and in any case it is a mere informality in the entry of the judgment by the clerk, and is not ground for staying or reversing the judgment.

The reference to 17 Grat., 136, is to the same case above cited from page 124.

SECTION 181.

In the case of *Acker vs. A. & F. Railroad Co.*, 84 Va., 648, decided March 22, 1888, it was held: *Supersedeas* bond made payable to the Commonwealth is sufficient.

Bond reciting the judgment as that of the "Circuit Court of Alexandria," omitting the words "the city of," is not vitiated by such omission.

A bond not containing "a waiver of homestead" may be insufficient, and may be made sufficient at any time on motion of the defendant in error, but it is not a void bond.

TITLE VIII.

In the case of *Loving et als. vs. Auditor of Public Accounts*, 76 Va., 942, decided December 19, 1882.

1. Public Officers—Compensation. For reasons of public polity, the powers of the legislature to change the compensation of public officers is absolute, except so far as it may be limited by the fundamental law. Such limitation is found in the Constitution of this State as respects the salaries of certain enumerated officers.

2. *Idem.*—*Idem.*—*Sureties.* This applies also to sureties on official bonds of public officers. There being no contract between the State and its officer that during his term his compensation shall not be changed, and the power to change it being absolute, the sureties must be held to have signed the bonds of

the principal with reference to the existence of this power, and their liability thereon is not affected by such change.

3. Construction of Statute—Countersigning drafts. If by the provisions of Code 1873, ch. 206, § 58, the legislature intended all drafts drawn by the general agent of the penitentiary to be certified by the superintendent and countersigned by the governor, the failure to certify and to countersign these drafts does not affect the liability of his sureties for money so drawn and received by him. These provisions are merely directory to such officers, and form no part of the contract with the sureties.

4. General Agent.—Material furnished. Where the general agent of the penitentiary bought raw material for the State, and gave therefor his notes signed by himself with the letters G. A. (meaning general agent) appearing, but the State assumed the liability and paid the notes, the general agent and his sureties are entitled to no credit therefor, as for material purchased on his individual responsibility.

5. *Idem.*—Sureties.—Credits for compensation. The legislature having reduced the general agent's compensation, he and his sureties are entitled to credit for the reduced compensation, and not for the compensation at the rates allowed by the law in force at the dates of the official bonds. But as by act, which became law first July, 1878, the legislature restored the compensation as allowed by Code 1873, ch. 13, § 23, credit must be allowed after that day at the original rates.

6. *Idem.*—*Idem.*—Liability. Code 1873, ch. 206, § 57, provides that the general agent and his sureties shall be responsible for the amount of all debts for goods or work contracted with him or under his authority, and for all money received by him as such agent, except as therein provided. There is no law making it a part of his duty to collect debts contracted with his predecessors, and moneys so collected are not covered by his bond, and not chargeable to his sureties.

7. *Idem.*—*Idem.*—Outside receipts. Where money went into the agent's hands outside of his lawful duties, the sureties are not chargeable with the same, *e. g.*, contributions to build a chapel for convicts.

8. *Idem.*—*Idem.*—Receipts in excess of appropriations. The Constitution (Art. X., § 10) declares that no money shall be paid out of the treasury except in pursuance of appropriations by law. Where the general agent received twelve thousand five hundred dollars pursuant to appropriations made before or after receipts, and five thousand dollars in excess of appropriations, the sureties are liable for the first, but not for the last sum.

In the case of *Holladay (Judge) vs. The Auditor*, 77 Va., 425, decided April 26, 1883, it was held: It has been decided by this

court (*Loving et als. vs. The Auditor*, 76 Va. Rep., 942) that the services rendered by public officers do not partake of the nature of contracts, and have no affinity thereto.

In the case of *Frazier vs. Virginia Military Institute*, 81 Va., 59, decided October 8, 1885, it was held, p. 62: Appointment to office is not a contract, and vests no rights in the appointee to the salary or emoluments thereto attached.

CHAPTER 14.

SECTION 183, PART 2.

In the case of *Thon vs. The Commonwealth*, 77 Va., 289, decided March 15, 1883, it was held: Act approved March 12, 1878, Acts 1877-'78, ch. 183, sec. 2, p. 174, providing that the attorney-general shall receive a salary of \$2,500 annually for his services, and shall not be entitled to any further compensation therefor, refers to salaries payable out of the State treasury, and not to fees taxed in the costs as fees of attorneys on the winning side in any case. The laws requiring such fees to be taxed for the Commonwealth have never been repealed or amended, and the losing suitor has them to pay, whether they go into the State treasury or to the attorney-general. But the laws requiring such fees to be taxed in the costs and paid to said attorney are also unrepealed.

In the case of *Blair (Attorney-General) vs. Marye (Auditor)*, 80 Va., 485, decided May 7, 1885, it was held: By Section 8, Article 6, State Constitution, the election and commissioning of an attorney-general is provided for, and it is directed that he shall perform such duties and receive such compensation as the law may prescribe. It is not within the power of the legislature itself to withhold from him the salary which is prescribed by law, nor to delegate such power to the auditor. The salary of the attorney-general is of constitutional grant and of public official right, and the doctrine of offset cannot be applied to it. It is not liable to attachment, to garnishment, nor to assignment in bankruptcy, and upon principles of public policy it has absolute immunity from detention for debt or counter claims.

The act of Assembly passed November 24, 1884, Acts 1884, p. 90, requiring the auditor to withhold the salary of any officer who is indebted to the State for money collected by him, or improperly drawn by him, during his term of office, until the default is made good, is unconstitutional and void so far as it affects constitutional officers. The officer's remedy for the withholding of the salary attached to his office is by *mandamus*.

In the case of *Commonwealth vs. Field*, 84 Va., 26, decided November 17, 1887, it was held: The attorney-general is entitled to be paid out of the public treasury, his salary and no-

thing more. The Commonwealth may recover by an action from the attorney-general fees paid him by the auditor under mistake that he was entitled thereto as part of his compensation.

SECTION 185, PART 3.

In the case of *Holladay (Judge) vs. The Auditor*, 77 Va., 425, decided April 26, 1883, it was held: In the sense of the acts approved April 7, 1870, May 18, 1870, and April 1, 1873, that court is a "city court." The last, providing that the judges of the city and corporation courts of this Commonwealth shall be paid out of the treasury of their respective corporations, is constitutional, has not been repealed, and applies to the judge of the Chancery Court of the city of Richmond, no part of whose salary is payable out of the State treasury.

SECTION 192.

In the case of *Blair (Attorney-General) vs. Marye (Auditor)*, 80 Va., 485, decided May 7, 1885, it was held: By Section 8, Article 6, State Constitution, the election and commissioning of an attorney-general is provided for, and it is directed that he shall perform such duties and receive such compensation as the law may prescribe. It is not within the power of the legislature itself to withhold from him the salary which is prescribed by law, nor to delegate such power to the auditor.

The salary of the attorney-general is of constitutional grant, and of public official right, and the doctrine of offset cannot be applied to it. It is not liable to attachment, to garnishment, nor to assignment in bankruptcy, and upon principles of public policy, it has absolute immunity from detention for debt or counter claims.

The act of assembly passed November 24, 1884, Acts 1884, page 90, requiring the auditor to withhold the salary of any officer who is indebted to the State for money collected by him, or improperly drawn by him during his term of office, until the default is made good, is unconstitutional and void, so far as it affects constitutional officers. The officer's remedy for the withholding of the salary attached to his office is by *mandamus*.

TITLE IX.

CHAPTER XV.

SECTION 207.

In the case of *Wolfe et als. vs. McCault (clerk), &c.*, 76 Va., 876 and 891, the legislature passed a bill, and presented it to the governor under the Constitution, Art. 4, Sec. 8; but before

he acted it was recalled by a joint resolution. He returned it without approval or disapproval. Held: The legislature had no power to recall the bill. The governor cannot return a bill except with his veto and objections. In this case his return of the bill was illegal, and it not having been vetoed, became a law.

Under Code, 1873, Chapter 14, Section 14, it was the duty of the keeper of the rolls to have this bill thus become a law, printed and published with the other acts of the General Assembly; and also, upon request, to furnish the incorporators with a copy thereof, properly certified.

The keeper of the rolls failing to perform this duty, *mandamus* is the only appropriate remedy, and this court hath jurisdiction to award that writ in such case.

TITLE X.

CHAPTER XVI.

CHAPTER XVII.

CHAPTER XVIII.

CHAPTER XIX.

CHAPTER XX.

TITLE XI.

CHAPTER XXI.

TITLE XII.

CHAPTER XXII.

SECTION 399.

In the case of *Greenhow (Treasurer) vs. Vashon*, 81 Va., 336, decided January 14, 1886, it was held: Section 2 of act of Assembly, approved March 15, 1884, providing for a separate assessment of taxes for the support of the public free schools, and Section 113, of the same act, providing that such taxes shall be paid and collected only in lawful money of the United States, are not repugnant to Section 8 of Article 8 of the State's Constitution, but were enacted in obedience to its positive mandate; and such taxes cannot be paid in the State's tax-receivable coupons.

See Section 406.

SECTION 402.

In the case of *Commonwealth vs. Maury*, 82 Va., 883, decided February 10, 1887, it was held: This section is not repugnant to the United States and the State Constitutions wherein they forbid the passage of laws impairing the obligation of contracts.

This case is cited as from 11 Va. Law Journal.

SECTION 406.

The reference to *Antoni vs. Wright (Sheriff)*, 22 Grat., 833, is not available here.

In the case of *Wise, Bro., &c. (Agents) vs. Rogers (Second Auditor)*; *Maury & Co. vs. Rogers (Second Auditor)*, 24 Grat., 169, decided November, 1873, it was held: The act of March 7, 1872, which repeals the act of March 30, 1871, so far as it authorizes the issue of coupon bonds with coupons attached, receivable for taxes and other dues of the State, is constitutional so far as it applies to bonds not presented to the Second Auditor before the passage of the repealing act.

The reference to 24 Grat., 171, is to the case above cited from page 169.

In the case of *Clarke vs. Tyler (Sergeant)*, 30 Grat., 134, decided April 4, 1878, it was held: Fines imposed for a violation of law are embraced in the act of 1871, known as the Funding Act, and a person upon whom such a fine is imposed may discharge it by the over-due coupons taken from the bonds mentioned in said act.

In the case of *Williamson vs. Massey (Auditor)*, 33 Grat., 237, decided April 29, 1880, it was held: The over-due coupons upon bonds issued under the act of March 28, 1879, are receivable for all taxes levied by the State, including the capitation tax, and the auditor is bound to receive them when offered in payment of taxes returned delinquent to his office.

In the case of *Lee vs. Harlow*, Va. Reports, 75, 22, decided November 14, 1881, Lee, holding coupon bond issued under the act of March, 1871, after the passage of the acts of March 7 and March 19, 1872, received from the auditor of the State two-thirds of the interest due thereon, which payment was stamped upon the coupons. In 1880 he offered to the collector of the State taxes the said coupons for one-third unpaid thereon, in payment of taxes due from him to the State, held: Lee is entitled to pay his taxes due the State in the unpaid one-third of said coupons.

In the case of *The Board of Public Works et als. vs. Gannt et als.*, 76 Va., 455. 1. Sovereignty.—It is an established principle that a sovereign can not be sued in its own courts, or in any other without its permission. This principle applies to States of the Union (except as to controversies between two or more

States. United States Constitution, Art. 3. Sec. 2, Clause 1), as well as to the United States Government. And it may at any time revoke such permission, even as to antecede contracts, without impairing the obligation thereof. See 11 Otto, 338. Even when judgment is rendered she may determine for herself whether she will pay it or not. Though in form the suit be against officers or agents of the State, yet if in effect, it be against the State itself, this principle applies.

Idem.—Case at bar.—In February, 1881, the Board of Public Works of Virginia sold State's interest in Atlanta, Mississippi and Ohio Railroad for five hundred thousand dollars. In February, 1892, legislature ratified the sale by act of March 5, 1882. One hundred thousand dollars thereof was appropriated to Normal and Collegiate Institute by act of April 21, 1882; the Board of Public Works was directed to pay this five hundred thousand dollars when received into the public treasury. One hundred thousand dollars thereof to the State Board of Education for the benefit of said institute, and the remainder, four hundred thousand dollars, to the credit of the public school fund, subject to the draft of the State Board of Education. In June, 1882, G. and R. filed their bills in the Circuit Court of Richmond, representing themselves to be creditors of the State, and as such, to be entitled to have the said funds paid into the public treasury to the credit of the sinking fund. In conformity with the act of March 30, 1871, known as the Funding Bill, they claim that the acts of 1882, appropriating said funds to educational purposes, are unconstitutional and void, as being in violation of the contract made with the public creditors by said Funding Bill; and prayed that the Board of Education be restrained from taking possession of said funds, and that the commissioners of the sinking fund be decreed to take charge thereof, and to purchase therewith bonds issued under said Funding Bill. The persons composing the Board of Education, the Board of Public Works, the Board of Commissioners of the sinking fund, and the Board of Visitors of Virginia Normal Institute, as such and individually, and others were made defendants, but no reply was asked against them individually, and they had no personal interest in the question.

In the case of *Commonwealth vs. H. M. Smith, Jr.*, 76 Va., 477.

Idem.—A tax-payer tendered coupon detached from bond issued under Funding Bill of 1879, in payment of his taxes to the collector, who refused to receive it. Held: The refusal was not justifiable under the act of January 14, 1882, and the tax-payer was entitled to a *mandamus* to compel the collector to receive the coupon.

In the case of *Commonwealth vs. Guggenheimer*, 78 Va., 71,

decided November 29, 1883, it was held: This applies not to coupons detached from bonds issued under Funding Bill of 1879, but only to coupons detached from bonds issued under Funding Bill of 1871.

In the case of *Taylor (Acting Treasurer) vs. Williams*, '78 Va., 422, decided February 21, 1884, W. petitioned the Hustings Court of Richmond to verify certain coupons, amounting to \$249, tendered by him in payment of his license tax under the statute. The jury found the coupons genuine, and judgment was entered that the facts be certified to the treasurer, and that he refund to W. the money paid by him for his taxes. The treasurer discovered that the coupons presented to him did not correspond with those for which the judgment had been rendered, and refused payment. W. then obtained from said court a *mandamus* to compel the treasurer to pay. The latter moved to quash the writ for irregularities on its face, demurred, and answered, objecting to the proceedings; but the court awarded a peremptory *mandamus*, to which respondent excepted, and obtained a writ of error. Held: The Circuit Court of Richmond city alone hath jurisdiction in suits against State officers, including the treasurer. The proceedings should have been quashed on the treasurer's motion.

In the case of *Brown, Davis & Co. vs. Greenhow (Treasurer)*, 80 Va., 118, decided January 29, 1885, it was held: Assumpsit against collecting officer is the proper remedy of a tax-payer to recover money paid by him for taxes, after collector's refusal to accept coupons tendered in payment thereof, under act approved January 26, 1882.

In the declaration to special claims alleging the tender of tax receivable coupons to pay the tax, and the defendants refusal to accept the coupons, and the latter's proceeding to collect the tax in money when payment thereof was made under protest, the common counts for money had and received, etc., may be added.

The action under this statute is in form against the collector, but being to recover a demand growing out of his acts done *colore officii* is substantially against the Commonwealth, and the judgment is likewise.

In the case of *Dunnington vs. Ford*, 80 Va., 177, decided February 5, 1885, it was held: The State can only be sued by its consent. When a remedy by suit against the State, or any of its officials is provided, those seeking to avail of its benefits must follow its provisions with exact strictness.

Under act of January 26, 1882, amended March 13, 1884, page 527, the suit is required to be commenced by a petition to be filed at rules, upon which a summons shall be issued to the collecting officer and regularly matured like any other action at

law, and the coupons tendered shall be filed with the petition. A suit brought in any other way is unlawfully instituted, and must be dismissed.

In the case of *Greenhow (Treasurer) vs. Vashon*, 81 Va., 336, decided January 14, 1886, it was held: Section 2 of act of Assembly, approved March 15, 1884, providing for a separate assessment of taxes for the support of the public free schools, and Section 113 of the same act, providing that such taxes shall be paid and collected in lawful money of the United States only, are not repugnant to Section 8 of Article 8 of the State Constitution, but were enacted in obedience to its positive mandate; and such taxes cannot be paid in the State's tax-receivable coupons.

SECTION 408.

In the case of *Brown, Davis & Co. vs. Greenhow (Treasurer)*, 80 Va., 118, decided January 29, 1885, it was held: Assumpsit against collecting officer is the proper remedy of a tax-payer to recover money paid by him for taxes, after collector's refusal to collect coupons tendered in payment thereof, under act approved January 26, 1882.

In the declaration to special claims alleging the tender of tax-receivable coupons to pay the tax, and the defendants refusal to accept the coupons, and the latter's proceeding to collect the tax in money when payment thereof was made under protest, the common counts for money had and received, etc., may be added.

The action under this statute is in form against the collector, but being to recover a demand growing out of his acts done *colore officii* is substantially against the Commonwealth, and the judgment is likewise.

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In the case of *Vashon vs. Greenhow*, 135 U. S. S. C. Reports, 664, decided October, 1889, it was held: The statute of Virginia requiring the school tax to be paid in lawful money of the United States was valid, notwithstanding the provision of the act of 1871, and was not repugnant to the Constitution of the United States.

SECTION 409.

For reference to 78 Va. 71, see *ante* section 406.

SECTION 410.

In the case of *Mallan Bros. vs. Bransford (Treasurer)*, 86 Va., 675, decided March 20, 1890, it was held: Where tax-payers, under protest, pay taxes to tax collector, who, under this section, pays the money over into the treasury, an action of assumpsit for money had and received will not lie to recover the money.

SECTION 411.

See *Mallan Bros. vs. Bransford (Treasurer)*, 86 Va., 675, cited *supra*, Section 410..

SECTION 412.

In the case of *Commonwealth vs. Weller*, 82 Va., 721, decided January 11, 1887, it was held: This section is not repugnant to Art. 1, Sec. 10, United States Constitution. This is the case referred to in 11 Va. Law Journal, 166.

The case of *Cornwall vs. Commonwealth*, 82 Va., 644, and 11 Va. Law Journal, 90, decided December 9, 1886, affirms and follows the case of *Commonwealth vs. Weller*, above cited.

In the case of *Newton vs. Commonwealth*, 82 Va., 647, decided December 9, 1886, it was held: It is the province of the law-making power of the State to prescribe rules of evidence to govern the procedure in her own courts. The United States Constitution has no application to the subject. This is the same case referred to in 11 Va. Law Journal, 93.

In the case of *Commonwealth vs. Hurt*, 85 Va., 918, decided March 21, 1889, it was held: When a paper, purporting to be a coupon cut from a State bond, is offered in evidence, the burden of proof is on the party offering it. The contestant of its genuineness may demand the production of the bond as a condition precedent to his right to recover, and the question may be raised without plea of *non est factum*.

In the case of *The Commonwealth vs. Ford (Trustee)*, 89 Va., 427, decided December 1, 1892, it was held: The Code, Section 412, so far as it requires the production into court of the State bonds, does not apply where bonds have been surrendered to the Commonwealth under the refunding act of February 20, 1892.

In the case of *Commonwealth vs. Dunlop*, 89 Va., 431, decided December 1, 1892, it was held: Under the Code, Section 412, the burden of disproving the genuineness of the bonds of the State is upon the Commonwealth. When the sovereign consents to be sued, the terms and conditions upon which consent is given must be observed, and the tax-payer whose tender of coupons is refused, and who brings his suit, must, as required

by those conditions, produce at the trial the bonds from which the coupons were cut.

SECTION 414.

In the case of *Taylor (Acting Treasurer) vs. Williams*, 78 Va., 422, decided February 21, 1884, it was held (p. 427): The statute expressly confers the right of appeal to this court from all judgments in all proceedings of *mandamus* rendered in the inferior courts.

In the case of *McIntosh (Treasurer) vs. Braden et als., Dunnington (Treasurer) vs. Hurt et als., The Commonwealth vs. Consani et als.*, 80 Va., 217, decided February 5, 1885, it was held: Act of March 12, 1884, is unconstitutional so far as it confers upon this court jurisdiction in all cases of coupons arising under act of January 14, 1882, without regard to the amount in controversy, being in conflict with Article 6 of the State Constitution, fixing minimum jurisdictional amount in cases purely pecuniary at \$500.

SECTION 418.

In the case of *Kendall Banknote Co. vs. Commissioners of the Sinking Fund*, 79 Va., 563, decided November 20, 1884, it was held: When a State board is authorized to cause the execution of a work, and makes a contract therefor, such contract is binding on the State. The rights of contracting parties under it are the same as in other cases of the like kind, and the measure of damages for the breach of such contract is regulated by the settled rule on the subject, viz., that the plaintiff should have a fair compensation for all labor done, materials furnished, and expenses incurred, together with such profits as he was likely to have realized as the direct and immediate fruit of the contract had it been fulfilled.

SECTION 434.

In the case of *Arents vs. The Commonwealth*, 18 Grat., 750, decided April, 1868, it was held: Coupons stolen after the day when they had become due and payable, though afterwards come into the hands of a *bona fide* holder for value, cannot be held by him against the rightful owner.

In the case of *Branch vs. Commissioners of Sinking Fund*, 80 Va., 427, decided April 9, 1885, note, payable to bearer, has been delivered, stolen from the owner, and come to *bona fide* holder for value. Latter may recover on it against the maker, Secus, where the note has not been delivered, or, if delivered, has been returned to maker, and stolen from him.

Two coupon bonds issued by the State of Virginia, payable to bearer, are redeemed by the State, and other bonds issued in their stead. Later the bonds were stolen from the State treasury, came into the hands of B., a *bona fide* holder for value

without notice of the theft, and by B. were presented to the Commissioners of the Sinking Fund, to be funded into other bonds of the State. The commissioners refused, on the ground that the bonds had been stolen from the State treasury. B. applied for a *mandamus*. Held: *Mandamus* denied.

TITLE XIII.

CHAPTER XXIII.

CHAPTER XXIV.

SECTION 457.

In the case of *City of Petersburg vs. Petersburg Benevolent Mechanics Association*, 78 Va., 431, decided February 28, 1884, it was held: This section, exempting from taxation property owned by benevolent associations, is valid under Article 10, Section 3, of the State Constitution. The power of the legislature to exempt from taxation is absolute, but taxation is the rule, exemption the exception, and the intent of the legislature must be clear.

The grant of power to exempt from taxation all property used for benevolent purposes, carries with it the power to exempt property, the proceeds whereof are used for benevolent purposes.

Where the revenues of an association are applied wholly to paying its current expenses, the assistance of its indigent members, and the families of such as have died in need; these are charitable purposes, and it is not essential that they shall be universal. This section is intended to include for taxation property of such associations used for any private purpose, or for profit, "and to exempt such property to the extent its proceeds are used for charitable purposes."

In the case of *Black vs. Sherwood*, 84 Va., 906, decided May 10, 1888, it was held: A lot in the city of Norfolk, owned and used by the county of Elizabeth City and city of Portsmouth as a landing for a ferry maintained by them, is exempt from taxation.

SECTION 472.

The reference to 28 Grat., 129, is an error. This section is referred to in them, but it has no influence on the decision, nor is it construed by the decision.

SECTION 485.

The reference to 29 Grat., 129, is an error. This section is there referred to in a mere *obiter dictum*, it has no effect on the decision, nor does the decision construe the statute.

SECTION 489.

In the case of *State Bank of Virginia vs. City of Richmond*, 79 Va., 113, decided May 7, 1884, it was held: The capital stock and shares of the capital stock are distinct things. Both may be taxed, and it is not double taxation.

When ordinance directs assessment of tax "on all personal property, money and credits, including all capital stock," etc., the valuation of the personal property of a bank is rightly ascertained by adding to the paid-up capital the demand notes of the stockholders given for unpaid-up capital stock, drawing interest, and held by the bank.

Domicil of holder of evidence of debt is the *situs* of the debt for taxation purposes. Notes held by a bank located in a city are taxable by said city, wherever the makers may reside, whether in or out of the city, or in or out of the State.

Where tax has been lawfully assessed, and is not paid when due, of course the penalty imposed by the ordinance for non-payment of the tax may rightly be enforced.

SECTION 534.

In the case of *Whitlock vs. The Commonwealth*, 89 Va., 337, decided September 22, 1892, it was held: It is immaterial that indictment charging a person with practicing as a physician without license failed to charge that he did so for compensation, under Code, Section 534.

Where in such prosecution the court instructs the jury that the case is governed by Code, Section 574, and the jury assesses the fine at thirty dollars only, held: The instruction though erroneous does not prejudice the defendant.

SECTION 535.

In the case of *Commonwealth vs. Jones*, 82 Va., 789, decided January 20, 1887, it was held: This section is not repugnant to Article 1, Section 10, United States' Constitution.

This is the case cited from 11 Va. Law Journal, 152.

SECTION 555.

In the case of *Roche vs. Jones (Sergeant)*, 87 Va., 484, decided March 5, 1891, it was held: This section held to apply only to State, and not to municipal licenses, which may be prescribed to expire June 30th instead of April 30th of each year.

SECTION 574.

In the case of *Harris vs. The Commonwealth*, 81 Va., 240, decided December 17, 1885. Skating rinks are not enumerated in the act of requiring license to be taken out for public performances or exhibitions, and unless they be conducted so as to

be clearly shown that they are properly public performances or exhibitions, they cannot be brought within that act.

Where accused kept a skating rink ordinarily visited by persons for the purpose of skating, and took out no license, except when he gave performance by professional skaters, and ordinarily charged ten cents for admission, and ten cents more for use of skates, and some visitors skated, whilst others did not. Held: The case does not clearly come within the statute requiring license.

SECTION 579.

In the case of *Leighton vs. Maury*, 76 Va., 865. The object of the statute, acts 1879-'80, p. 148, was to depart from the former laws on the subject of licenses to sell ardent spirits as construed by this court in Yeager's case, 11 Grat., 655, where it was held that the county courts had unlimited discretion on the subject, and that their decisions were not liable to review by any appellate tribunal. The present statute is mandatory, and the right of appeal to the circuit court absolute. The appeal is a transfer of the case to the circuit court, where it is heard *de novo*.

1. The statute says the county court "shall grant the license" if the applicant brings himself within the requirements, and that the circuit court "may grant the license." The words "may grant the license," mean the circuit shall have the jurisdiction to do so, and must do so, if the applicant brings himself within the requirement, and they confer no arbitrary discretion, but a sound, judicial discretion, subject to review as in other cases provided by Code 1873, page 1136, Sections 2 and 3.

2. The word "may" is sometimes construed as mandatory and sometimes as permissive, as will best carry into effect the true intent and object of the legislature.

3. *Idem.*—*Idem.*—Case at bar.—Circuit court certifies it is not "fully satisfied that the place is suitable for a bar-room and for retail of ardent spirits." The county court certified the same. The testimony is conflicting. It is contended, on the one hand, that the sale of ardent spirits at the proposed place will injure the large and precarious business of making charcoal iron in the vicinity, and so detriment the community. On the other hand, it is answered that "the legislature has adopted the system of licensed sales of liquor throughout the State," and that this policy ought not to be defeated by the personal objections and private views of individuals, however extensive and important their interests and business may be. Held:

1. In deciding this question, all the circumstances, whether of a general or limited nature, may be taken into consideration. *Lewis vs. Washington*, 5 Grat., 275.

2. Though the primary object may have been to raise revenue,

this cannot be accomplished to the detriment of important industrial enterprises.

3. Where the testimony conflicts, and in a doubtful case, the appellate tribunals will always lean in favor of the concurring judgments of the tribunals below.

4. A citizen is entitled to make himself a party to the proceedings in the county and circuit courts, and oppose the granting of the license; and he can appear and defend in this court, and should be served with process upon appeal, writ of error, and *supersedeas*.

5. In such case such citizen renders himself liable to costs, and may recover costs as in other cases.

6. In the county court no costs were given; in the circuit court costs were refused to either party; and, under all the circumstances, the judgment of the county court ought to be affirmed without costs to either party.

In the case of *Ailstock vs. Page et als.*, 77 Va., 386, decided April 19, 1883. The purpose of the legislature in framing the act of March 3, 1880, was to require the county courts to grant a license to sell liquor to every applicant who brought his case within the requirements of the law.

The purpose and effect of the change by the legislature, by its act of March 6, 1882, of the word "shall" to the word "may," was to conform the act of March 3, 1880, so amended, to the law in this respect, when the case of *French vs. Noel*, 22 Grat., 454, was decided, and to so leave it discretionary with county courts to grant or refuse such licenses. This, however, is a sound legal discretion, subject to the appeal specifically allowed by the statute to the applicant.

Before these acts of 1880 and 1882 there was from the decisions of county courts granting or refusing licenses to sell liquor under *Yeager's Case*, 11 Grat., 655, and *French vs. Noel*, *supra*, no appeal allowed either applicant or contestant. Those acts give to the applicant an appeal to the circuit court only. The failure to give the appeal to others must be construed as conclusive evidence of a purpose to withhold the right of appeal from all but the applicant, and the contestant has no appeal whatever. So far as this court, in *Leighton's Case*, reached a different conclusion on the question of the right of appeal from judgments of county courts on applications for licenses to sell liquor, its decision is overruled.

A. applied to a county court of R. for license to sell by retail liquor at G. P. opposed. By the evidence the court was fully satisfied that A. brought this case within the requirements of the law, and granted the license. P. excepted. The court certified the evidence. P. obtained from the circuit judge a writ of error and *supersedeas*. On petition of A. to this court for a

writ of prohibition to the circuit court—Held: The circuit court has no jurisdiction to award a writ of error and *supersedeas* in this case. The writ of prohibition must be awarded, so that the judgment of the county court will remain as if no writ of error and *supersedeas* had been awarded.

In the case of *Ex parte Lester, Ex parte Stone, Ex parte Wilson*, 77 Va., 663, decided September 20, 1883, act of March 6, 1882, amending act of March 3, 1880, and substituting “may” for “shall” was not designed to remit applications to sell liquor to the court’s arbitrary discretion. The words “may grant the license” mean the court must grant it in a proper case.

Where statute declares a court may do a judicial act, the word “may” must be construed as mandatory when a proper occasion for doing the act arises. To applicant denied liquor license, by the act of March 6, 1882, there is given an appeal of right to the circuit court. Under Code 1873, ch. 178, section 2, he may, upon the bill of exceptions taken at the trial, apply to the circuit court for a writ of error and *supersedeas*. Of his two remedies he may resort to either, and if the circuit court also erroneously refuse the license; its decision is reviewable by the court upon appeal, or writ of error and *supersedeas* as in other cases.

The applicant is a party directly in interest in the decision refusing the license, and comes within the letter, Code 1873, ch. 178, section 2. Not so with contestant.

Ex parte Yeager, 11 Grat., 655, was founded on the law of 1849, which gave county courts arbitrary discretion as to liquor licenses; *French vs. Noel*, 22 Grat., 454, on law of 1870, was based on the same ground; *Leighton vs. Maury*, 76 Va., 865, on the law of 1880, construing the law as giving those courts a legal discretion reviewable upon appeal or error upon petition of either applicant or contestant; *Ailstock vs. Page*, ante page 386, on law of 1880, amended by act of March 6, 1882, overrules *Leighton vs. Maury* so far as the latter allows right of appeal or error to the contestant, but decides nothing concerning the applicant. *Ailstock vs. Page et als.*, explained and approved.

L. applied to County Court of M. for license to sell liquor. It was refused, and applicant excepted. The court certified that the applicant proved that he was a fit person, and that his place of business was suitable. L. applied to the circuit court for a writ of error. He denied the writ of error, and endorsed the petition as follows: “The words of the statute (1882) only appeal to an applicant, and only allow him right of appeal during the term at which the refusal to allow his application is entered. I therefore decline to grant as asked for in the petition.” Held: (by a majority of the court).

1. The applicant brought himself within the requirements of the law, and was entitled to the license applied for.

2. The right of appeal upon errors to the circuit court was not taken away by the statute, and the applicant was entitled, upon the facts manifested by the record, to have the judgment refusing him the license reviewed and reversed by the circuit court. Held: (by Lewis P. and Hinton J.) From the judgment of the county court refusing license under the act of March 3, 1880, amended by the act of March 6, 1882, the applicant is entitled, during the term at which the refusal is entered, to take an appeal of right to the circuit court, and no further, and such appeal is his only remedy. The reference to page 677 is to this case.

In the case of *Commonwealth vs. Sheckels*, 78 Va., 36, decided November 15, 1883, it was held: Liquor cannot without license obtained in accordance with the laws of this State be lawfully sold therein, either on land or on board of a vessel, although the seller may have obtained from the United States Government a special tax stamp therefor, it being expressly provided by Section 3243 of the United States Revised Statutes, that persons holding such stamps shall not be exempted from any penalties imposed by the law of any State for carrying on the trade within its limits.

In the case of *Cherry vs. Commonwealth*, 78 Va., 375, decided January 31, 1884, it was held: It was not the intention of the legislature to require, in proceedings under Section 106, Chapter 206, Acts of Assembly, 1874-'5, page 244, the application of the strict and technical rules applicable to indictments.

In proceedings to revoke liquor licenses under said section, the defendants are competent to testify in their own behalf, those proceedings being not criminal in their nature. Those proceedings may be on the motion of any other person as well as the commonwealth's attorney. In such proceedings the defendant is not entitled to a trial by jury. The object is not punishment, but revocation of privilege. It is no bar to the proceedings that it is founded on some act or offence wherefor the defendant has been formerly convicted.

In the case of *Haddox vs. County of Clarke*, 79 Va., 677, decided October 2, 1884, it was held: Where application for liquor license is refused by county court, and during same time applicant appeals to circuit judge or court (not upon bills of exceptions to rulings of county court), the appeal is but a transfer of the application to another tribunal, when it is heard *de novo*.

In the case of *Harris vs. The Commonwealth*, 81 Va., 240, decided December 17, 1885, it was held: Though prosecution be on a revenue law, yet so far as that law imposes penalty, it is a penal statute, and must be construed strictly like other criminal laws.

Skating-rinks are not enumerated in the act requiring license to be taken out for public performances or exhibitions, and

unless they be properly conducted, so as to clearly show that they are properly public performances or exhibitions, they cannot be brought within that act.

In the case of *Arrington vs. Commonwealth*, 87 Va., 96, decided November 20, 1890, it was held: Indictment under this section, for selling liquor without license, must definitely state the place where sold, but the exact time of the sale need not be stated, nor need it be stated that the sale was "by sample, representation, or otherwise."

CHAPTER XXV.

In the case of *Savage vs. Commonwealth*, 84 Va., 619, decided March 15, 1888, it was held: This chapter does not delegate a portion of the legislative power vested by the Constitution in the General Assembly, but merely leaves it to the popular vote to determine whether license shall be granted or not, and is not unconstitutional.

SECTION 581.

In the case of *Haddox vs. The County of Clarke*, 79 Va., 677, decided October 2, 1884, it was held: Where a question is submitted to the qualified voters of a county and of each magisterial district, and it is made the duty of the sheriff of the county to post notices of the election at every voting-place in the county within a prescribed period preceding the election; the failure to post such notices invalidates the election.

An application for liquor license in a county, when such an election has taken place, either in the first case before the county court, or in the second place before the circuit court or judge in vacation, parol evidence is admissible to prove that notices of the election had not been posted, or that any other plain and express provision of the statute providing for the election had not been complied with.

SECTION 587.

In the case of *Savage vs. Commonwealth*, 84 Va., 582, decided March 8, 1888, it was held: Under this section it is not necessary that indictment allege that the magisterial district wherein the sale occurred voted against license, the court taking judicial notice of such vote, nor that the liquor sold was the subject of license before the vote was taken, nor the time when the sale was made—the time of sale not being of the essence of the offence.

In the case of *Webster vs. Commonwealth*, 89 Va., 154, decided June 23, 1892, it was held: In a county where the local option law has been adopted, the sale of liquor without license is none the less liable to prosecution as a violation of the general revenue law.

CHAPTER XXVI.

SECTION 590.

In the case of *Lucas (Sergeant), etc. vs. Clafflin & Co.*, 76 Va., 269.

Tax on deeds.—Code of 1873, Chap. 36, Sec. 11, provides that “no deed shall be admitted to record until the tax is paid thereon.” This is directory. Clerk may refuse to admit the deed to record until the tax is paid. But if he chooses to admit it without pre-payment, he assumes the tax, and the admission to record is valid. *Hill vs. Rixey*, 26 Grat., page 80, distinguished from this case.

The reference to 76 Va., 281, is to the same case above cited from page 269.

CHAPTER XXVII.

SECTION 619.

In the case of *Allen vs. Commonwealth*, 11 Va. Law Journal, 559, decided April 7, 1887, it was held: The auditor and his sureties are liable to the State for the amount paid by him to the county treasurer for collecting taxes due the State over and above the commission of two and a half per cent. allowed by law.

CHAPTER XXVIII.

SECTION 635.

In the case of *Staats vs. Board*, 10 Grat., 400, decided July, 1853, it was held: Lands having been forfeited under the act of the 27th of February, 1835 (Session Acts, p. 11), for the failure to enter them on the commissioner’s books, that forfeiture was complete on the 1st of November, 1836, the period limited in which the forfeiture might be saved by complying with the provisions on the act of March 23, 1836 (Session Acts, 1835–’36, p. 7). The act of March 30, 1837 (Session Acts, p. 9), giving time for redemption until the 15th of January, 1838, did not release the forfeiture which had accrued, except in cases where the owner or proprietor availed himself of the privilege of redemption. The forfeiture in such case became absolute and complete by the failure to enter and pay the taxes due on the land and the damages in the manner prescribed by the act on the 27th of February, 1835; and no inquisition or judicial proceeding, or inquest, or finding of any kind was required to consummate such forfeiture. After the forfeiture of the land to the Commonwealth no possession thereof adverse to the proprietor, in whose name it was forfeited, can run against the Commonwealth. Where, after the lien of the Commonwealth for taxes attaches to lands, any possession adverse to the proprietor can

operate so as to impede the right of the Commonwealth to subject said lands to sale or forfeiture for such taxes, and, as a consequence, to transfer to a purchaser, or vest in actual occupant, or subject to re-entry and grant, such forfeited lands.

In the case of *Wild's Lessee vs. Serpell*, 10 Grat., 405, decided July, 1853, it was held: The statutes of Virginia forfeiting lands to the Commonwealth for the failure of the owners to enter them upon the commissioners' books and pay the taxes due thereon are constitutional.

The forfeiture, under these statutes, is perfected without a judgment, decree, or other matter of record, or an inquest of office; but by the operation of the statutes the title is divested out of the owner, and is vested in the Commonwealth.

In such cases where the title is vested in the Commonwealth and the forfeiture enures to the benefit of a third person claiming under the Commonwealth by virtue of another and distinct right, the transfer of the title to such person is, in like matter, perfect and complete, without any new grant from the Commonwealth or any proceeding to manifest the transfer by matter of record or otherwise.

Land omitted to be entered by the owner on the commissioners' books were forfeited, under Section 2 of the act of February 27, 1835 (Session Acts 1834-'35, p. 12), and the forfeiture became perfect and consummate on the 1st of November, 1836, the period limited in which the forfeiture may be saved by complying with the provisions of the act of March 23, 1836. (Session Acts, 1835-'36, p. 7.)

A party claiming under a grant from the Commonwealth issued in August, 1836, cannot claim the benefit of an older title forfeited to the Commonwealth under the act of the 27th of February, 1835, because by that act a forfeiture only enured to the benefit of those who claimed title under a grant from the Commonwealth bearing date before April 1, 1831. Nor can such a party sustain such a claim under the provisions of the act of March 30, 1837, unless he is a *bona fide* occupant of the land. To sustain such a claim under Section 16 of the act of March 16, 1838 (Session Acts 1837-'38, p. 21), the party must have been at the date of the act in the actual possession and occupancy of the land forfeited or parcel thereof, with the title *bona fide* claimed or derived under grants from the Commonwealth which issued subsequent to the 31st of March, 1831, and prior to the 15th of January, 1838.

By the act of March 18, 1841 (Session Acts 1840-'41, p. 31), the forfeiture of title to the Commonwealth only enures to the benefit of those then in actual possession of the forfeited land under claim of title through a grant from the Commonwealth. Though at that time the party held a patent for the land, yet if

he was in actual possession under a lease from another person claiming the elder title, that is not the actual possession contemplated by the statute.

By the act of March 22, 1842 (Session Acts 1841-'42, p. 13, sec. 3), the title to forfeited lands is transferred to and vested in such persons other than those for whose default the same may have been forfeited, or has title or claim, legal or equitable, derived under a grant from the Commonwealth, bearing date prior to the 1st of January, 1843, without making either actual occupancy or possession of the land, or a *bona fide* claim of title, any part of the condition on which the transfer of the title takes effect. Though the land had been reported to the court as forfeited land, and an order had been made for a sale thereof, yet if not actually sold after the passage of the act, the title is transferred under the statute.

The act of March 22, 1842, is retrospective in its operation. A tenant who renders possession at the end of his term, or from whom possession is recovered, is not concluded by the existence of such tenancy at such time, or by the deed of lease which he executed, from contesting the title of his former landlord.

SECTION 642.

In the case of *Boon vs. Simmons*, 88 Va., 259, decided July 9, 1891, it was held: All acts prescribed by the statute must be performed in the place, manner, and time therein named. Every provision in which the owner can possibly have an interest must be strictly obeyed, else the tax title will be void. The maxim, *caveat emptor*, applies with great force to the purchaser. Judicial confirmation of the sale, when required by law, is essential to a valid tax title, but no confirmation can aid a void title.

This section provides, that within thirty days after a tax sale, treasurer shall report same to county court at its next term, which shall enter of record the fact of return of report, and shall continue the matter until the next term for exceptions to be filed by any person affected thereby; and if no cause be shown to the contrary, the court shall confirm the sale, and make it binding upon the parties in interest, and a writ of possession may be granted to the purchaser at any time thereafter on demand. A sale made December 19, 1887, under said act to appellant, was reported as therein directed, but the county court failed to continue the matter to the next term for exceptions, and never at that or any other term confirmed the sale or granted the purchaser a writ of possession, and he never had possession. Six months later the same land was sold under a decree of the circuit court, and the sale was duly confirmed, and the purchaser, the appellee, paid the entire purchase-money and received his deed of conveyance and the possession, which he

held for nearly two years without notice, actual or constructive, of the tax sale. At its January term, 1890, the county court made an order requiring a plat and certificate of survey of said property made by the county surveyor, and returned to the court by the appellant, and reciting the purchase by the appellant of said land at a sale of lands delinquent for taxes by said treasurer as aforesaid, to be recorded, and that the clerk make the necessary deed conveying said land to the appellant, which deed was accordingly made. In a suit in chancery brought by appellee to remove from his title the cloud thereon occasioned by said tax deed, the court adjudged the latter deed null and void, which judgment was affirmed in the appellate court.

SECTION 651.

The case of *Hale vs. Penn's heirs*, 25 Grat., 261, decided July 1, 1874, does not construe the statute, but is ruled by the statute.

SECTION 653.

In the case of *Justices of Randolph Co. vs. Stalnaker*, 13 Grat., 523, decided September 6, 1856, it was held: It is the duty of the county court, acting in relation to lands sold for taxes, to admit the report of the surveyor to record, if it conforms to the act; and the court has no authority to inquire into the regularity or validity of the sale made by the sheriff. The circuit court may proceed by *mandamus* to compel the county court to admit the report of the surveyor to record.

In the case of *Nowlin vs. Burwell*, 28 Grat., 883, decided July, 1877. At the August term, 1874, of the county court of P., N. presented a plat and certificate of land assessed in the name of L. and sold in her name in 1860, by the sheriff of the county for the non-payment of taxes due thereon, and purchased by N.'s assignor. B., claimant of the legal title to the land, opposed the recording the plat and certificate, and proved he had paid to the clerk the taxes, etc., but he offered no evidence of his title. The court admitted the plat and certificate, and B. appealed to the circuit court, and that court reversed the order of the county court, on the ground that the county court should have admitted evidence of B.'s title. On the second trial in the county court, B. traced back his title to a deed from T., as attorney in fact of L. to S., but the power of attorney was not produced or proven. The county court sustained the claim of B., and rescinded its order, admitting the plat and certificate to record; and upon appeal by N. to the circuit court, the last order of the county court was affirmed. Held: The first order of the county court admitting the plat and certificate to record was proper.

It not appearing that B. offered any evidence of his title to

the land, it was error in the circuit court to reverse the order of the county court and send the cause back to let B. introduce such evidence.

B. not producing or proving the power of attorney under which T. professed to act, he failed to establish his title to the land; and the second order of the county court, and order of the circuit court affirming it, were erroneous.

The act Code of 1873, ch. 38, secs. 18 and 19, in relation to the sale of land for taxes, is only intended to furnish evidence of the identity of the land sold, not only for the information of the former owner and all others interested, but for the guidance of the clerk in making the deed. When the purchaser offers the plat and certificate for recordation, the sole duty of the court is to consider whether the plat and certificate, or the report of the surveyor, as the case may be, is in conformity to the requirements of the law in respect to the description and identity of the land. It is no concern of the court whether the purchaser has acquired the title or whether the owner has properly exercised his right of redemption. The proceeding is *ex parte* in its character, and does not in the least effect the rights of the third person.

SECTION 654.

The cases of *Randolph Justices vs. Stalnacker*, 13 Grat., 523, and *Nowlin vs. Burwell*, 28 Grat., 883, are quoted *supra*, Section 653.

SECTION 655.

In the case of *Flanagan vs. Grimmer et als.*, 10 Grat., 421, decided July, 1853, the act of February 9, 1814, 2 Rev. Code, 542, concerning taxes on lands, Sections 24 and 25, directs the sheriff to advertise the sale of delinquent lands at the May, June and July terms of the court of his county, and to publish the advertisement at least every week for two months preceding the time of sale in some newspaper published in the city of Richmond. Section 28 directs him to execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth particularly and truly the amount of the purchase money. Section 38 provides that after the time of redemption allowed has elapsed, the regularity of the proceedings under which the purchaser at the sale claims title shall not be questioned unless such irregularity appear on the face of the proceedings. Held: That by the circumstances of the sale which are to be recited in the deed, is not meant all the steps to be taken by the various officers, which preceded the sale, but the circumstances attending the sale itself, viz.: That the sale was made at the time and place prescribed for the sale of lands returned delinquent; if less than the whole tract of land was sold,

how much was sold, who was the purchaser, and the amount of the purchase money.

It is not necessary that the deed shall recite that the land had been advertised. If the deed recites that the land was advertised at the court-house door for two months, but does not state that it was at the May, June and July terms of the court for the county, or in a Richmond paper, yet as it was not necessary to recite in the deed that the land had been advertised, the recital in the deed of an insufficient advertisement is not an irregularity on the face of the proceedings, which will avoid the deed.

The deed cannot be questioned by parol proof of a failure to advertise the sale as the law prescribes. If the deed is defective, it is competent evidence to show with other evidence an actual entry under a claim of title, and continued holding thereunder, so as to make out a title or right of entry by actual possession. Possession so taken and continued for the time prescribed might ripen into a right of possession, and so bar the right of entry of the opposing party.

SECTION 661.

In the case of *Flanagan vs. Grimmer et als.*, 10 Grat., 421, decided July, 1853, the act of February 9, 1814, 2 Rev. Code, 542, concerning taxes on lands, Sections 24 and 25, directs the sheriff to advertise the sale of delinquent lands at the May, June and July terms of the court of his county, and to publish the advertisement at least every week for two months preceding the time of sale, in some newspaper published in the city of Richmond. Section 28 directs him to execute a deed to the purchaser at such sale, reciting the circumstances thereof, and setting forth particularly and truly the amount of the purchase money. Section 38 provides that after the time of redemption allowed has elapsed, the regularity of the proceedings under which the purchaser at the sale claims title shall not be questioned, unless such irregularity appear on the face of the proceedings, held: That by the circumstances of the sale which are to be recited in the deed, is not meant all the steps to be taken by the various officers which preceded the sale, but the circumstances attending the sale itself, viz.: That the sale was made at the time and place prescribed for the sale of lands returned delinquent; if less than the whole tract of land was sold, how much was sold, who was the purchaser and the amount of the purchase money.

It is not necessary that the deed shall recite that the land had been advertised. If the deed recites that the land was advertised at the court-house door for two months, but does not state that it was at the May, June and July terms of the court for the county, or in a Richmond paper, yet as it was not necessary to

recite in the deed that the land had been advertised, the recital in the deed of an insufficient advertisement is not an irregularity on the face of the proceedings, which will avoid the deed.

The deed cannot be questioned by parol proof of a failure to advertise the sale as the law prescribes. If the deed is defective, it is competent evidence to show, with other evidence, an actual entry under a claim of title, and continued holding thereunder, so as to make out a title or right of entry by actual possession. Possession so taken and continued for the time prescribed might ripen into a right of possession, and so bar the right of entry of the opposing party.

In the case of *Gates & Clarke vs. Lawson et als.*, 32 Grat., 12, decided July, 1879. By deed dated the 16th of February, 1864, T. sold and conveyed to R. a tract of land in Patrick county, but the deed was not recorded in that county until 1874, though R. paid the taxes on the land from 1866 inclusive. This land, standing on the land books of the county in the name of T., was returned as delinquent for the tax of 1865, and in 1873 sold as delinquent land, and purchased by G., to whom the clerk afterwards conveyed it. In ejectment by G. against R. to recover land, held: Under the statute, Code of 1873, ch. 38, sec. 26, a purchaser at a sale of land delinquent for taxes only acquires such estate as was vested in the person assessed with the taxes at the commencement of the year for which said taxes were assessed, and as T. had in 1864 sold and conveyed the land to R., T. had no estate in the land in January, 1865, and G. took no title to the land under his purchase and the deed to him.

CHAPTER XXIX.

CHAPTER XXX.

SECTION 682.

In the case of *Commonwealth vs. Ford et als.*, 29 Grat., 683, decided January 17, 1878, it was held: A judgment in the name of the Commonwealth for W., treasurer of C. county, founded on a notice in the name of the Commonwealth, proceeding by W., late treasurer of C. against F., the collector of township M., and his sureties, upon his official bond, is a judgment in favor of the Commonwealth. On such a judgment, the Commonwealth, at the relation of T., auditor of accounts, may maintain a suit against F. and his sureties.

SECTION 685.

In the case of *Monteith (Sheriff) et als. vs. The Commonwealth*, 15 Grat., 172, decided April, 1859, it was held: On motion against a sheriff and his sureties for his failure to pay his taxes due to the Commonwealth, it is not necessary that the notice should state on what bond of the sheriff the motion will be made.

SECTION 684.

In the case of *Monteith (Sheriff) et als. vs. The Commonwealth*, 15 Grat., 172, decided April, 1859, it was held: The notice to sheriff and his sureties being of a motion for a balance of the land, property, and free negro taxes of 1857, and a judgment being for a balance due upon these, and also for a license tax, this is error for which the judgment will be reversed in the appellate court.

In the case of *Commonwealth vs. Latham (Judge)*, 85 Va., 632, decided January 10, 1889, it was held: The Circuit Court of Richmond city alone hath jurisdiction to enjoin or affect any judgment in behalf of the Commonwealth.

SECTION 701.

In the case of *Commonwealth vs. Ford*, 29 Grat., 683, decided January 17, 1878, it was held: The property of the sureties being covered by their homestead exemption deeds, the Commonwealth may go into equity to enforce her judgment against them.

SECTION 702.

The reference to 18 Grat., 13-28, applies to the former statute, now useless in this connection.

CHAPTER XXXI.

SECTION 712.

In the case of *Commonwealth vs. Collins*, 9 Leigh, 666, decided December, 1839, by the General Court, it was held: Forfeiture for selling goods without a license may be recovered upon presentment and indictment.

SECTION 714.

In the case of *Honaker vs. Howe*, 19 Grat., 50, decided February 2, 1869, it was held: Page 55—Cases of special fines, prescribed by statute, are governed by this section. It is not necessary, therefore, in order to afford a foundation for the judgment, as it is in the case of "submission," to regard the prosecution as implying a confession of guilt for the purposes of the case. The judgment in such a case stands on no other foundation than the consent of the defendant, given in pursuance of the compromise with the Commonwealth, that judgment may be entered up against him for the fine agreed upon. Nor is there anything in the fact of proposing or assenting to such a compromise arrangement, which necessarily implies an admission of guilt.

SECTION 717.

In *Ex Parte Marx*, 86 Va., 40, decided April 18, 1889, it was

held: The fine prescribed for violating the Sabbath is recoverable before a justice and by a civil warrant. The constitutional rights to trial by jury does not extend to such an offence.

SECTION 724.

In the case of *Wells vs. The Commonwealth*, 21 Grat., 500, decided November 13, 1871, it was held: An appeal may be taken to the court of appeals from the judgment of a circuit court imposing a fine upon a person for a contempt of the court, in aiding to obstruct the execution of a decree of the court.

SECTION 726.

In the case of *Shifflett et als. vs. Commonwealth*, 18 South-eastern Reporter, 838, decided January 11, 1894, it was held: When the accused was not in custody it is not error to direct his arrest and confinement in jail for the non-payment of a fine before a *fieri facias* has been issued; this section giving the court this power.

SECTION 735.

In the case of *Tyler (Sergeant) vs. Taylor (Auditor)*, 29 Grat., 765, decided February 7, 1878, it was held: Fines collected by a sheriff of a county, or by the sergeant of a city or town, are to be paid by him to the treasurer of county, city, or town, and not to the auditor of accounts of the State, and therefore a *mandamus* will not lie at the suit of a sheriff or sergeant to compel the auditor to receive coupons which have been paid to him in discharge of a fine.

TITLE XIV.

CHAPTER XXXII.

SECTION 746.

The reference to 18 Grat., 764, is not a construction of this section, it was a case which followed the statute.

In the case of *Commonwealth vs. Chalkley*, 20 Grat., 404, decided March, 1871, N. was elected store-keeper of the penitentiary prior to 1861, for a term commencing on the first of January, 1861, and to continue for two years. In the last of the year 1861, and the first of the year 1862, he, as such store-keeper, purchased of C. leather and findings to be manufactured by the convicts in the penitentiary. Both N. and C. recognized the authority of the Richmond government, C. not having been able to obtain payment of his debt from the Richmond authorities, he, in December, 1866, instituted proceedings to recover the amount due him from the present government of Virginia.

Held: He has no claim, either in law or equity, upon the present government for its payment.

In the case of *Higginbotham executors vs. Commonwealth*, 25 Grat., 627, decided December 18, 1874, it was held: The present state of Virginia is bound to the creditors of the State for debts due before the division for the whole of their debts, and West Virginia is equally bound.

Under the statute the State of Virginia may be sued for any debt or claim due, whether liquidated or unliquidated.

In the case of *Parsons vs. The Commonwealth*, 80 Va., 163, decided January 29, 1885, P., a creditor of the Commonwealth, filed in the Circuit Court of the city of Richmond his petition against the Commonwealth and the auditor of public accounts, praying judgment against her for the amount of the debt, and a rule was awarded summoning them to answer the petition. Later, before the appearance of either of them, the court, *ex mero motu*, dismissed the petition against the Commonwealth. On error to this court, held: Under statute the Commonwealth of Virginia may be sued for any debt or claim due. But though the order dismissing the petition against the Commonwealth may have been necessary, yet, as it did not effect the petitioner's right or remedy, it was not an error for which this court will reverse the order.

In the case of *Dunnington vs. Ford*, 80 Va., 177, decided February 5, 1885, it was held: The State can only be sued by its consent. When a remedy by suit against the State, or any of its officials provided, those seeking to avail of its benefits must allow its provisions with exact strictness.

Under act of January 26, 1882, amended March 13, 1884, Acts 1883-'84, page, 527, the suit is required to be commenced by a petition to be filed at rules, upon which a summons shall be issued to the collecting officer, and regularly matured like any other action at law, and the coupons shall be filed with the petition. A suit brought in any other way is unlawfully instituted, and must be dismissed.

SECTION 751.

In the case of *Commonwealth vs. Lilly's Adm'r.*, 1 Leigh, 525, decided April, 1830, it was held: An officer of the State Navy of Virginia during the war of the Revolution, who became supernumerary before and so continued until the end of the war, entitled to half-pay for life under the act of May, 1779. The act of limitations does not apply to such a claim; nor does the lapse of time, from 1783, when the claim accrued, till 1826, when it was asserted, under the circumstances of the case, afford any presumption of payment or of abandonment of the claim.

TITLE XV.

CHAPTER XXXIII.

SECTION 755.

In the case of *Walker et als. vs. Commonwealth*, 18 Grat., 13, decided November 2, 1867, it was held, p. 28: A sheriff cannot pay money to the auditor or attorney-general collected upon execution, and though an agent to sell delinquent lands may receive the money from a purchaser, he must pay it into the treasury in the mode prescribed by the statute in all cases.

SECTION 765.

The reference to 18 Grat., 764, is to a case which does not construe the statute, but merely follows it.

In the case of *Dunnington vs. Ford*, 80 Va., 177, decided February 5, 1885, it was held: The State can only be sued by its consent. When a remedy by suit against the State or any of its officials is provided, those seeking to avail of its benefits must follow its provisions with exact strictness.

Under act of the 26th of January, 1882, amended March 13, 1884 (Acts 1883-'84, p. 527), the suit is required to be commenced by a petition to be filed at rules, upon which a summons shall be issued to the collecting officer, and regularly matured, like any other action at law, and the coupons shall be filed with the petition. A suit brought in any other way is unlawfully instituted, and must be dismissed.

SECTION 780.

In the case of *Clarke vs. Tyler (Sergeant)*, 30 Grat., 134, decided April 4, 1878, it was held, p. 152: This section is not unconstitutional.

TITLE XVI.

CHAPTER XXXIV.

SECTION 802.

In the case of *Dinwiddie County vs. Stuart, Buchanan & Co.*, 28 Grat., 526, decided April 26, 1877, it was held: An appeal from the decision of a board of supervisors of a county rejecting a claim arising under an order of a county court, made in 1862, is properly taken to the county court of the county.

CHAPTER XXXV.

SECTION 812.

In the case of *Virginus Johnson vs. Mann (Judge) and Couch (Treasurer)*, 77 Va., 265, decided March 15, 1883: Under the Constitution and laws of this State, county, municipal and district officers must qualify before the day whereon their terms respectively begin, else their offices are vacant, and the incumbents continue to discharge the duties of the offices after their terms of office have expired, until their successors have qualified.

In May, 1882, Couch was elected Treasurer of Petersburg for term beginning July 1, 1882, and continuing three years; when elected, Couch was a member of the city council, his term not expiring until July 1, 1884. On July 1, 1882, he acted as councilman, but qualified and entered upon the duties as treasurer; Johnson, the incumbent treasurer, claiming that he was entitled to hold the office until the next regular election, and petitioning to be restored thereto by *mandamus*; Held:

1. Couch's failure to qualify before the commencement of his term vacated his office, and the judge of the Hustings Court of Petersburg is entitled to fill the vacancy.

2. Johnson, the incumbent, is not entitled to hold the treasurer'ship until the next general election, but only until his successor so appointed shall have qualified.

In the case of *Branham vs. Long*, 78 Va., 352, decided January 24, 1884, it was held: Under the Constitution and laws of this State, county, municipal and district officers must qualify by taking the several oaths required by law before the day whereon their terms respectively begin, else their offices are vacant, and the incumbents continue to discharge the duties of the offices after their terms of office have expired, until their successors have qualified.

SECTION 813.

In the case of *Johnson vs. Mann (Judge) and Couch (Treasurer)*, 77 Va., 265, decided March 15, 1883, it was held: Failure to qualify before commencement of term vacates office, and the office may then be filled by the proper authority.

CHAPTER XXXVI.

SECTION 833, PAR. 2.

In the case of *Stockholders of the Bank of Abingdon vs. Supervisors of Washington County*, 88 Va., 293, decided July 16, 1891, it was held: Under Acts 1883-'84, p. 568, Section 17, the State, without regard to the residence of stockholders, levies for State purposes a tax on the assessed value of their shares of stock as it does upon other monied capital; and this section of

the Code requires the supervisors of each county to levy for county purposes annually, and to order the levy on all property assessed with State taxes.

SECTION 834.

In the case of the *Board of Supervisors of Culpeper vs. Gorrell and others*, 20 Grat., 484, decided March, 1871, it was held: The board of supervisors of a county have authority to provide land for building a court-house, clerk's office, and a jail, either by purchase or proceeding to have it condemned in the mode prescribed in the statute.

The board of supervisors of a county have authority to sell the lands belonging to the county on which the court-house and other public buildings stood. It is for the board of supervisors to determine what land they will procure for the public building of their county; and whether their discretion is wisely or unwisely exercised in the selection cannot be inquired into the proceeding instituted to condemn the land.

In the case of *Supervisors of Bedford vs. Wingfield (Judge)*, 27 Grat., 329, decided March, 1876, it was held: A judge of a circuit court has authority to control the court-house in which he administers justice to the extent at least of preventing any interference with the discharge of the public business, and of having necessary jury rooms and other conveniences for that purpose. Where there is any such interference by the board of supervisors of a county, or any one else, the judge certainly has the right to inquire into it. If, in doing so, he violates the law or infringes upon the rights of others, his action may be corrected by a writ of error, but it is not a case in which prohibition will lie.

The board of supervisors of a county order that one of the jury rooms attached to the court-house shall be prepared to be used as a part of the clerk's office of the county court, and this order is approved by the county court. The judge of the circuit court thereupon makes a rule upon the board of supervisors to show cause why they shall not be restrained from making the changes in the room. This court will not restrain him by prohibition by proceeding under the rule, but the board should make their defence in the circuit court, and any error of the judge in that proceeding may be corrected by a writ of error to this court.

SECTION 838.

In the case of *Dinwiddie County vs. Stuart, Buchanan & Co.*, 28 Grat., 526, decided April 26, 1877, it was held: An appeal from a decision of a board of supervisors of a county rejecting a claim arising under an order of a county court, made in 1862, is properly taken to the county court of the county. The reference to 28 Grat., 872, is an error.

SECTION 843.

In the case of *Dinwiddie County vs. Stuart, Buchanan & Co.*, 28 Grat., 526, decided April 26, 1877, it was held: An appeal from a decision of a board of supervisors of a county rejecting a claim arising under an order of a county court, made in 1862, is properly taken to the county court of the county.

In the case of *Prince George County vs. A. M. & O. R. R. Co.*, 87 Va., 283, decided January 8, 1891, it was held: Where board of supervisors "refused" to act upon a claim presented under this section, claimant may sue the county under Section 843.

SECTION 844.

See the case of *Prince George County vs. A. M. & A. R. R. Co.*, 87 Va., 283, cited *supra*, Section 843.

CHAPTER XXXVII.

SECTION 859.

In the case of *Anable vs. Commonwealth*, 24 Grat., 563 and 576, decided November, 1873, A. was the secretary of the Board of Supervisors of the county of H., and there was to his credit on the books of the treasurer for claims held by him against the county one thousand six hundred and forty-nine dollars. Blank warrants, signed by the chairman of the board, were left with him, and he filled up and sold warrants to a considerably larger amount than the sum due to him. Warrants to near the amount due are registered, and among these one for three hundred and fifty dollars sold to W.; but there were other warrants sold before the one was sold to W., and if they had been registered before W.'s, the fund would have been exhausted, and would have left nothing to be applied to W.'s warrant. Upon an indictment of A. for larceny of the check given by W. for payment of the warrants, held: The warrants are to be paid in the order in which they are registered, and there being sufficient to pay W.'s warrant, as well as all the warrants registered before it, A. cannot be convicted of the larceny charged.

W. having bought his warrant of N., an agent of A., and having given a check payable to the order of N., and the indictment charging the larceny of the check of W., endorsed by N., and the proof being that N. endorsed his name after receiving the check.

Quære: If this is a variance.

SECTION 864.

The reference to 2 H. & M., 580, is an error.

In the case of *Munford et als. vs. The Overseers of the Poor of Nottoway*, 2 Rand., 313, decided February 18, 1824, it was held:

A judgment against a principal in a bond is not conclusive evidence against his sureties.

When the principal and sureties are sued jointly, and the judgment is erroneous as to the sureties, it must be reversed as to all, although the judgment would have been good against the principal if he had been sued alone.

The reference to 2 Leigh, 393, is continued in the present Code by error. It does not apply to this section.

SECTION 865.

In the case of *Overseers of the Poor of Brunswick vs. Tucker*, 2 Leigh, 580, decided March, 1831, T. sheriff of B., for the years 1803-'4, collects the poor rates; and in November, 1823, the overseers of the poor commence proceedings against him by motion for balances unaccounted for. Held: After such a lapse of time the motion ought not to be entertained.

In the case of *Board of Supervisors of Washington County vs. Dunn et als.*, 27 Grat., 608, decided June, 1876, it was held, p. 622: A notice by the supervisors of a county to D., late sheriff, and his sureties, that they will move the county court at its November term to render judgment against them for the sum of \$4,840.03, the same being the amount of said D.'s deficiency and default for county levies for the year 1869, that went into D.'s hands as sheriff as aforesaid, and which he had failed to account for, etc., is sufficiently specific and definite to warrant a judgment thereon.

The rule governing notices is that they are presumed to be the acts of parties, and not of lawyers. They are viewed with great indulgence by the courts, and if the terms of the notice be general, the court will construe it favorably, and will apply it according to the truth of the case, so far as the notice will admit of such application. If it be such that the defendant cannot mistake the object of the motion, it will be sufficient.

Upon notice to a sheriff and his sureties of a motion against them for his failure to account for taxes, they appear and ask for a rule upon the attorney for the Commonwealth to show cause why the record of the bond of the sheriff should be amended, corrected or vacated; and several of the sureties file affidavits, in which each states the grounds on which he relies, to show he is not bound by the bond. One says he signed on condition that other persons should sign. Another says he signed the bond, but never acknowledged or delivered it, and after signing it he determined not to acknowledge it. Another says he acknowledged it in court, on condition that all the parties who signed would acknowledge it. In fact, the defendants had either acknowledged the bond before the court or before a justice, and none of these conditions appeared on the record or

bond, or were made known to the court. These affidavits present no grounds for the release of the parties or for the rule.

It is not necessary that the sureties of a sheriff in his official bond should acknowledge the same in court. The bond may be acknowledged by them in court, or its execution out of court may be proved by witnesses. And there is no statute or rule of law requiring such proof to be adduced at the time the bond is received by the court. With or without such proof, the parties who had actually signed would be bound by the deed.

A person who signs, seals and delivers an instrument as his deed will never be heard to question its validity upon the ground that it was not acknowledged by him nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy to the deed, not proof of its execution; and this principle applies to all bonds, whether executed by public officers or private persons, unless there is a statute making the acknowledgment or proof in court essential to the validity of the instrument.

In an action on an official bond, if there is no record evidence, the execution of it may be established by the testimony of attesting witnesses, or if there be none, by proof of handwriting, or by discovery from the adverse party.

On notice of a motion against a sheriff and his sureties on his official bond, the pleas of "*non damnificatus*" and "*nil debet*" are not proper pleas. The fact that the names of two of the parties who executed and acknowledged the bond were not in the body of it does not invalidate as to them.

On a motion against a sheriff and his sureties for the county levies he had failed to account for, the report of the clerk who had been directed by an order of the county court to settle the sheriff's account, though made with the sheriff without notice to the sureties, is competent evidence against them to show the amount for which the sheriff is indebted. If they had notice as the statute provides, the report would be conclusive upon them; without notice, it is *prima facie* evidence of the amount of the sheriff's indebtedness.

CHAPTER XXXVIII.

SECTION 869.

In the case of *Bonsack & Kiser vs. Roanoke Co.*, Va. Reports, 75, 585, decided September, 1881, it was held: The supplies were to be procured by purchase, and, if need be, by impressment, through agents appointed for the purpose, and the debts thus contracted were to be paid in the manner and by the means indicated. The express designation of a particular mode of raising the means excludes every other, though the borrowing

of money might be deemed by some a more appropriate mode than a levy in the ordinary way.

SECTION 881.

In the case of *City of Lynchburg vs. Slaughter*, Va. Reports, 75, p. 57, decided November 25, 1880: A municipal corporation, having a general authority under its charter to contract loans or cause to be issued certificates of debts or bonds, may issue coupon bonds and sell them at public auction for less than their par value, and for bonds sold during the war might receive payment for them in Confederate money.

A municipal corporation, having authority to provide for the poor and needy of the city in 1864, pass an ordinance for the issue of fifty thousand dollars of the coupon bonds of the city, and the ordinance provides that the proceeds shall be paid into the treasury of the city, subject to the order of the council, for the use and benefit of indigent families and citizens. Held: A *bona fide* holder of these bonds is not required to look farther than the ordinance to see whether the bonds were issued for a legitimate purpose; and his right to recovery upon the bonds will not be affected by the fact that the council may have applied the proceeds of the bonds to other purposes.

Though coupon bonds may have been issued by a municipal corporation for the purpose of aiding the rebellion, this not appearing on the face of the bonds, or the ordinance authorizing their issue, the bonds in the hands of a *bona fide* holder for value, without notice or knowledge of the purpose, are valid and binding upon the corporation. And though the holder of the bonds had such notice, the bonds are valid and binding in the hands of the present holder.

CHAPTER XXXIX.

SECTION 893.

In the case of *Ballard et als. vs. Thomas & Armuon*, 19 Grat., 14, decided November 14, 1868, it was held, p. 23: The statute is permissive only in regard to causes other than the death of the sheriff, and not mandatory. When no such appointment is made, the duty of the sheriff remains, and the sureties remain liable for its due performance.

SECTION 895.

In the case of *Andrews vs. Fitzpatrick*, 89 Va., 438, decided December 1, 1892, it was held: Unless the office of coroner is vacant, or the incumbent under disability, a constable cannot lawfully serve a process directed to the sheriff. Such is no legal service and should be quashed.

SECTION 897.

In the case of *Ferguson et als. vs. Moore*, 2 Washington, 54, decided April term, 1795, it was held: A bond taken upon replevying property distrained for rent must be returned to the court to which the officer levying the distress belongs, or to the court of that county in which the land lies.

The reference to *Barksdale et als. vs. Neale*, 16 Grat., 314, 315, is an error. That case defines what is a good return on a process. See the cases cited to Section 3591.

SECTION 898.

In the case of *Commonwealth vs. Roland*, 4 Call, 97, decided November, 1786, it was held: Judges, attornies, witnesses and suitors are exempt from arrest in civil suits during their attendance at court, and for a reasonable time thereafter to return home by the common law. This statute was afterwards passed to establish the exact extent of the privilege.

SECTION 900.

In the case of *Turnbull vs. Thompson et als.*, 27 Grat., 306, decided March 16, 1876, it was held: A summons in debt is served on a defendant on the 3d of February, and the judgment by default becomes final on the 3d of March. Under the statute the day of the service of the process may be counted, and therefore thirty days had elapsed between the service of process and the judgment, and it is a valid judgment.

In the case of *Jesse Mitchell vs. The Commonwealth*, 89 Va., 826, decided March 30, 1893. When the return to process is signed only with the name of the deputy by whom it has been served, and not with that of the principal also, held: Such process and return should be quashed by the trial court.

SECTION 901.

In the case of *Bullock vs. Goodall et als.*, 3 Call, 44 (2d edition, 39), decided October 14, 1801, it was held: If the sheriff neglects to return an execution at the request of the plaintiff, he is not liable to a fine.

In the case of *Tomkies' Executors vs. Downman*, 6 Munf., 557, decided March 28, 1820, it was held: Not more than one fine can legally be imposed on the sheriff, or other officer, for failing to return one execution. The plaintiff at law having recovered, by successive judgments, many fines against the sheriff for failing to return one execution, to a greater amount in all than the execution itself, with his extra costs added thereto; it appearing also that the execution was lost, and therefore could not be returned; that the sheriff's failure to make defence at law against any of the judgments after the first, proceeded from ignorance

of the true construction of the act of assembly; and that, in relation thereto, there was a general delusion among the citizens of the Commonwealth, the court of equity gave the sheriff relief by injunction, prohibiting any farther recovery against him on account of his failure to return the said execution; and this, although it appeared he had received and applied to his own use a part, and probably the whole, of the money upon the execution.

In the case of *Fletcher vs. Chapman*, 2 Leigh, 560, decided March, 1831: A *fi. fa.* sued out by C. against P. is delivered to the sheriff, and P., the debtor, pays the amount of the execution to C., the creditor; the sheriff fails to make due return of the execution. Held: P., the debtor, cannot maintain a motion in the name of C., the creditor, against the sheriff for a fine for failing to return the execution, even though the debtor were a party injured thereby.

The reference to 30 Grat., p. 16, is an error.

SECTION 907.

In the case of *Ballard vs. Whitlock*, 18 Grat., 235, decided February 18, 1867, it was held, p. 239: The sheriff may receive chattels under this section, for the production of which a forthcoming bond has been given, and sell the same after the return day of the execution.

SECTION 909.

In the case of *Drew vs. Anderson*, 1 Call, 51 (2d edition, 44), decided November 16, 1797, it was held: If there be a judgment for too much money against the sheriff on account of money received by his deputy on an execution, he cannot recover the amount of that judgment against his deputy; for he shall not, by submitting to an erroneous judgment, saddle the deputy with it.

In the case of *Taylor vs. Dundass*, 1 Washington, 92, decided at spring term, 1792, it was held: The execution book directed to be kept by the clerk shall be *prima facie* evidence of the time of a return on execution, liable, however, to be set aside by clear proof of error.

In the case of *Paxton vs. Rich*, 85 Va., 378, decided September 13, 1888, it was held: This section, providing that in motions against officers for money the fact that a *fi. fa.* has not been returned shall be *prima facie* evidence that the whole amount has been collected, has no application but to such proceedings; and the facts that, about a year before the *fi. fa.* went into the sheriff's hands another execution against same debtor was returned (no effects), and that an account of liens was decreed, which creditor could and did take advantage of to repel

any presumption of payment arising from non return of *fi. fa.* for fourteen years.

SECTION 910.

See the case of *Drew vs. Anderson*, 1 Call, 51 (2d edition, 44), quoted *ante*, Section 909.

In the case of *Royster et als. vs. Leake*, 2 Munf., 280, decided May 8, 1811, it was held: A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty during his continuance in the office of deputy sheriff, is binding upon him and his sureties for the second year as well as the first, and until the winding up of the business lawfully committed to him as deputy.

In the case of *Davis vs. Johnson & Co.*, 3 Munf., 81, decided December 20, 1811, it was held: In an action on the case against a sheriff for failing to levy an execution, if the return was "that there were no effects with which the debt could be satisfied, the burden is thrown on the plaintiff of proving the falsehood of such return, and the court, if requested in a proper manner, ought to instruct the jury." But if the defendant request the court to instruct the jury "that it is incumbent on the plaintiff to prove the falsehood of the return mentioned in the declaration," and no return be distinctly stated therein, the court ought to decline giving any instruction in pursuance of such request.

In the case of *Norris vs. Crummy et als.*, 2 Rand., 323, decided February 19, 1824, it was held: If a sheriff, before a judgment is obtained, makes an arrangement with the defendant by which he (the sheriff) undertakes, for a valuable consideration, to pay the debt to the plaintiff when the judgment is rendered, and execution sued out and return "ready to render," he will be considered as having "levied the debt" within the meaning of the statute; and if he fails to pay the plaintiff, the sureties in his official bond will be liable for his default, unless the plaintiff was privy to such arrangement.

In the case of *Jacobs vs. Hill*, 2 Leigh, 393, decided November, 1830, a bond is executed to a sheriff during the first year of his shriffalty by a deputy sheriff and his sureties, the condition whereof recites that the sheriff has been commissioned sheriff of N., and that the deputy has undertaken the duties of the said office for and during the time the sheriff may continue in the office, etc. Held: That the contract here recited is the deputation of the office, not only for the first, but for the second year also of the shriffalty, and the sureties are bound for the conduct of the deputy during both years. The statute giving a summary remedy by motion for a sheriff against his deputy and his sureties does not authorize the court to allow interest.

A motion is made against a sheriff for default of his deputy,

upon which the sheriff, with the assent of the deputy, but without the knowledge of his sureties, confesses judgment. Held: The record of his judgment is admissible evidence against the deputy's sureties, upon a motion by the sheriff against the deputy and his sureties.

A deputy sheriff gives bond with eight sureties to the sheriff; one of the sureties dies. Held: A motion lies on the bond against the deputy and the surviving sureties.

In the case of *Fletcher vs. Chapman*, 2 Leigh, 560, decided March, 1831, neither the statute which gives the motion against a sheriff for a fine for failing to return an execution, nor the statute which gives a motion to a sheriff against his deputy to recover the amount of fines imposed upon the sheriff for the alleged faults of the deputy, is imperative on the court to give such judgments; but the court, in its sound discretion, may give or deny judgment in such cases.

Judgment is rendered against a sheriff for a fine for the alleged default of his deputy, the sheriff making no defence nor giving any notice to the deputy of the proceeding. This judgment is erroneous in point of law, and unjust upon the merits. Held: In such case the sheriff is not entitled to recover the amount of the fine from the deputy.

In the case of *McDaniel et als. vs. Brown's Ex'or*, 8 Leigh, 218, decided March, 1837, judgment having been rendered against a sheriff, on account of the deputy's default, for a sum of money, with damages, at the rate of 15 per centum per annum from a specified day till payment, a motion is made, under the statute, by the sheriff against the deputy and his sureties for the amount of that judgment. Held: On such motion the judgment against the deputy and sureties, like that against the sheriff, may be for damages continuing until payment.

In the case of *Scott's Administrator vs. Tankerley's Executor*, 10 Leigh, 581 (2d edition, 608), decided February, 1840, a decree is rendered against the administrator of a sheriff for the default of the sheriff's deputy in not returning an execution; and thereupon a motion is made by the administrator of the sheriff against the executor of the deputy. At the hearing of the motion, evidence is offered to show that the motion against the sheriff's administrator was not within ten years from the return day of the execution. But it appearing that the executor of the deputy had notice from the administrator of the sheriff to defend the motion against the said administrator, and promised to attend to it. Held: The sheriff's administrator is entitled to judgment against the deputy's executor.

In the case of *Skinker vs. Weaver*, 4 Grat., 160, decided October, 1847, it was held: A judgment having been recovered against a high sheriff for the default of his deputy in failing to

pay over money received on an execution, the high sheriff may, though he has discharged the judgment, maintain a motion against the deputy and his sureties for the amount of the judgment recovered against him. Upon this motion the high sheriff can only recover the amount of the judgment recovered against him; and not the aggregate amount of debts, interest, and costs paid by him, with interest thereon.

In the case of *Lee County Justices vs. Fulkerson*, 21 Grat., 182, decided June, 1871, it was held: Upon a motion against a high sheriff for the failure of his deputy to collect and account for the county levies which went into his hands, of which motion the deputy has notice, it is the duty of the deputy to defend the suit, and show, if he can, that he has accounted for them.

In such a case, judgment having been rendered against the high sheriff, he is entitled to recover a judgment for the same amount against his deputy; and the deputy cannot show upon motion against him that he has paid the levies to the parties entitled. Judgment having been recovered against the deputy, he applies for and obtains an injunction, on the grounds that he had been induced to confess the judgment, upon the agreement of the high sheriff that the account should be settled by persons named, and the execution should only issue for the amount, if any found due from the deputy, and that in fact nothing was due, and in breach of this agreement, execution had been sued out on the judgment. At the hearing the injunction is dissolved and the bill dismissed, and this decree is affirmed on appeal. The deputy is estopped from proceeding by bill in equity against the justices of the county, to recover the amount he has paid to the county creditors above what he has collected from the county levies.

The judgment recovered against the high sheriff is by a creditor of the county for money lent; the deputy sustains no such relation to the creditor as will entitle him to be substituted to the rights of the creditor against the justices of the county, to enforce the payment of so much of the debt as they have not levied for.

The deputy sheriff pays the judgments recovered against him in 1847, and he does not institute his suit against the justices of the county until 1858. The statute of limitations is a bar to the claim. *Quære*: Whether under any circumstances the deputy sheriff could maintain a suit against the justices of a county for their failure to lay the levy. And it seems he could not.

In the case of *Ramsey's Administrators vs. McCue et als.*, 21 Grat., 349, decided August, 1871, it was held: There is a judgment against a high sheriff for a fine for the failure of one of his deputies to return an execution, which the record showed had come into the hands of the deputy; and the high sheriff satisfies

the judgment. In fact, the execution had been delivered to another deputy, who formed the sheriffalty, who collected the money, and failed to pay it over, and to return the execution. The high sheriff may sue the last named deputy and the sureties on his bond, and recover the amount that he had paid.

In the case of *Crawford et als. vs. Turk (Sheriff)*, 24 Grat., 176 and 188, decided January, 1874, it was held: In an action by an execution creditor against a high sheriff for the failure of his deputy to pay over money made on the execution, the deputy is present at the trial and examined as a witness, but there is a verdict and judgment for the plaintiff. In a subsequent action by the high sheriff against the deputy and his sureties, on their bond with condition to indemnify the high sheriff from all loss and damages from the conduct of deputy in said office, the judgment against the high sheriff, in the absence of fraud and collusion, is conclusive evidence of the default of the deputy against not only the deputy, but also his sureties.

Though the declaration in the action by the high sheriff does not allege that the deputy was requested to defend the suit against the high sheriff, or had an opportunity of doing so, or had notice thereof, his presence at the trial and being active in the defence may be proved by oral testimony.

1. In the case of *Allebaugh vs. Coakley et als.*, Va. Reports, 75, 628, decided September, 1881, a deputy sheriff made default in paying over certain collections which were made, or ought to have been made, by him prior to 1869. A judgment for the amount of such collections was obtained against the sheriff in 1874, and the judgment was paid by him in 1878. In May, 1879, the sheriff moved against the deputy and his sureties for his judgment for the amount so paid with interest and damages. Held: That the claim of the plaintiff was not barred by the statute of limitations, notwithstanding the default of the deputy occurred more than ten years before his principal moved for judgment against him.

2. Under Section 46, Chapter 49, of the Code of 1873, whenever a sheriff becomes liable on account of the default of the deputy, whether a judgment has or has not been recovered against the sheriff, and although he has paid nothing to the creditor, he is entitled to recover against the deputy and his sureties the amount for which he may be so liable.

Under the 47th Chapter of the same section the sheriff is authorized to proceed against the deputy and his sureties only when there has been a recovery against him, and a payment of the amount, in whole or in part, to the creditor.

At common law the sheriff, upon paying the debt accruing from the default of his deputy, might at once bring an action against such deputies and his sureties for reimbursement. But

until such payment no right of action could accrue upon the bond of the deputy. The object of the 46th Section aforesaid was to furnish a complete indemnity to the sheriff by providing for him a remedy by anticipation, so as to enable him to recover of the deputy in time to meet the demand of the creditor.

The said 46th Section is cumulative, and was not designed to affect any of the sheriff's existing rights and remedies. He may, if he pleases, waive any proceeding under that section, await the termination of the creditor's action against him, pay the amount of the recovery, and then proceed by action on the deputy's bond, or by motion under the 47th Section of the said chapter of the Code.

If the deputy is notified of the creditor's action or motion against his principal, it is his duty to appear and defend it. It is in effect his suit and his liability, and that of his sureties is as fully established by the judgment as though it were a direct proceeding against the deputy himself. Such a judgment is a judicial ascertainment of the deputy's default or misconduct, which cannot be called in question in any subsequent proceeding against the deputy and his sureties.

In such case the action of a sheriff against the deputy is not on account of the default of the latter, but for money paid under a judgment of a court of competent jurisdiction in a suit to which the deputy was the real party. The sheriff is not bound to prove the default or misconduct of the deputy or to show when it occurred. These are wholly immaterial inquiries. All that is necessary for him to do is, to show the action against himself on account of the deputy's default, the notification of the deputy to defend, or that he had notice and did make defence, and the payment by the sheriff of the amount of the recovery.

Under the said 47th Section the sheriff's right of action accrues from the time of his paying the amount of the recovery against him; and the obvious meaning of the language of the statute, is, that after he has made such payment he may bring his action or motion thereafter against the deputy at any time within the period prescribed by the statute of limitations.

The mere fact that the remedy is given the sheriff by the 46th Section for his protection and indemnity, can impose no obligation upon him to resort to that remedy under the peril of being barred of a right existing at common law and under another section of the statute.

Whenever a former judgment is relied upon as a bar, whether by pleading or in evidence, it is competent for the plaintiff to show that it did not relate to the same property or transaction in controversy, and the question of identity thus raised is a matter of fact to be decided upon the evidence, if the record is

itself silent. And so if the cause of action is diversible, or the pleadings involve two distinct propositions, it is competent to show that only one of them was submitted to and passed upon by the jury. Where the matters involved in a second motion were not submitted to the jury on the trial of the first motion, or, if submitted, could not have been legally adjudicated by them, no question of estoppel can arise.

SECTION 911.

The reference to 21 Grat., 182, is to the case of *Lee County Justices vs. Fulkerson*, cited *supra*, Section 910.

CHAPTER XL.

CHAPTER XLI.

CHAPTER XLII.

SECTION 925.

In the case of the *Board of Supervisors of Culpeper vs. Gorrell et als.*, 20 Grat., 484, decided March, 1871, it was held: The board of supervisors of a county have authority to provide land for building a court-house, clerk's office, and a jail, either by purchase or proceeding to have it condemned in the mode prescribed in the statute.

The board of supervisors of a county have authority to sell the lands belonging to the county on which the court-house and other public buildings stood. It is for the board of supervisors to determine what land they will procure for the public building of their county; and whether their discretion is wisely or unwisely exercised in the selection, cannot be inquired into in the proceeding instituted to condemn the land.

In the act authorizing the condemnation of the land for public purposes (Code, Chapter 50), the tenant of the freehold referred to in Section 7 is the tenant in possession, appearing as the visible owner.

In the case of *Carroll County vs. Collier*, 22 Grat., 302, decided June 22, 1872, on p. 310 it was said: In assumpsit by the contractor against a county for the price contracted to be paid for building a jail, the defendant pleads specially that the building was not completed in time, and that the material used, and the work, was defective, so that it was unfit for use as a jail, and the plaintiff takes issue on this plea. Upon the trial the defendant offers a witness to sustain the defence, when the plaintiff objects to the evidence, and offers in evidence an order of the court, showing that the court had appointed commissioners to examine the buildings, and, upon their report that it had been done according to contract, had received it. Held: The

plaintiff having taken issue upon the plea, the offer could not operate as an estoppel when offered in evidence, even if it would have been such if set up by replication to the plea, or if the trial had been upon the general issue. The order was not an estoppel, it not being a judgment, and the report of the commissioners not being an award.

CHAPTER XLIII.

SECTION 946.

In the case of *Carpenter et als. vs. Sims*, 3 Leigh, 675, decided May, 1832, it was held: Though authority is given to the county courts to open only such new roads as may be wanting for a public right of way to some one or more of the places mentioned by the statute, yet the purpose for which the road is wanting need not be stated in the petition of the applicant if it appear in any other part of the record, or be proved to the court; and if this was a defect in the petition, the party opposed to the application, having appeared and prayed an *ad quod damnum*, waived the objection.

In the case of *Hollins vs. Patterson*, 6 Leigh, 457, decided November, 1835, a county court, without petition or any of the proceedings required by the statute concerning roads, makes an order, summarily, on motion, for an alteration of a public road. Held: The court, as it had no jurisdiction to make such order, may, at a subsequent term, at the instance of a party aggrieved, and on hearing of the party on whose motion the alteration was ordered, set aside the order for alteration, and re-establish the old road.

Upon a controversy in court touching the alteration of a public road, the evidence leaves it doubtful whether the old road or the new is preferable, and the judge, upon his own knowledge of facts, and declaring such to be the ground of his judgment in the order, rejects the application for the new road. Held: There was no error in the judge in founding his order on his own knowledge, though that knowledge was not stated by him on oath as a witness in the cause.

SECTION 947.

In the case of *Senter vs. Pugh*, 9 Grat., 260, decided August 24, 1852, it was held: A county court, having made an order establishing a public road, and directing it to be opened, may entertain and act upon an application to discontinue the road before it has been opened.

SECTION 948.

In the case of *Mitchell vs. Thornton et als.*, 21 Grat., 164, decided July, 1871, it was held: Upon application for a change of a road, the order directs the viewers to view the proposed alter-

ations of the road (describing it), and to return to the court such view in the manner prescribed by law. It would have been more formal, and therefore better, to follow the terms of the law in the order, but the order is substantially and sufficiently conformed to it.

Under the present law (Code, chapter 52, section 6), the viewers appointed to view the alteration proposed in a road, and report to the court, are not required to be sworn. And though the order appointing them directs them to be sworn, it need not be done.

The writ of an *ad quod damnum*, issued in such a case, is defective for not directing any inquiry as to the damage to the residue of the tract beyond the peculiar benefits which will be derived in respect to such residue from the road. And the inquest taken on such writ not making this inquiry is defective, and for this defect both the writ and the inquest will be quashed if the motion to quash is made at the proper time. In such a case the defendant, not having made any motion to quash the writ and inquest in the county court, but going to trial on the merits, waived the objection to the writ and inquest, and it is too late to move to quash them or any of the proceedings in the circuit court.

Although in such cases there is an appeal as of right, and *viva voce* the testimony is heard in the circuit court on such appeal, yet, as a general rule, a party must make any objections he may have to the proceedings in the court of original jurisdiction; and if he permits such proceedings to progress to the final trial of the case, without making the objection, he will be held to have waived them, and cannot make them for the first time in the appellate court. In such a case, on appeal by the defendant, it is his right and duty to begin, the judgment of the county court being *prima facie* right.

SECTION 950.

In the case of *White vs. Coleman*, 6 Grat., 138, decided July, 1849, it was held: A county court professing to proceed under the act of 1819 in opening a road, it is not necessary that the record of their proceedings shall show that the county court had previously dispensed with the act of 1835 in relation to roads, and retained the act of 1819. In such a case, where a party who opposes the opening the road should call for the production of the previous order of the county court dispensing with the act of 1835, and spread the whole evidence on that question on the record, and if he fails to do so, it will not be presumed in an appellate court that the county court, though professing to proceed under the act of 1819, acted without lawful authority.

SECTION 951.

In the case of *Lewis vs. Washington*, 5 Grat., 265, decided October, 1848, it was held: No limitation to the power of the county court to establish a road is to be found in the degree of accommodation which it may afford to the public at large. This is a matter which addresses itself not to the authority, but to the discretion, of the court.

The true limit to the authority of the court to establish a road is in the purpose for which the road is employed. A terminus of a proposed road must be at the court-house, or a public warehouse, landing, ferry, mill, coal mine, lead or iron works, or the seat of government, or in an already established road leading to one or more of these places; but the other terminus may be at any place, whether public or private, or of any description, and the road may accommodate many or one. The county court having established a proposed road, may authorize a particular individual to open it.

In the case of *The Commonwealth vs. Kelley*, 8 Grat., 632, decided December, 1851, by the General Court, it was held: The mere use of a road by the public for however long a time will not constitute it a public road. A mere permission to the public by the owner of land to pass over a road upon it is more to be regarded as a license, and revocable at the pleasure of the owner. A road dedicated to the public must be accepted by the county court upon its records before it can be a public road.

If a county court lays off a road before used into precincts, or appoints an overseer or surveyor for it, thereby claiming the road as a public road, and if, after notice of such claim, the owner of the soil permits the road to be passed over for a long time, the road may be well inferred to be a public road.

In the case of *Mitchell vs. Thornton et als.* 21 Grat., 164, decided June, 1871, it was held, p. 176: The writ of *ad quod damnum* issued in such a case is defective for not directing any inquiry as to damage to the residue of the tract beyond the peculiar benefits which will be derived in respect to such residue from the road; and the inquest taken on such writ and inquest will be quashed if the motion to quash is made at the proper time.

The regular mode of objecting to the inquest of the jury on account of the small amount of the damages assessed is by a motion to quash the inquest, on which motion evidence will be heard to prove if the damage assessed is insufficient. Until this is shown the inquest is conclusive on the question of damages. This objection may, however, be made on the hearing, and evidence may be then introduced by either party to show that the damages assessed are either adequate or inadequate. So, in such case upon appeal by defendant, he is entitled to introduce evidence in the circuit court to prove the inadequacy of the

damages assessed by the inquest. In assessing the damages in such a case the defendant is entitled to have the value of the land taken for the road without deduction, and such further damages as the residue of this tract will sustain beyond the regular benefits which will be derived to said residue from the road.

In the case of *Jeter vs. Board et als.*, 27 Grat., 910, decided November, 1876, upon the petition of B. and others for the establishment of a road, the county court, in February, 1871, made an order that M., road commissioner, view the route proposed for the road and report, etc. In July, T., the road commissioner of the township in which the road would lie, made a report, stating that, as to a part of the road, there was no objection, and only J. claimed damages. There was an order of court establishing that part of the road not objected to, and a summons to J., who appeared and asked for a writ of *ad quod damnum*, which was ordered and executed and returned. The case was then continued, on motion of J. At a subsequent term J. moved the court to quash the return of the commissioner, which was done, and then at the same term B. and the other petitioners applied again for the road, and there was an order for a review, and B., &c., appealed from the order quashing the report. Held: M. having been the commissioner when the order directing the report was made, and he having been succeeded in that office by T., the name of M. in the order was surplusage, and it was proper for T. to make the report.

But if the objection could have ever been a good one, it was not made at the proper time, and was waived by J.'s applying for a writ of *ad quod damnum*, moving for a continuance of the case, and contesting it on other grounds.

The provisions of the statute in relation to yards, gardens, etc., and as to a map or diagram of the route, are merely directory, and if any of them are not complied with, objection to the report on that ground must be made in due time, or it will be considered as waived. In this case it was not made in time, and was in effect waived.

There may be an appeal as of right from an interlocutory order of a county court in a controversy concerning the establishment of a road.

The judgment of the county court was final. As to much the larger part of the road, it had been established by a previous order of the court, and the order quashing the report put an end to the cause in that court. The order for another view of the route was a new proceeding.

In the case of *Taylor et als. vs. The Commonwealth*, 29 Grat., 780, decided January, 1878, the defendants in an indictment for a nuisance for obstructing a street were the joint owners of

a house and lot of two acres, fronting two hundred and sixty-four feet on Porter street in Manchester. The house was ancient, and had been held by the defendants, and those under whom they claimed, for more than sixty years, according to its present enclosures. The city council of Manchester, holding that the said enclosures were in Porter street, directed that they should be removed, and the defendants obtained an injunction to prevent it; and this suit was pending in the same court. When the indictment was called for trial, the defendant moved that the case should be continued until the injunction suit was decided. Held: The indictment was the appropriate remedy in such a case, and the continuance was properly refused.

The report of a case in a printed volume of reports of decisions of the Court of Appeals of Virginia, the original records of the case having been destroyed, held admissible in evidence to show that such a map as that mentioned in the report as Watkins' map actually existed, and was in the papers in said cause, and thereby to lay the foundation for the introduction, as further evidence in the cause, of a map purporting to be and certified as a map of Manchester by the clerk of the superior court of chancery of the Richmond district.

Copies of two maps attached to two deeds for lots in Manchester recorded in the clerk's office of Chesterfield county, one deed dated August 10, 1816, and the other January 3, 1847, held to be admissible for the purpose of ascertaining the scale and verifying the map of Manchester, certified by the clerk of the superior court of chancery for the Richmond district, which had been previously admitted as evidence, but for this purpose only.

S. Taylor, under whom the defendants claimed the house and lot, was a member of the council of Manchester in 1855. Held: That certain proceedings of the council at that time, when he was present, in regard to what is called the Percival survey of the said town, were admissible evidence for the purpose of showing said S. Taylor's connection with said survey.

William Byrd having laid off the land comprised within certain limits of the town of Manchester into lots and streets, and made a map of the town so laid off, showing the lots and streets, and having lots sold with reference to said map, all the streets designated on the said map were irrevocably dedicated to the public; and the public have the right to have the streets as designated on that map, throughout their entire length and width, thrown open forever, and kept free from any or all encroachments or obstructions.

The act of the House of Burgesses passed November, 1769, establishing the town of Manchester as laid off into lots and

streets, was an acceptance on the part of the colony of Virginia of the streets thus dedicated to the public.

The streets of the city of Manchester having been dedicated to the public by William Byrd when he laid off the town, and this dedication having been accepted by the act of the House of Burgesses in November, 1769, the streets are public highways; and any occupation of a street, or a part of the street, by the owner of an adjoining lot, however long continued, cannot give such occupant a right to hold it, or bar the right of the public to the use of the street to its full width and extent.

In the case of *Plecker vs. Rhodes*, 30 Grat., 795, decided October 3, 1878, it was held, p. 799: The General Assembly has the power to authorize an individual to build a toll-bridge over a river. When the statute confers the privilege of building the toll-bridge, that determines the question of public convenience, and the only question to be ascertained by the proceedings in the court is the damages to the owners of the land condemned.

In the case of *Linkinhoker vs. Graybill*, 80 Va., 835, decided October 1, 1885, it was held: Easements follow land into assignee's hands; division of a dominant tract does not destroy easement. Owner of any portion may claim right so far as applicable to his portion; provided provision does not impose additional charge on servient tracts. If one take conveyance of land surrounded by lands of his grantors and others, he can enforce a right of way under plea of necessity against none but his grantors.

L. bought part of the R. lands, knowing how they were situated as to public roads, and they were entitled to a right of way in one direction over G.'s lands to a public highway, and contracted with his grantors for a right of way out to the public road over other lands than G.'s. He cannot now be permitted to abandon his said rights of way and have a public road established for his own exclusive right, and to the great damage of G. over G.'s land in another direction to a public highway.

In the case of *Carpenter et als. vs. Sims*, 3 Leigh, 675, decided May, 1832, it was held: The party opposed to opening a new road appears and prays an *ad quod damnum*, which the court awards, and appoints a day for holding the inquest; the defendant shall be presumed to be present in court at the time the writ is awarded and the day of inquest appointed; so that the sheriff need not give him notice of the day of the holding the inquest.

SECTION 955.

In the case of *White vs. Coleman*, 6 Grat., 138, decided July, 1849, it was held: It is proper that the county court should

direct that the damages assessed by the jury to the owner of the land through which the road is opened, and the cost of the inquest, should be provided for and paid out of the county levy. But it is error to direct all the costs of the applicant for the road to be thus provided for and paid. His costs, except costs of the inquest, should be recovered against the contestant.

SECTION 989.

In the case of *County Court of Gloucester vs. County Court of Middlesex*, 79 Va., 15, decided March 20, 1884, a run divides Gloucester and Middlesex counties, and a swamp lies in Middlesex adjacent to the run. County Court of Middlesex notified County Court of Gloucester of the necessity of a bridge over the run and a causeway over the swamp. Latter concurred as to the necessity, and appointed commissioners to confer with the commissioners appointed by the former. The commissioners also concurred as to the necessity; but those of Gloucester thought the causeway should be made at the sole expense of Middlesex, and so reported, and their report was confirmed. The County Court of Gloucester refused to appoint commissioners to unite with those of Middlesex in letting the causeway to contract; thereupon County Court of Middlesex applied to the Circuit Court of Gloucester for a *mandamus*. County Court of Gloucester demurred. Held: The section provides only for a bridge or causeway between two counties, and not for a bridge between the counties and a causeway wholly in one county, though adjacent and necessary to the bridge. Gloucester County was under no obligation to aid in making the causeway, and in such case a *mandamus* should be denied.

In the case of *Gloucester County vs. Middlesex County*, 88 Va., 843, decided March 10, 1892, it was held: A county is not liable for any part of the expenses of maintaining a causeway wholly in an adjacent county, though necessary to approach a bridge over a stream between the two counties. (This is the sequel to the above cited case from 79 Va., p. 15.)

SECTION 990.

In the case of *The Dinwiddie Justices vs. The Chesterfield Justices*, 5 Call, 556, decided November, 1805, it was held: There must be a rule to show cause before a writ of *mandamus* can be awarded.

In the case of *Brander vs. The Chesterfield Justices*, 5 Call, 548, decided November, 1805, it was held: A *mandamus* is the proper remedy to compel the county court to erect a bridge on a public road.

Records are the regular proofs of a public road; but they will not be presumed without great length of time and a suggestion that they have been lost.

In the case of *Gloucester County vs. Middlesex County*, 88 Va., 843, decided March 10, 1892, it was held: A circuit judge has, in vacation, power to compel a county, by *mandamus*, to contribute to maintain a bridge or causeway over a place between it and an adjacent county.

CHAPTER XLIV.

SECTION 1016.

In the case of *Roche vs. Jones (Sergeant)*, 87 Va., 484, decided March 5, 1891, it was held: This section held not to a town having less than five thousand inhabitants and no corporation court, notwithstanding the provision that the word "city" shall be construed to mean a town of five thousand inhabitants and a corporation court.

SECTION 1020.

In the case of *Poulson vs. The Justice of Accomac*, 2 Leigh, 743, decided November, 1830, a justice of the peace of the county of A. leaves this State with the intent to establish his residence in another State; he remains in another State nine months, but does not establish his permanent residence there, and then he returns to, and resumes his former residence in the county of A. Held: He has no right to resume the exercise of his office of justice of the peace of A.

In the case of *The Commonwealth vs. Tate*, 3 Leigh, 802, decided July, 1831, it was held: The office of deputy sheriff is incompatible with the office of justice of the peace, though by the statute law of Virginia the office of high sheriff is not so, and the acceptance of the office of deputy sheriff vacates the office of justice.

In the case of *The Commonwealth vs. Sherrard*, 4 Leigh, 643, decided by the General Court December, 1832, it was held: By the statute of 1821-'22, Chapter 26, if a justice of the peace is appointed to and accepts an office under the government of the United States, or any other incompatible office, he thereby vacates his office of justice of the peace. His resignation of the incompatible office will not restore him to the office of justice of the peace, nor can he ever lawfully exercise this office without a new commission.

SECTION 1038.

In the case of *Jones & Co. vs. The City of Richmond*, 18 Grat., 517, decided April, 1868, it was held: On the 2d of April, 1865, in anticipation of the evacuation of the city of Richmond by the Confederate army, the council of the city ordered the destruction of all the liquor in the city, and undertook to pay for it. The council, under the charter of the city, had authority to make the order, and the pledge of the city of

Richmond is responsible for the value of the liquor destroyed under the order of the council.

In the case of *Town of Danville vs. Sutherlin*, 20 Grat., 555, decided April 18, 1871, it was held: The council of the city of Danville has authority, under its charter, to contract loans and issue certificates of debts. In 1863 the council sold the bonds of the city to be issued at public auction for Confederate money and for a bond of \$5,000, bearing 6 per cent. interest, and payable at the end of twenty years. The purchaser gave \$11,050 Confederate currency, being at the time as ten for one of gold. This is usury.

In the case of *Davenport & Morris vs. Richmond City*, 81 Va., 636, decided April 15, 1886, it was held: Storage of gunpowder in a city being dangerous, its regulation is a matter within the power of the corporate authorities, and their judgment, as expressed in an ordinance requiring the removal of powder magazines, is conclusive upon the courts.

An ordinance requiring the removal of powder magazines in a city, the sites whereof were sold by the city council to vendees for the purpose of erecting thereon such magazines, does not impair the obligation of a previous valid contract with that council, and does not take private property without compensation, but is constitutional, being a valid exercise of the police power.

In the case of *Kehrer vs. Richmond City*, 81 Va., 745, decided April 22, 1886, it was held: Such corporation, acting within the scope of its powers with reasonable care and skill in opening, grading, and improving its streets, is not liable to the adjacent owner, whose land is not actually taken, for consequential damages to his premises, unless there is a provision in its charter, or in some statute, creating the liability. It is a *damnum absque injuria*. Where the specifications of damages are rested in the declaration only upon the elevation of the grade of the street from which, as alleged, it results that plaintiff is obliged to maintain a wall to prevent earth falling from the street on his premises; that ingress and egress is made inconvenient and unsafe; that the value of his premises is diminished; that his business has been injured, and that the flow of rain-water upon his premises causes further damages, a demurrer will lie.

In the case of *Green vs. Ward et als.*, 82 Va., 324, decided September 16, 1886, by Section 14 of its charter power is conferred on the city of Alexandria "to specifically tax a lot adjoining a street on which paving is done or a curbstone put down (whether on the sidewalk or carriage-way) not exceeding two-thirds of the expense of the curbstone or paving on that half of the street opposite the lot." Held: This section does not authorize a special assessment for street improvements to be made a personal

charge against the owner, but only a charge on the lot so taxed. Nor does this section authorize a tax for the grading of the street, but only for the paving and laying down of curbstones on the same. This case is the same cited as from 10 Va. Law Journal, 683.

SECTION 1042.

In the case of *Gilkeson vs. The Frederick Justices*, 13 Grat., 577, decided November 18, 1856, it was held: The Constitution of Virginia, Article 4, Sections 22, 23, and 25, in relation to taxation and finance, relates to taxation by the General Assembly for purposes of State revenue, and does not apply to taxes, levies, etc., by counties, corporations, etc., for the local purposes of such bodies.

The General Assembly has full power to authorize counties, municipal corporations, and the like, to levy taxes within their bounds for their peculiar purposes; and the mode, subject, and extent of such taxation is not limited or regulated by the provisions of the Constitution in relation to taxation and finance.

The act of June 7, 1852 (Session Acts of 1852, p. 12), authorizing assessments in certain cases on the offices of sheriffs and sergeants, is not in violation of the Constitution.

An assessment of four hundred dollars upon the sheriff of Frederick county, laid on the 4th of October, and to be paid on the 1st of February following, is not in violation of the act of 1852. If the time of payment fixed by the court was inconsistent with the act, that would not render the assessment void; but it would be corrected as to the time of payment.

In the case of *Wades et als. vs. The City of Richmond*, 18 Grat., 583, decided April, 1868, it was held: The act (Session Acts 1866-'67, p. 635) extending the boundaries of the city of Richmond is not unconstitutional in any of its provisions.

The act operates upon the municipal relations of the inhabitants of the territory annexed to the city, but in political elections they are still to vote as part of the county of Henrico.

The General Assembly having authority to extend the boundaries of the city, the justice or expediency of it is not a question of which the courts can take jurisdiction.

That the tax-payers of the county may have the burthen of taxation increased, or the creditors may have their security lessened by the reduction of the value of the subjects of taxation, or that the inhabitants of the annexed district may be subjected to heavier taxation, does not affect the constitutionality of the act.

SECTION 1048.

The reference to 18 Grat., 20, is an error.

CHAPTER XLV.

SECTION 1060.

In the case of *Beach vs. Trudgain et als.*, 2 Grat., 219, decided July, 1845, it was held: A house in a town may be pulled down and removed, to arrest the spread of a fire, when it is inevitable that the house will take fire and be consumed if it is permitted to stand, and it is inevitable that if it takes fire and is consumed it will spread the fire to other houses.

A house in a town may not be pulled down and removed to arrest the spread of a fire if it may be prevented taking fire by the use of the means within the power of the parties pulling it down, or if the use of these means would prevent it communicating fire to other houses.

Parties pulling down a house in a town to arrest the spread of a fire are responsible for the damages thereby sustained by the owner, if the house may be prevented taking fire by the use of the means within the power of the parties pulling it down.

The declaration charges a trespass in entering the plaintiff's close and pulling down his house. The plea says the house was in imminent danger of taking fire and of communicating the fire to other houses. The replication to the plea avers that by a diligent use of the means in the power of the defendants the house might have been prevented taking fire. Held: This is no departure in pleading. It is not necessary to state in the replication the means by which the house might have been prevented taking fire.

TITLE XVII.

CHAPTER XLVI.

SECTION 1068.

In the case of *Currie's Administrators vs. The Mutual Assurance Company*, 4th H. and M., 315, decided November, 1809, it was held: A member of the Mutual Assurance Company against fire is bound by an act of assembly varying the terms of the original act of incorporation, such act being passed at the instance of a legally constituted meeting of the said society; although that individual member was not present at said meeting. When an act of incorporation provides that there shall be "three directors, out of whom a president shall be chosen," it is sufficient if the president be elected by a legally constituted meeting, and at the same time with the other directors, without having previously been appointed a director.

In the case of *Bank of Marietta vs. Pindall*, 2 Rand., 465, decided May 31, 1824, it was held: A corporation of another

State may maintain an action against its debtors in the courts of Virginia. But a bank of another State cannot enforce a primary contract made in Virginia, as by discounting notes or otherwise.

In the case of *Taylor's Administrator vs. The Bank of Alexandria*, 5 Leigh, 471, decided November, 1834, it was held: A corporation of the District of Columbia, or of any State of the nation, and even a foreign corporation, may maintain suits in the courts of Virginia.

It is not necessary for such corporation to show in its declaration how it was incorporated; it may prove that it is incorporated under the general issue.

The printed copies of the Acts of Congress, distributed to the executives of the different States to be distributed among the people, are proper evidence of the statutes therein contained without other authentication.

A statute is alleged in pleading to have been passed by Congress, to-wit: in 1811; but the statute given in evidence bears date in 1810. As the date is pleaded under a *videlicet*, the variance is immaterial.

In the case of *Rivanna Navigation Co. vs. Dawsons*, 3 Grat., 19, decided April, 1846, it was held: A bequest to a corporation of its own stock is valid.

In the case of *Callison vs. Hedrick*, 15 Grat., 244, decided July, 1859, it was held: An act authorized the construction of a road from M. to L., and the road was located and a plat thereof returned to the clerk's office, and an owner of land through which the road was to pass did not apply to the county court within the year to have her damages assessed. The road was, in fact, made but a part of the distance and stopped, and at the next session of the legislature a company was incorporated to construct the remainder of the road. This company is entitled to make their road upon the location made under the previous law, and the owner of the land, not having applied for damages within the year from the return of the plat, is precluded from recovering them.

In the case of the *City of Richmond vs. Long's Administrator*, 17 Grat., 375, decided April 18, 1867, it was held: Municipal corporations, in the exercise of their political, discretionary, and legislative authority, are not liable for the misconduct, negligence, or omissions of the agents employed by them.

Municipal corporations, in the discharge of ministerial or specified duties, assumed in consideration of the privileges conferred by their charter, are liable for the misconduct, negligence, or omission of their agents; and this, though there be the absence of special rewards or advantages.

The city of Richmond is not responsible for the loss of a

slave admitted into the city hospital, on the ground of the negligence of its agents at the hospital.

In the case of *Anderson vs. The Commonwealth*, 18 Grat., 295, decided January, 1868, it was held : Section 93 of the act of February 15, 1866, for the assessment of taxes, embraces express companies chartered by the State of Virginia, and the present stockholders are personally liable for taxes due to the Commonwealth from the company, incurred while they were stockholders.

Though the charter of an express company did not make the stockholders personally liable for the debts of the company, the said assessment act, passed subsequent to the charter, has so far modified the charter as to make them personally liable. The charter reserving to the General Assembly the power to modify or repeal the charter was effectually done by the act for the assessment of taxes, and it is not in violation of Section 16, Article 1, of the Constitution. Whether Section 93 of the said assessment act makes the stockholders of an express company liable for taxes due from the company primarily or only as guarantors?

In the case of *Davis vs. Lee Camp, No. 1, C. V.*, 18 South-eastern Reports, 839, decided January 11, 1894, under this section of the Code every corporation, when not otherwise provided, has the right to purchase, hold, and grant real estate and personal property. The defendant corporation, by special act, has power to hold land, to provide a home for invalid Confederate veterans, provided that it shall not hold, at any one time, more than 500 acres. The government was vested in a board of visitors, who purchased land. At a regular meeting of the camp the board of visitors was authorized to sell a portion of the tract purchased, if advisable. Subsequently the board of visitors sold the tract in question, which sale was ratified by both the board and the camp. Held : That the board of visitors had full power to make the sale, and the purchaser obtained a good title.

SECTION 1069.

In the case of *Yeaton vs. Bank of the Old Dominion*, 21 Grat., 593, decided January, 1872, it was held : Under the power vested in the charter of a private corporation to repeal, alter, or modify the charter, the legislature may repeal the charter, but cannot modify it without the consent of the corporation. But if the corporation refuses to consent to the modification, it must discontinue its business as a corporate body.

The bank of D., located at Alexandria, within the Federal lines, has a branch at P., within the Confederate lines. The acts of March 9, 1862, and May 16, 1862, of the Richmond government not having been assented to by the mother bank,

though acted on by the branch at P., did not operate to amend the charter of the bank at D.

In the case of *City of Richmond vs. Richmond & Danville Railroad Company*, 21 Grat., 604, decided January, 1872, the charter of the Richmond & Danville Railroad Company provides that all machines, wagons, vehicles or carriages belonging to the company, with all their works and all profits which may accrue from the same, shall be vested in the respective stockholders forever, in proportion to their respective shares; shall be deemed personal estate, and exempt from any charge of tax whatever. Held: The real estate owned and used by the company for the purposes of their business is embraced in the provision, and is personal estate. All the said property, real and personal, is exempt from taxation, both State and municipal.

The exemption from taxation of the real estate of the company in the city of Richmond is not unconstitutional as being in conflict with the charter of the city, previously granted, giving the city the power to tax real estate for the purposes stated in the city charter; the city having ample means of taxation left for the payment of her expenses and debts. A city charter is not a contract between the State and the city, securing to the city the absolute power of taxation beyond the control or modification of the legislature.

The power of exemption as well as the power of taxation is an essential element of sovereignty, and can only be surrendered or diminished in plain and explicit terms. Municipal corporations are mere auxiliaries of the government, established for the more effective administration of justice; and the power of taxation confided to them is a delegated trust.

In the case of *Silliman et als. vs. Fredericksburg, Or. & Charl. R. R. Co.*, 27 Grat., 119, decided February, 1876, by statute the charter of a railroad company is extended to enable it to complete its road, and it is authorized to issue its bonds, registered or coupon, for \$1,200,000, and sell them at less than par, and secure them by mortgage or deed of trust upon all the property and franchises of the company. And by the same act it is provided, that unless the road is completed to a certain point by a certain day, the company shall forfeit to the State their corporate franchises and rights, together with their road-track and their road-bed, and all works and materials thereon, or other property; the State to hold the same as trustee for certain parties named. The company accepted the charter, issued \$480,000 of bonds, and executed a deed of trust upon its property and franchises to secure them. The company failed to complete the road to the point fixed by the time prescribed, or, as it would seem, to expend any money in its construction, and the State proceeded to declare the charter forfeited, and to take posses-

sion of the road and other property and franchises of the company, and to turn it all over to the *cestui que trust*, who organized another company. Persons, one of whom was president of the road, and all who were the principals in the road when the said act passed, or were connected with them, claimed they were the holders of \$323,500 of the bonds issued and filed their bills to enforce the deed of trust. Held: Under the provision for the forfeiture of the charter, the State took the property and the franchises of the company free from the trust.

Upon the failure of the company to complete the road to the point fixed by the day prescribed, the forfeiture became absolute and complete; and the State having entered and elected to hold under the forfeiture, no inquisition or judicial proceedings or inquest or finding of any kind was required to consummate the forfeiture.

From the relation of these plaintiffs to the company and to each other, they must be held to have had notice of the terms of the act which authorized the execution of the deed of trust under which they claim, and as no money was expended on the road, or, as they claim, paid for interest, the strong presumption is that the company received no money for the said bonds. The plaintiffs are not, therefore, innocent purchasers for value, and holders of said bonds without notice of the provisions of the said act.

Persons dealing with corporations must take notice of what is contained in the law of their organization; and they must be presumed to be informed as to the restrictions annexed to the grant of power by the law by which the corporation is authorized to act.

In all cases, even in cases of negotiable instruments, a party contracting with an agent must inquire into his authority; and either a State or a corporation is bound only when its agents keep within the limit of their authority.

In the case of the *B. & O. R. R. Co. vs. Noel's Administrator*, 32 Grat., 394, decided November, 1879, it was held: A railroad company incorporated in another State, which leases a road lying in this State, and operates it as the owner of the same, is liable to be sued in the courts of Virginia for an injury which occurred on said road operated in this State, and said foreign company has no right to remove the suit to the United States court.

Whilst the *B. & O. R. R. Co.*, as a corporation of the State of Maryland, can have no legal existence outside of that State, yet, as the lessee of a Virginia railroad company, exercising all the powers and functions of the latter, it may be subject to all its duties and obligations. So acting, it may be treated as a Virginia corporation *quoad* the line of railroad under its con-

trol in Virginia, so far, at least, as its liability to the citizens of Virginia is concerned.

In the case of *Cowardin et als vs. Universal Life Insurance Co.*, 32 Grat., 445, decided November, 1879, it was held: An insurance company, incorporated by the laws of New York, having its principal place of business in that State, which had complied with the laws of Virginia in relation to foreign insurance companies doing business in this State, by making the deposit and appointing a citizen of Virginia an agent, by power of attorney, &c., as required by the statute of Virginia, is not a resident of this State, within the meaning of the foreign attachment laws of Virginia, and the property of said insurance company is liable to such attachment as a non-resident.

The reference to 75 Va., 57, 215 and 263, are errors, as are also the references to 76 Va., 503 and 956.

In the case of *Haden vs. Farmers and Mechanics Fire Association*, 80 Va., 683, decided September 24, 1885, it was held: Persons dealing with a corporation are effected with notice of the provisions of its charters, constitution and by-laws.

SECTION 1072.

See the case of *Hodges vs. S. & R. R. R. Co.*, 88 Va., 653, quoted Section 1093.

SECTION 1074.

In the case of *James River and Kanawha Canal Co. vs. Teays*, 3 Grat., 270, decided July, 1846, it was held: The franchise, as well as the property of the citizen, may be taken for public uses, upon making just compensation therefore.

An act directs the public engineer to lay off a road and bridges thereon, and declares that upon a return of the plats thereof to the clerk's offices of the county courts in which the road located lies, the land shall be vested in the Commonwealth for the use of the road. Held: That on a compliance with the law, the title to the land on which the road is located, and the sites of the bridges are fixed, is vested in the Commonwealth, and that the Commonwealth or her grantee may maintain ejectment therefor against the former owner.

In the case of the *Board of Supervisors of Culpeper vs. Gorrell et als.*, 20 Grat., 484, decided April, 1871, it was held: In the act authorizing the condemnation of land for public uses, Code, chapter 56, the tenant of the freehold referred to in Section 7 is the tenant in possession appearing as the visible owner. The board of supervisors, proceeding to have certain land condemned for the purpose of building thereon a court-house, clerk's office and jail, and the persons whose lands are proposed to be condemned not objecting to the report of the commissioner, other citizens of the county have no right to make themselves parties

in the proceeding and object to the confirmation of the report. In such case the circuit court of this county has no jurisdiction on the application of these citizens to award a writ of error and *supersedeas* to the judgment of the county court refusing to admit such citizens as parties, and confirming the report of the commissioner.

In the case of the *Va. & Tenn. R. R. Co. vs. Campbell's Ex'or*, 22 Grat., 437, decided July 13, 1872, it was held: Under the statute, the case of a railroad company asking the county court to ascertain the compensation to a land owner for the land proposed to be taken for its purposes, which has remained in the court for more than one year without being determined, may be removed to the circuit court. In such a case, if the circuit court sets aside the report of the commissioners, that court should not send the case back to the county court, but should take jurisdiction of the case, and proceed in it with the same powers that are vested in the county court by the statute.

A land-owner, or his executor, whose land has been taken by a railroad company for its purposes, cannot apply to the court for the appointment of commissioners to ascertain the compensation of the land-owner for the land so taken. After the company has made a motion for commissioners to ascertain the compensation due to a land-owner, and the commissioners have reported, and the court has allowed the money to be received by the clerk, and directed him to pay it to the land-owner, or hold it until the further order of the court, the executor of the land-owner applies to the same court for commissioners to ascertain such compensation, and this case is removed to the circuit court. The removal of this case does not bring up the first, and neither the circuit court nor this court can inquire whether there is error in the action of the court in the first case. The record in the first case may be used by the company in their defence upon the second motion.

In the case of *Roanoke City vs. Berkowitz*, 80 Va., 616, decided June 27, 1885, it was held: Report of commissioners to condemn land for municipal purposes will not be quashed on the ground that a commissioner, appointed at the instance of the municipality, was interested, where the record does not show that the municipality was ignorant that he was interested when so appointed. Ignorance of the attorney making the motion for the appointment is not evidence of the municipality's ignorance that the commissioner was interested. But if the commissioner was interested and disqualified, and municipality was ignorant, report will not be quashed, if record shows that the damages assessed are not excessive. Corporations condemning land under Code of 1873, ch. 56, sec. 11, must take and pay for the fee-simple, and not merely an easement, except it be a turnpike

company. This statute requiring the condemnation of the fee-simple is not repugnant to the constitution ; and if it was, municipality cannot be heard to deny the validity of the statute under which it has chosen to proceed. The ordinance to which land-owner refused assent, allowing him to build across the drain to be cut through land proposed to be condemned for the purpose, cannot be considered in assessing the damages.

In the case of *Foster vs. City of Manchester*, 89 Va., 92, decided June 16, 1892, it was held : Defences allowed by the Code, Sections 1074 and 1075, must be made, if made at all, in the condemnation proceedings.

SECTION 1075.

See case of *Foster vs. City of Manchester*, 89 Va., '92, cited *supra*, Section 1074.

SECTION 1076.

In the case of *Pitzer vs. Williams*, 2 Rob., 241, decided August, 1843, a person owning real estate died intestate, leaving a widow and children, and dower not being assigned to the widow, she continued in the mansion house and the plantation thereto belonging. Under the statute, notice was given the widow as the proprietor of the land, by a person desiring to build a machine useful to the public, and to abut his dam against the said land, that application would be made for a writ of *ad quod damnum*, and the writ was accordingly awarded, and an inquisition returned. After which one of the heirs, who resided on the plantation with his mother, being made a defendant, on his motion, moved the court to dismiss the case on the ground that notice of the application ought to have been given to him as one of the proprietors, but his motion was overruled. He then offered to introduce evidence to prove that the applicant did not own the land on which he proposed to erect his machine, but it being proved that the applicant was in possession of the land, claiming title to it, and had built a house thereon, the court refused to admit the evidence so offered to be introduced. Held: There is no error in these proceedings. For it was sufficient that the person making the application was in the actual possession and occupation of the land on which the machine was to be built, and that the person to whom notice was to be given was the tenant in possession, and appeared as the visible owner.

In the case of the *Board of Supervisors of Culpeper vs. Gorrrell et als.*, 20 Grat., 484, decided April 6, 1871, it was held: The board of supervisors proceeding to have certain lands condemned for the purpose of building thereon a court-house, a clerk's office, and a jail, and the persons whose lands are proposed to be condemned not objecting to the report of the com-

missioners, other citizens of the county have no right to make themselves parties in the proceeding and object to the confirmation of the report.

In the case of *Hope vs. Norfolk and Western R. R. Co.*, 79 Va., 283, decided August 7, 1884, it was held: Statute prescribes how such company may have land condemned for their purposes, but if they proceed by negotiations in *pais* with the life tenant only, they can acquire only such life tenant's rights.

SECTION 1078.

In the case of *James River and Kanawha Co. vs. Turner*, 9 Leigh, 313, decided April, 1838. The charter of the James River and Kanawha Company provides that the assessors for ascertaining damages to proprietors of lands shall take into consideration the quality and quantity of land to be condemned, the additional fencing that will be required thereby, and all other inconveniences that will result to the proprietor from the condemnation thereof, "and shall combine therewith a just regard to the advantages which the owner of the land will derive from for the use of which the land is condemned." Held: That the advantages to be derived to the owner of the land condemned for the companies use from the improvement to which the charter requires the assessors to have regard, are such advantages as particularly and exclusively affect the particular tract or parcel of land whereof a portion is condemned, not advantages of a general character which may be derived to the owner in common with the country at large from the improvement; and it seems that had the charter provided that advantages of a general character, which the owner of the land condemned may derive from the improvement in common with the country at large, should be set off against the actual value of land condemned and the actual advantages sustained by the owner, such a provision would have been unconstitutional.

(N. B.—This last paragraph is entirely an *obiter dictum*).

In the case of *Winchester & Pot. R. R. Co. vs. Washington*, 1 Rob., 67, 2d ed., 72. Under the act passed April 8, 1831, to incorporate the Winchester and Potomac Railroad Company, the freeholders, appointed by an order of the county court for the purpose of ascertaining the damages which would be sustained by the proprietors of certain lands through which the railroad was to be opened, certified, in the form prescribed by the act, that they assessed the damages at the sum of \$972, and then subjoined the following words: "We further declare that if the railroad company shall refuse to pass the water from the south side of the road to the north side by a culvert west of the lane, the thoroughfare of the farm, and return the same by a culvert on the east side of the lane, she (the proprietor) shall

receive the additional sum of \$2,000." The report, upon being returned to the county court, was ordered to be recorded. An action of debt was afterwards brought to recover \$2,000, the declaration averring that the company, although requested so to do, had refused to pass the water as aforesaid. Upon demurrer to the declaration—Held: The action cannot be maintained. Per Stanard, J., the charter of a company does not warrant a contingent assessment of damages by the commissioners, and does not authorize the county court to render a conditional judgment therefor. The court is authorized to render such judgment only as would authorize the clerk to issue an execution thereon.

In the case of *Callison vs. Hedrick*, 15 Grat., 244, decided July, 1859, it was held: An act authorized the construction of a road from M. to L., and the road was located and a plat thereof returned to the clerk's office; and an owner of land through which the road was to pass did not apply to the county court within the year to have her damages assessed. The road was, in fact, made but a part of the distance and stopped, and at the next session of the legislature a company was incorporated to construct the remainder of the road. This company is entitled to make their road upon the location made under the previous law; and the owner of the land not having applied for damages within the year from the return of the plat, is precluded from recovering them.

In the case of *Wash., Cin. & St. Louis R. R. Co. vs. Switzer*, 26 Grat., 661, decided October 7, 1875, it was held: Where commissioners are appointed by a county or corporation court for the purpose of ascertaining what will be a just compensation to the tenant of the freehold for land taken for a work of public improvement, it is the duty of such commissioners to hear all the legal and relevant testimony offered by either party bearing upon the question of such compensation. The refusal of the commissioners to hear such testimony, when offered in time, is of itself sufficient to vacate their report. When such report is returned to the court, either party may show cause against its confirmation, upon the ground of excessive or inadequate damages, improper conduct of the commissioners in refusing or failing to hear legal and proper evidence, or by proof of any other fact tending to show that said report ought not to be confirmed. Under the statute all matters affecting the validity of the report and the action of the commissioners are open for investigation without notice.

On the motion of the company, a rule is made on the tenant of the freehold to show cause why the report and assessment of the commissioners made in such a case should not be set aside, upon the ground that said assessment is excessive, and why

other commissioners should not make said assessment. Upon the hearing the company will not be confined to the specific objection therein suggested to the confirmation of the report, but the company may impeach it by showing that the commissioners had improperly refused or failed to hear legal testimony offered by the company upon the question of compensation and damages. If the tenant may be surprised by the offer of testimony on matters not referred to in the rule, it is competent for the court to continue the hearing to a future day or term.

SECTION 1079.

In the case of *Bolling vs. The Mayor, etc. of Petersburg*, 3 Rand., 563, decided December, 1825, it was held, p. 574: A public highway only vests in the Commonwealth a right of passage, but the freehold and the profits, such as trees upon it and mines under it, belong to the owner of the soil, who has a right to all remedies for the freehold, subject, however, to the easement.

In the case of *S. V. R. R. Co vs. Robinson*, 82 Va., 542, decided November 11, 1886, it was held: Demurrer lies to bill to set aside order made under this section confirming report of commissioners assessing damages to land owners for part taken for company's purposes, and to residue of tract, beyond peculiar advantages, although bill avers that company falsely promised to establish a depot on said part, and that by such promise commissioners were induced to assess less damages, and land owners not to except to their report, the land owners remedy being at law for damages for breach of promise.

In the case of *Robinson vs. Crenshaw*, 84 Va., 348, decided January 19, 1888, it was held: Where corporation has had land condemned for its purposes, and doubt exists as to the title, it can acquire clear title only by paying the damages into court according to the statutes, so that the parties in interest may be convened before disposal thereof.

SECTION 1080.

In the case of *Washington, Cincinnati and St. Louis Railroad Co. vs. Switzer*, 26 Grat., 661, decided October 7, 1875, it was held: When commissioners are appointed by a county or corporation court for the purpose of ascertaining what will be a just compensation to the tenant of the freehold for land taken for works of internal improvement, it is the duty of such commissioners to hear all the legal and relevant testimony offered by either party bearing upon the question of such compensation.

The refusal of the commissioners to hear such testimony, when offered in due time, is of itself sufficient to vacate their report.

SECTION 1081.

In the case of *The Tuckahoe Canal Company vs. The Tuckahoe and James River Railroad Company*, 11 Leigh, 42, decided March, 1840, it was held: A navigable canal being constructed by a chartered company along the valley of a stream, a company is afterwards chartered to construct a railroad along the same valley. If the *terminii* given for the railroad be such that it may cross the canal, the railroad company is authorized to lay out its road so as to cross the canal; but in such case, the railroad must be so constructed as nowise to obstruct or impair the navigation, the railroad company being liable to the canal company for all damages which may result therefrom.

Under the statute a railroad company may have condemned for its use lands which a chartered canal company has acquired for its canal as well as lands of individuals; and if the canal company has only acquired a right of way in the lands occupied by the canal, the railroad company may have the lands condemned for its use, as the lands of the original proprietors, subject to such right of way.

In the case of the *James River and Kanawha Company vs. Anderson et als.*, 12 Leigh, 278, decided April, 1841, upon the construction of the charter of the James River and Kanawha Company passed March, 1832. Held:

1. That the company has a right to enter upon and occupy the public streets of a town, as well and in like manner as the lands of individuals, when it shall deem the same necessary for its canal or other works, liable to make compensation in damages to any party injured.

2. That the company may lawfully enter and occupy such streets for its work and proceed with its work before instituting proceedings to ascertain the damage that may result to others.

3. That it is not competent to a court of chancery to award an injunction to stay the proceedings of the company in the prosecution of its works of any kind, unless it be manifest, both that it is transcending the authority given by the charter, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. The two circumstances must concur to warrant the court in awarding such process.

In the case of *Southside R. R. Co. vs. Daniel*, 20 Grat., 344, decided March, 1871, it was held: In an action on the case for damages to plaintiff's land, there is the plea of not guilty, on which issue is joined, and there is a special plea to which there is a special replication concluding to the country. To this there is a rejoinder, and the record does not say that the issue was joined upon it; but the parties go to trial, and the subjects of the special plea and replication are contested before the jury

which renders a verdict for the plaintiff. No objection having been taken to the want of joinder of issue in the court below, it seems that the objection cannot be taken in the appellate court.

In such case, if the subject of the replication is such that the defendant cannot rejoin special matter without a departure from the defence set up in this plea, but must take issue upon the replication, the non-joinder of issue will be cured by the statute.

Two actions on the case are brought in the same court at the same time, by the same plaintiff against the same defendant. The same act of defendant is charged as the cause of the damage in each case; but the damage in one case is charged to be the plaintiff's land, and in the other to the crops grown and growing upon it. The case as to the crops is the first tried, and the evidence is as to the crops, and there is a verdict and judgment for the defendant. This verdict and judgment cannot be set up as an estoppel to the plaintiff in the other action for damages to the land.

A railroad company has the land of R. condemned for the its road, and the commissioners assess the damages, and their report is confirmed, and the company pay the amount of the damages assessed to R. R. sells the land to D. D. may maintain an action against the company for injury to his land done since the purchase, which would not be foreseen and estimated for by the commissioners.

In such cases the assessment of damages is only a bar to an action for such injuries as could have properly been included in such assessment. The commissioners are bound to presume the company will construct its work in a proper manner, and they have no right to award damages upon the supposition that the company will negligently and improperly perform its work. A failure to do so by the company will therefore impose a liability to any one who may sustain any loss or injury by reason of such negligence.

In the case of the *Board of Supervisors vs. Gorrell et als.*, 20 Grat., 484, decided April 6, 1871, it was held: The board of supervisors of a county have authority to provide land for building a court-house, a clerk's office, and a jail, either by purchase or by proceeding to have it condemned in the mode prescribed in the statute.

The board of supervisors of a county have authority to sell the lands belonging to the county on which the court-house and other public buildings stood.

It is for the board of supervisors to determine what land they will procure for the public buildings of their county, and whether their discretion is wisely or unwisely exercised in the selection cannot be inquired into in the proceeding instituted to condemn the land.

In the act authorizing the condemnation of land for the public purposes, the tenant of the freehold referred to is the tenant in possession appearing as the visible owner.

The board of supervisors proceeding to have certain land condemned for the purpose of building thereon a court-house, a clerk's office, and a jail, and a person whose land is proposed to be condemned not objecting to the report of the commissioners, other citizens of the county have no right to make themselves parties in the proceeding and object to the confirmation of the report.

In the case of *Manchester Cotton Mills vs. Town of Manchester*, 25 Grat., 825, decided January, 1875, the authorities of the town of M. gave notice to the corporation of C. that they would remove three brick tenements held by C., which, the authorities of the town claim, encroach upon the street of the town of Manchester.

The corporation of C., and those under whom they claim, have been in possession of the house for more than twenty years, and have had title to the land much longer. The authorities claim that the land was dedicated as a street by a previous owner, under whom C. claims, and this C. controverts. Held: Equity will enjoin the authorities of the town of M. from removing the houses until the rights of the parties are ascertained. The evidence in the cause leaving the rights of the parties in doubt, equity cannot settle them, involving, as they do, the title and boundaries of land, but will enjoin the removal of the houses until the question of right can be settled by a trial at law. Such relief equity will more readily afford against corporations than against private individuals. A provision in the charter of M. prohibits the interference with the authorities by injunction, unless they are transcending their powers. If the lot in controversy be the property of C., the authorities of M. should not transcend their powers in removing the houses, and the injunction is not forbidden by the charter.

In the case of *N. & W. R. R. Co. et als. vs. Smoot*, 81 Va., 495, decided March 11, 1886, it was held: Conceding that the plaintiffs can establish that they are entitled to compensation; that the injury they complain of is such that it cannot be adequately compensated in damages, and that it is, therefore, proper for a court of equity to grant the relief to which they may appear to be entitled; yet it is not proper for the court, pending the inquiry into their right to compensation, and before its assessment by law, to interfere, by injunction or otherwise, to stay the proceedings of the defendant railroad companies in laying or using the tracks on the land in respect to which the injury is alleged to be done or threatened, unless it be "manifest" that said company is transcending its authority, and that

the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

SECTION 1093.

In the case of *The James River & Kanawha Co. vs. Anderson et als.*, 12 Leigh, 278, decided April, 1841, upon the construction of the charter of The James River and Kanawha Company, passed March, 1832, held: 1, That the company has the right to enter upon and occupy the public streets of a town as well and in like manner as the lands of individuals, when it shall deem the same necessary for its canal or other works, liable to make compensation in damages to any party injured. 2, That the company may lawfully enter and occupy such streets for its work, and proceed with its work before instituting proceedings to ascertain the damage that may result to others. 3, That it is not competent for a court of chancery to award an injunction to stay the proceedings of the company in the prosecution of its work of any kind, unless it be manifest both that it is transcending the authority given by the charter, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. The two circumstances must concur to warrant the court in awarding such process. [Since altered by the statute.]

In the case of *Hodges vs. S. & R. R. Co.*, 88 Va., 653, decided January 28, 1892, it was held: Owners of lots abutting on streets own the fee in the land to the middle of the street, subject to the rights of the public to travel over it. Locating a railroad track on the street is an additional burden, which cannot be imposed without compensation to the owner.

The remedy for illegal entry by a corporation on land is by an injunction; and plaintiff is not required to show a case of destructive trespass or irreparable damage. The slightest excess of power is sufficient; whether the statute, Section 1072, forbidding the invasion of the owner's dwelling-house or the space of sixty feet about it was by implication repealed by this section or not; yet as in this case, the railroad company did not before invading the street, the fee whereof was in the complainant, and occupying it within sixty feet of his dwelling-house, compensate him therefore as required by said section the injunction should be perpetuated.

SECTION 1094.

In the case of *The Tuckahoe Canal Co., vs. The Tuckahoe and James River Railroad Co.*, 11 Leigh, 42, decided March, 1840, it was held: A navigable canal being constructed by a chartered company along the valley of a stream, a company is afterwards chartered to construct a railroad along the same valley; if the *terminii* given for the railroad be such that it may cross the

canal, the railroad company is authorized to lay out its road so as to cross the canal; but in such case, the railroad must be constructed as nowise to impair or obstruct the navigation, the railroad company being liable to the canal company for all damages which may result therefrom.

SECTION 1103.

In the case of *Rider vs. The Nelson and Albemarle Union Factory*, 7 Leigh, 154, decided February, 1836, bill against a public company incorporated for a limited time, dismissed by the court of chancery, and plaintiff appeals from the decree; pending the appeal, the charter of the company expires by efflux of time. Held: The appeal must abate.

In the case of *The Bank of Alexandria vs. Patton et als.*, 1 Rob., 499, 2nd edition, 528, a bill in equity by a corporation being dismissed at the hearing, and an appeal taken from the decree, pending the appeal the charter of the corporation expires. A motion is made to the appellate court, upon the authority of *Rider vs. The Union Factory*, 7 Leigh, 154, that the appeal be entered as abated for that cause.

In opposition to the motion it is suggested, that during the existence of the corporation it made an assignment of its rights in the subject in controversy. Held: The appellate court may inquire whether the fact of assignment exists, as a guide for its action on the motion to abate, and upon being satisfied of the fact, may permit the case to proceed, without noticing on the record the dissolution of the corporation.

In the case of *May vs. The State Bank of North Carolina*, 2 Rob., 56, decided May, 1843, it was held: If a corporation become extinct by the expiration of the term of its corporate existence, pending a suit at law for a corporate demand, and that fact be brought regularly before the court in which the suit is pending, the action must terminate. It is equally clear that if after judgment in favor of a corporation the corporation becomes extinct by the expiration of the term of existence granted by the charter, no execution on such judgment can regularly be sued out in the name of the corporation, and if one be sued out, it is liable to be quashed on showing the fact of the extinction of the corporation before the emanation of the execution. On the other hand, if an original judgment be rendered in favor of a corporation, it could not be regularly rendered unless the existence of the corporation continued. The necessary intendment from the rendition of it is, that the continued existence of the corporation was either proved or admitted, and if execution be sued out on the judgment, the defendant being by this intendment estopped to deny the existence at the time of the judgment, would not, on motion to quash the execution, be admitted

to controvert this intendment, and proof on such motion of the extinction of the corporation before judgment would be inadmissible or unavailing.

In the case of *Crews vs. Farmers Bank of Virginia, for &c.*, 31 Grat., 348, decided January 30, 1879, it was held, p. 361: A bank having in pursuance of the act of February 12, 1867, conveyed all its property to trustees for the purpose of closing up its affairs, a suit may be brought in the name of the bank for the benefit of the trustees upon a note discounted by the bank prior to the execution of this deed.

In the case of *Pixley et als. vs. Roanoke Navigation Co. et als.*, Va. Reports, 75, 320, decided March 17, 1881, it was held: A cause of forfeiture of its charter by a corporation cannot be taken advantage of collaterally or incidentally, but can be enforced only in a court of law by a direct proceeding against the corporation.

In the case of *Hamilton vs. Glenn*, 85 Va., 901, decided March 14, 1889, it was held: Under this section a corporation, though desolved or expired, may be sued to enforce its liabilities, and its stockholders are not necessary parties.

Assignor of shares of stock is still liable for unpaid subscriptions, whether instalments accrue before or after assignment.

TITLE XVIII.

CHAPTER XLVII.

SECTION 1106.

In the case of *Norwick Lock Co. vs. Hockaday*, 89 Va., 557, decided January 26, 1893, it was held: Defendant signed subscription to stock in a corporation, circulated with a prospectus, stating that the corporation was to be located at R.; that the maximum capital was to be \$400,000, and that its purpose was limited to "manufacturing locks, bolts, all house hardware, and other articles of a similar character." Later a second prospectus, under which the corporation was afterwards organized, was circulated for signatures, by which it was stated that the corporation was to be located outside of R.; that the maximum capital was to be \$500,000, and the purpose to embrace a large variety of industries. Defendant refused to sign this second prospectus. Held: The defendant was not liable to plaintiff for stock he subscribed to under first prospectus. A material change in the purposes of a corporation as set forth in the prospectus will release a subscriber thereto from liability, if made without his consent.

SECTION 1107.

In the case of *Lewis's Adm'r vs. Glenn (Trustee)*, 84 Va., 947, decided June 5, 1888, it was held: Under this section the statute of limitations does not begin to run against an action for unpaid assessments until the time such assessment is made.

SECTION 1114.

In the case of *Burr's Ex'or vs. McDonald*, 3 Grat., 215, decided July, 1846, it was held: Although by the charter of such a company a general meeting is to be held at least once annually, at such time and place as the by-laws prescribe, the company may hold other general meetings as often as the interests of the company render it necessary; and at such general meetings the stockholders may remove and appoint officers if the welfare of the company requires it; and *a fortiori* may this be done where the officer is elected for a year, and till a successor is appointed, and the year is expired. The reference to 19 Grat., 592, is an error.

SECTION 1120.

In the case of *Allison vs. The Farmers Bank of Virginia*, 6 Rand., 204, decided March, 1828, it was held: In an action of debt upon a bond conditioned for the faithful discharge of the duties of an office, the declaration need not set forth the particular persons from whom the money was received, nor the sums received from each, nor the time when the breaches were committed, if it appear that they occurred during the continuance of the defendant in his office, nor is it necessary to state the damages occasioned by the breaches.

The sureties of an accountant of a bank are not liable for monies taken by him from the teller's drawer, without his knowledge or consent, it appearing that the accountant is not entrusted with, or put in possession of any monies of the bank as accountant.

In an action for the penalty of a bond, it is not necessary to state that, in consequence of the refusal of the defendant to pay, the plaintiff sustained damage.

In the case of *Burr's executor vs. McDonald*, 3 Grat., 215, decided July, 1846, it was held: Though the election of an officer of such company has been irregular, such election constitutes him the officer *de facto*, and his acts done under the authority of the company, and *colore officii*, would be binding on the company, and could not be impeached by strangers on the ground of want of authority.

SECTION 1122.

In the case of *Booker vs. Young*, 12 Grat., 303, decided April, 1855. A board of directors of a bank consists of seven, and

they are all present. Upon a vote for president but five vote, three of whom vote for Y. and two for B. who had been president the year previous. Under the belief that it required a majority of the whole number to elect, they postpone the election, and B. continues to act as president. At a subsequent meeting they proceed again to the election, when Y. receives the three votes he had received at the former meeting, and votes for himself, making the majority of the whole number; B. receives the two votes he had received before, and he votes for S. Whereupon Y. is declared to be duly elected, and he proceeds to act as president. Upon an application by B. for a *mandamus* to restore him to the office. Held by two of the judges: That Y. was duly elected on the first day, and whether or not he accepted the office, B. has no right to it after that time. One judge held that Y., not then having insisted on it, it was no election; but that he might vote for himself, and therefore he was duly elected on the last day, and another judge held that the votes of both Y. and B. were to be treated as nullities, and therefore, that Y. received the majority of the legal votes cast on the last day, and was duly elected.

In the case of *Addison et als. vs. Lewis et als., Blythe et als vs. Lewis et als.*, 75 Va., 701, decided September, 1881, it was held: When the lender of money to the corporation is a director charged along with others with the control and management of the corporation, representing in this regard the aggregated interests of all the stockholders, his obligation, when he becomes a party to a contract with the company, to candor and fair dealings, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him; but the general doctrine with regard to this class of contracts is not that they were absolutely void, but that they are avoidable at the election of the party whose interest has been so represented by the party claiming under it.

In the case of *Planters Bank of Farmville vs. Whittle et als.*, 78 Va., 737, decided April 24, 1884, it was held: Directors are bound to discharge their duties prudently, diligently, and faithfully, and apply the assets, in case of insolvency, for the benefit of creditors in preference to stockholders and other persons.

But they are not technically trustees, nor bound to apply the assets ratably among the general creditors. They may not only make preferences between creditors, but such preferences may be made in their own favor if they be creditors. But in such cases they must act with the utmost good faith.

SECTION 1125.

In the case of *The Orange and Alexandria Railroad Company*

vs. *Fulvey*, 17 Grat., 366, decided April 17, 1867, it was held: A court of law cannot render a judgment that defendant shall deliver to plaintiff so many shares of stock. Upon a contract to deliver stock in payment of a debt or otherwise, a court can only award damages for the failure to deliver it.

Upon a contract to deliver stock, the damages for the failure to deliver it is the value of the stock at the time it ought to be delivered. Judgment for a certain sum of money; but it may be discharged by the transfer and delivery, within six months, of certain stock at par. The stock not having been delivered in time, on motion for execution on the judgment, the court cannot presume that the sum stated in the judgment is the amount the plaintiff was entitled to recover, and rejecting the latter part of the judgment as surplusage, award execution thereon for the money.

SECTION 1127.

In the case of *Petersburg Savings and Insurance Co. vs. Lumsden*, 75 Va., 327, decided February 17, 1881, it was held: By the Statute, Code of 1860, Chapter 57, Sections 21, 22, 24, a lien is created upon the stock of each stockholder in a joint stock company for the balance due upon his shares of stock; and if assigned, which may be done with the consent of the company, the lien is not then discharged, but the stock in the hands of the assignee for balance, which was owing by the assignor upon the shares when the assignment was made, or which may thereafter become due, may be sold by the company for such arrearages, just as it might have been sold if it had not been assigned.

The charter of a stock company provides for the payment of five dollars per share when the subscription is made, and the residue thereafter as may be required by the president and directors, and the corporation is made subject to the provisions of the Code as far as they are applicable, and not inconsistent with the charter. And by a by-law of the company, each stockholder is required to give his note satisfactorily endorsed for his unpaid stock. A stockholder giving his note, with an endorser for his unpaid stock, the unpaid stock is still a lien on the stock, and the endorser is entitled to have the stock applied to his relief.

The statute gives no lien to the company on the stock of a stockholder for any other debts due from him than that which is due for unpaid stock, and though a by-law of the company provides that the interest of any stockholder shall be liable for the payment of all debts which may be due from him to the company, and if there is more than one debt, the board of directors may prescribe which one or more of said debts shall be paid out of the stock of the debtor; this by-law can only apply to the interest of the debtor stockholder in stock after the lien

of the stock debt is satisfied. And the endorser on the stock note is entitled to have the stock applied to pay that debt in preference to the other debts due from his principal to the company.

In the case of *Lewis' administrator vs. Glenn (Trustee)*, 84 Va., 947, decided June 5, 1888. The National Express Company executed in Virginia a trust deed of all its estate, including money payable on assessments to trustees, for the benefit of its creditors, requiring payment of all its debts, but reserving enjoyment for a specified period. A decree entered in a creditor's suit against the company, to which, however, the stockholders were not parties, made an assessment, or call, for thirty per cent. on all subscriptions, substituting the plaintiff for the original trustees, and authorized him to collect such assessments by suit or otherwise. Held:

1. The trust deed must be construed by the laws of Virginia, and is valid.

2. It passed title to all unpaid subscriptions, with power to collect the same to the extent of call.

3. The decree binds not only the company, but the stockholders also, whom the plaintiff, as such trustee and assignee, may under and also independently of this statute, sue in his own name for the amount of the call on their subscriptions.

In the case of *Vanderwerken vs. Glenn (Trustee)*, 85 Va., 9, decided June 4, 1888, it was held: In suit wherein a corporation is a party, the decree binds the stockholders, though they be not personally parties; and assessments made under decree therein, payable to and collectible by the trustee of the corporation, may be sued for by him in his own name, and the statute of limitations begins to run against those assessments from the date of the decree.

In the case of *Hamilton vs. Glenn*, 85 Va., 901, decided March 14, 1889, it was held: Where trust deed executed by corporation provided that unpaid subscriptions shall be payable to trustee, the right to collect same passes, and creditors may enforce them by suit, or, in any event, the corporation's right thereto passes to creditors under this section.

In the case of *Bosher et als. vs. R. & H. Land Co. et als.*, 89 Va., 455, decided December 8, 1892, it was held: Persons who have been induced by the same fraudulent misrepresentations to subscribe to the stock of a corporation, have a common interest, and may join in a suit for the benefit of themselves and others similarly deceived to cancel their subscriptions.

SECTION 1128.

For the reference to 75 Va., 327, see case of *Petersburg Savings and Insurance Co. vs. Lumsden*, *supra*, Section 1127.

SECTION 1130.

In the case of *Petersburg Savings and Insurance Co. vs. Lumsden*, 75 Va. Reports, 327, decided February 7, 1881, it was held: By the statute, Code of 1860, Chapter 57, Sections 21, 22, and 24, a lien is created upon the stock of each stockholder in a joint stock company for the balance due upon his shares of stock, and if assigned, which may be done with the consent of the company, the lien is not discharged; but the stock in the hands of the assignee for the balance, which was owing by the assignor upon the shares when the assignment was made, or which thereafter became due, may be sold by the company for such arrearages, just as it might have been sold if it had not been assigned.

In the case of the *Shenandoah Valley R. R. Co. vs. J. T. Griffith et als.*; *The Pennsylvania R. R. Co. vs. Same*; *John Donaghue & Bro. et als. vs. Central Improvement Co. et als.*; *Adams, Hamner & Co. et als. vs. The Shenandoah Valley R. R. Co. et als.*, 76 Va., 913—

1. Railroads—Unpaid Subscriptions—Liens on Stock—Construction of Statute.—Code of 1873, Chapter 57, gives a railroad company no lien on paid-up shares to secure payment of unpaid subscriptions for other shares. The sale of such paid-up shares for such purpose by the company is unauthorized by the statute, and is a nullity.

2. *Idem.*—Stock Attachment.—The shares of a stockholder in a railroad company are liable to attachment, and by virtue thereof, the attaching creditor acquires a claim superior to that of a subsequent *bona fide* purchaser of those shares for value without notice of the attachment.

SECTION 1138.

In the case of *Slaymaker's Adm'r vs. Jaffray & Co.*, 82 Va., 346, decided September 16, 1886, it was held: If the board of directors of a corporation, when it is insolvent, declare a dividend of net profits, the directors concurring in the act in their individual capacity, are jointly and severally liable to the corporation's creditors for the amount of the capital stock so divided.

SECTION 1145.

In the case of *Combined Saw and Planer Co. vs. Flournoy (Secretary)*, 88 Va., 1029, decided April 14, 1892. Act February 10, 1890, Chapter 54, Section 1, provides that every charter thereafter granted under this section, and every act of incorporation thereafter passed, shall be inoperative until the payment of a certain fee. Act February 28, 1890, Chapter 124, Section 1, amends the former act and omits the words "granted

under Code, Section 1145." Held: There is no law requiring the payment of the fee in question.

SECTION 1149.

In the case of *Merchants Bank of Baltimore et als. vs. Goddin and Howison (Trustees) et als.*, 76 Va., 503.

Manufacturing Corporation—Trust Deeds to Secure Loans—Case at Bar.—In 1867 the U. M. Co. obtained an act authorizing it to borrow not exceeding \$30,000, without regard to the rate per cent. prescribed by law, or to Va. Code 1860, ch. 57, sec. 34. Then the company executed coupon bonds of \$500 each, sixty in number, and, to secure them, executed a trust deed, signed by the president, and having the corporate seal affixed by the secretary and duly acknowledged, conveying to G. and H., trustees, real estate and machinery. It was conditioned for the sale of the trust property on default in the payment of any of the bonds which were executed and issued by the U. M. Co. Of these sixty bonds thirty-one were purchased by the S. B. of T., and nine by A. P. H.; the other seventy were never issued. In 1869 the U. M. Co., desiring to sell the machinery, induced the S. B. of T. and A. P. H. to release it on assurance that the said twenty bonds had not been, and would not be negotiated. The release, however, was executed, not only by the S. B. of T. and A. P. H., but also by K., the president of the U. M. Co., who signed as holder of twenty bonds of \$500 each, as collateral for the payment of the floating debt of the U. M. Co. In 1879 the trustees, being required, sold the trust property to F. for \$13,500. F. excepted to the title, urging, among other objections, that the trust deed had not been properly executed; that it infringed vested rights of the creditors of the U. M. Co. in giving preference; that the claim of the holders of the floating debts of the U. M. Co. to the twenty bonds should be settled. Thereupon the trustees brought their bill to determine all questions. The S. B. of T., A. P. H., and the U. M. Co. answered. W. and the M. B. of B. came in by petition, claiming benefit of the twenty bonds held as collateral for payment of the floating debts, whereof they held large parts. The cause having been referred, the commissioner was directed to ascertain the names, amounts, and priorities of the creditors of the U. M. Co. entitled to participate in the sale money. The commissioner reported adversely to W. and the M. B. of B. representatives of the floating debts. They excepted to the report. The court below overruled the exception. Exceptors appealed. Held:

1. A deed of a corporation, executed by the president, under the seal of the corporation, is a valid mode of executing the deed of trust in this case.

2. The act authorizing the U. M. Co. to borrow money as it did, was a valid and constitutional act.

3. Independently of that act, the lien created by the trust deed was valid, securing contemporaneous loans, and giving no preference among existing creditors within the meaning of V. C. 1860, ch. 57, sec. 34.

4. That the S. B. of T. and A. P. H., holders of the only bonds that were duly executed and issued by the U. M. Co., and which have the security of the trust deed, are entitled to the entire sale money fund.

5. That R.'s executing the release as he did was neither proof of an existing trust in favor of the holders of the floating debt nor the creation of such trust, but unauthorized, inconsistent with the conditions of the release by the S. B. of T. and A. P. H., and inoperative.

In the case of *Planters Bank of Farmville vs. Whittle et als.*, 78 Va., 737, decided April 24, 1884, it was held: Directors are bound to discharge their duties prudently, diligently, and faithfully, and apply the assets, in case of insolvency, for the benefit of creditor in preference to stockholders and other persons. But they are not technically trustees, nor bound to apply the assets ratably among the general creditors. They may not only make preferences between creditors, but such preferences may be made in their own favor if they be creditors; but in such cases they must act in the utmost good faith. Objection that assignments of assets made by the directors to pay debts for which they are individually bound, are void under Code 1873, ch. 57, sec. 18, which provides that "no member of the board shall vote on a question in which he is interested otherwise than as a stockholder," must be made in the court below, and cannot be raised for the first time in the appellate court.

Code 1873, ch. 57, sec. 63, providing that liens or encumbrances giving preferences to creditors, except to secure debts contracted or money borrowed at the time of creating the lien or encumbrance, shall enure to the benefit, ratably, of all the creditors of the company existing at the time, does not prohibit the assignment of assets at their face value in discharge of the company's indebtedness, no lien being thereby created. Until the appointment of a receiver and the award of an injunction, the management of the affairs of the company remains in the hands of the directors, and assignments by them in payment of the company's debts may be lawfully made.

In the case of *Hardy (Trustee) et als. vs. Norfolk Manufacturing Company et als.*, 80 Va., 404, decided April 9, 1885, it was held: Property bought for and appropriated to the purposes, and paid for with the funds of the partnership, is the property of the firm, though the legal title be held in the name of one of its members.

As one member of a partnership may create a liability on the firm, so one member may discharge the liability of the firm.

To the extent of his stock, each stockholder is liable individually for the debts of the corporation. Where stockholder pays the debt of the corporation, and takes an assignment thereof to himself, he cannot revive that debt by assigning it to a third party.

Where real estate, whereon is a lien, is conveyed to a joint stock company, and a stockholder pays off the lien and takes an assignment thereof, the lien is extinguished as to the creditors of the corporation, and cannot be revived by his assignment thereof to a third party.

Where a vender's lien exists on his real estate of the corporation, represented by a past-due note, and the stockholders agree with the creditors of the corporation, that the latter shall give the corporation further time, the corporation will satisfy the vender's lien, and convey its property free from liens, in trust to secure those creditors, and one of the stockholders shall satisfy that lien and take an assignment thereof to himself, he is estopped from claiming that lien as his own property, and an assignee from him with notice, if the note be not past due, stands in no better position than his assignor; and the trust deed lien of the creditors hath precedence.

If a deed hath a date, the law presumes it to have been delivered at that date, and this, though it was acknowledged for registry at a subsequent time. But this presumption of law must yield to proof to the contrary.

If a chartered company creates a lien on its property for the purpose of giving preference to one or more of the creditors of the company over any other creditor (except to secure a debt contracted at the time), such lien shall enure to the benefit, ratably, of all the creditors existing at the time of the creation of the lien. So where a debtor, under contract made before the creation of the lien, is omitted, and after that time obtains a judgment for the unliquidated damages for the breach of the contract, the lien enures for his benefit, ratably with the other creditors.

CHAPTER XLVIII.

SECTION 1159.

In the case of *Booker vs. Young et als.*, 12 Grat., 303, decided April, 1855, it was held: A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving the majority of the votes cast is duly elected.

A board of directors of a bank consists of seven, and they are all present. Upon a vote for president but five vote, three of

whom vote for Y., and two for B., who has been president the year previous. Under the belief that it required a majority of the whole number to elect, they postpone the election, and B. continues to act as president. At a subsequent meeting they proceed again to the election, when Y. receives the three votes he had received at the former meeting, and votes for himself, making a majority of the whole number; B. receives the two votes he had received before, and he votes for S. Whereupon Y. is declared to be duly elected, and he proceeds to act as president. Upon an application by B. for a *mandamus* to restore him to office, held by two of the judges, that Y. was duly elected on the first day, and whether or not he accepted it, B. had no right to it after that time. One judge held that Y., not then having insisted on it, it was no election; but that he might vote for himself, and therefore he was duly elected on the last day. And another judge held that the votes of both Y. and B. were to be treated as nullities, and therefore Y. received a majority of the legal votes cast on the last day, and was duly elected.

SECTION 1161.

The reference to 4 Rand., 132, is evidently an error, as no case affecting this point appears there.

In the case of *Ford's Administrator vs. Thornton*, 3 Leigh, 695, decided May, 1832, W. G., having contracted a debt to a bank by note, payable sixty days after date, discounted by the bank for his accommodation, dies before the note comes to maturity, having on deposit in the bank at the time of his death a sum of money exceeding the amount of the note. Held: That in case W. G.'s estate proves insolvent, the bank has a right in equity to retain the amount of his note out of the money it held for him on deposit, whether there be debts of W. G. of superior dignity to the debt he owed the bank or not; equity in such case regarding the bank as debtor to W. G. only for the excess of his money on deposit above the contents of the note (*Dubitante Brook, J.*), if it appeared that the decedent's estate owed debts of superior dignity.

In the case of *Crump vs. Trylittle*, 5 Leigh, 251, decided April 1834, the Farmers Bank of Virginia discounted a note for six thousand dollars, payable on its face sixty days after date, for accommodation of the maker; it was understood that this accommodation would be continued indefinitely, till it should suit the convenience of the bank, or of the party to discontinue it, the bank reserving the right to discontinue it at its own discretion or pleasure, and the party also having the right to discontinue it at pleasure, and that for the purpose of so continuing it, the note should be renewed from time to time; the accommodation was, in fact, continued upon such renewed notes

from the 21st April, 1825, to the 4th May, 1826; the bank, in discounting the first note, deducted and retained to itself the interest for sixty-four days; *i. e.*, for the time the note had to run, including the days of grace, counting the interest from the day of the date to the last day of grace, both inclusive, and in discounting the second note made on the last day of grace of the first, deducted and retained to itself the interest for sixty-four days counting from the day of the date of the second and last day of grace on the first, to the last day of grace of the second note, both inclusive, and so on upon each renewed note successively to the end of the transaction; so that the bank in fact receives double interest for every sixty-fourth day, and this was in conformity with the known usage of the Farmers' Bank, and of all the banks of Virginia. Held: The transaction is in no wise usurious.

In the case of *Robinson vs. Gardiner et als.*, 18 Grat., 509, decided May 9, 1868, it was held, p. 516: Upon the force construction of the act of February 12, 1866 (Session Acts 1865-'66, p. 204), entitled an act requiring the banks of this Commonwealth to go into liquidation, all the creditors of a bank not having a specific lien upon property of the bank are placed upon the same footing, and are entitled to share the assets ratably. The General Assembly having reserved the right to alter or repeal the charter of the bank, the act is not obnoxious to the charge of interfering with vested rights, or impairing the obligations of contracts.

A deposit of money in a bank is a loan, and not a bailment.

Page 516, same case. Depositors have no priority over note-holders.

CHAPTER XLIX.

CHAPTER L.

SECTION 1181.

In the cases of *Wilson vs. Spencer*, *McGuire vs. Ashby*, *Snyder vs. Dailey*, 1 Rand., 76, decided April, 1822, it was held: Although the act of February, 1816, respecting unchartered banks, was suspended by the acts of November, 1816, yet the action of 1805 remained in force. Therefore, no action brought by an unchartered bank on a bond given for bank notes emitted by the said bank can be sustained.

A court of equity, as well as a court of law, will interfere to prohibit the effects of contracts made in violation of laws enacted for the public good. The principle in *pari delicto* does not apply to cases in which the act complained of is interdicted by the positive provisions of the statute. The person who merely takes the notes of an unchartered bank in payment may not be

as culpable as the institution which issues them. These principles apply as well to contracts prohibited under penalties as to those expressly declared void by statute.

In the case of *Berkshire vs. Evans et als.*, 4 Leigh, 223, decided January, 1833, it was held: A private unchartered company associated for the purpose of carrying on business as a bank, though such associations are contrary to the law, shall be entertained in a court of chancery in a suit against its cashier for an account of his agency.

SECTION 1182.

There is no such page as 735 in the 10 Leigh.

In the case of *Hamtramck vs. Selden, Withers & Co.*, 12 Grat., 28, decided January, 1855, it was held: To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia, but made payable at a bank out of the State, a plea that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy, sets up a good defence to the action; so in such a case a plea that the consideration of the note declared on was the bank paper of the plaintiffs, unlawfully issued by them as currency, they being an unchartered banking company, presents a good defence to the action.

CHAPTER LI.

SECTION 1185.

For the references to cases affecting this section, see Sections 1068 and 1069.

SECTION 1201.

In the case of *Wilson vs. C. & O. R. R. Co.*, 21 Grat., 654, decided January, 1872, it was held: The C. & O. R. R. Co. is the Virginia Central Railroad Company under another name, and is liable upon any contract or for the negligence of the Virginia Central Railroad Company. A railroad company is liable as a common carrier for the baggage of a passenger to the same extent, if the passenger is travelling with his baggage, as if it were carried without him.

Under the contract between the Virginia Central Railroad Company and Trotter & Bro., stage proprietors, for the carriage by the latter of passengers from the terminus of the railroad to the White Sulphur Springs, Trotter & Bro. are the agents for the railroad company, and the company is liable for the loss of the baggage of a passenger by Trotter & Bro. Though the contract stipulates that each party shall be responsible for losses occurring on their part of the line, the railroad company is responsible for the loss of a passenger's baggage by the stage line.

Through passengers from Richmond to the White Sulphur Springs are allowed to stay all night at the terminus of the road, and go on in the stages the next morning. Though a passenger takes her baggage with her to the hotel where she stays, yet if she the next morning brings it with her to the stage and commits it to the agent of the line, and it is lost, the railroad company is liable for the loss. Though the through ticket given to the passenger at Richmond specifies on its face that each party to the contract is only liable for losses on their part of the line, the railroad company is liable for the losses on the stage line.

To restrict the liability of a railroad company as a common carrier for the loss of baggage of a passenger, there must be proof of actual notice to the passenger of each restriction before the cars are started, and an endorsement on the ticket given to the passenger is not enough, unless it is shown that he knew its purport before the cars started.

In the case of *R., F. & P. R. R. Co. vs. Ashby*, 79 Va., 130, decided May 8, 1884, it was held: When a railroad company has sold a passenger a ticket to a particular station, it has no right to refuse to stop its train there, and is liable for such refusal. And a ticket from one designated station to another is good for any intermediate station at which, by the regulations of the company, the train regularly stops.

SECTION 1202.

In the case of *Norfolk & Western Railroad Company vs. Irvine*, 84 Va., 533, decided February 16, 1888, it was held: Plaintiff injured by railroad company's refusal to carry his baggage is not limited to a recovery of the penalty prescribed for such refusal by this section, but under Section 2900 may recover the amount of the actual damage.

In the case of *Norfolk & Western Railroad Company vs. Pendleton*, 86 Va., 1004, decided September 15, 1890, it was held: A State has the right to limit reasonably the amount of charges by a railroad company for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce.

SECTION 1233.

In the case of *Alexandria & Fredericksburg Railway Company's Trustees vs. Graham et als.*, 31 Grat., 769, decided April 24, 1879, it was held, p. 781: This section applies expressly and only to a sale under a deed of trust, or mortgage, by a company on all its works and property, and not merely on a specific part thereof.

In the case of *Karn & Hickson vs. Rorer Iron Co.*, 86 Va., 754, decided April 3, 1890, it was held: Where no objection was made below to a decree of sale before liens were ascertained, such exception cannot be made here. Where sale is confirmed without objection, it is presumable the property brought its full value. Where sale is made under a decree, it is not necessary that it should be advertised as directed in the trust deed. Where sale is decreed in a creditor's suit, it matters not that the creditor that brought the suit has parted with his interest before the decree, as all the creditors are deemed plaintiffs. After sale is confirmed, it will not be set aside, except for fraud, mistake, or surprise, or like causes.

SECTION 1234.

In the case of *The Washington, Alexandria & Georgetown Railroad Company vs. Alexandria & Washington Railroad Company*, 19 Grat., 592, decided February 14, 1870, by the military court of appeals, it was held: The Alexandria and Washington Railroad Company may make a deed on their property to secure certain bonds, and it provides that if the trustee becomes incapable of acting, the court of record of Alexandria county, upon the application of three-fifths of the holders of the bonds, or on notice to the president, or any director of the company, may appoint another trustee. The trustee, president, and directors go into the enemy's lines and remain there during the war. An order of the court of Alexandria county, substituting another person as trustee without notice, is null and void, and a sale made by such substituted trustee is null and void.

For the reference to 31 Grat., 781, see the case of *Alexandria & Fredericksburg Railway Company's Trustees vs. Graham et als.*, cited *supra*, 1233.

See case of *Karn & Hickson vs. Rorer Iron Co.*, 86 Va., 754, cited *supra*, 1233.

SECTION 1243.

In the case of *Redd et als. vs. The Supervisors of Henry County*, 31 Grat., 695 and 699, decided March, 1879, it was held: Though the act of January 15, 1875 (Session Acts 1874, Chapter 37, p. 29), provides a mode by which the qualified voters of a county or corporation may contest the due returns of the election or decision of the voters of said county or corporation upon the question whether the county or corporation shall subscribe to the stock of an internal improvement company, a court of equity still has jurisdiction of the question upon a bill filed by fifteen or more of the citizens and tax-payers of the county or corporation, and to enjoin the issue of the bonds of said county or corporation in payment of said subscription, if the proceeding has not been properly conducted.

In the proceedings under the statute (Code of 1873, chapter 61, sections 62, 63, 64, 65) in relation to subscriptions by a county or corporation to the stock of an internal improvement company, the provisions of the law must be strictly pursued; but a literal compliance in every particular, however essential, is not required. Substantial compliance with the law in every essential feature is all that is necessary. The failure to comply strictly with the provisions of the statute, which is not mandatory but merely directory, will not vitiate the proceedings, so as to render the subscription invalid.

Those directions which are not of the essence of the thing to be done, which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be recorded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute.

The order of the county court directing the sense of the qualified voters to be taken, directs the election to be held by the commissioners of election in conformity to law. Though the order does not expressly require the sheriff to act, so far as the agency of the sheriff was rendered necessary by law, although not named in the order, he was within its operation.

It was not necessary, under the statute, that the commissioners of election should be designated by name in the order, as there were already commissioners legally appointed. They were appointed at the May term of the court, and though the statute directs that they shall be appointed at the April term, this provision of the statute is clearly directory. For other questions in relation to the appointment of the board of commissioners to examine the returns and the time when the commissioners of election shall make their returns, see the opinion of Burks, J.

The commissioners of election are the body to compute and ascertain the number of registered voters in the county, the number of votes cast at the election, the number voting for and the number voting against subscription. In ascertaining and reporting the number of registered voters in the county, they are to be guided and controlled by the registration books. But where the registrar had noticed on the book the death or removal of a person registered, it was proper to omit his name from the count.

It was for the supervisors to fix the amount of the subscription to the stock, not exceeding the sum limited by the statute.

The supervisors of the county having resolved to subscribe

the sum of one hundred thousand dollars on condition that the town of D. subscribed fifty thousand dollars, that subscription cannot subsequently be rescinded by them; and a resolution by them to this effect was invalid. And the town of D. having made the subscription of fifty thousand dollars, the supervisors may carry out their subscription of one hundred thousand dollars, and direct the issue of the bonds of the county therefor in the mode prescribed by the statute. It was not necessary that the order of the court directing the vote upon the subscription should state that the amount to be subscribed will not require an annual tax in excess of twenty cents, or that it is not more than one-fifth the capital stock of the company.

There being no evidence in the record that the subscription will require a tax in excess of twenty cents on the one hundred dollars of the taxable property of the county, and no such question made in the pleadings, the court cannot look outside of the record to take notice of the auditor's reports and the assessor's books to ascertain the amount of taxable property in the county.

The legislature may by a subsequent act legalize the proceedings, if they were irregular, and so confirm the subscription.

In the case of *Taylor et als. vs. Board of Supervisors*, 86 Va., 506, decided November 7, 1889, it was held: In its order made under said act, and directing the submission of the question whether or not the county should subscribe to the stock of a company proposing to build its railroad through the county, the county court failed to state the maximum of subscription and the number of miles the road was to be built through the county. Held: Such failure does not invalidate the order nor the proceedings under it.

CHAPTER LII.

SECTION 1264.

In the case of *Richmond & Danville Railroad vs. Medley*, Va. Reports, 75, 499, decided April 28, 1881, it was held: A railroad company may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks, and operated by the most skillful engineers; it may do all that skill and science can suggest in the management of its locomotives; and still it may be guilty of gross negligence in allowing the accumulation of dangerously combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors.

In the case of *Brighthope Railroad Company vs. Rogers*, 79 Va., 443, railroad company is liable when fire is attributable to the negligence of its agents, or to its wants of proper

machinery and spark arresters, or to the accumulation of combustible matter along its line.

CHAPTER LIII.

SECTION 1265.

In the case of *Cowardin et als. vs. Universal Life Ins. Co.*, 32 Grat., 445, decided December 18, 1879, it was held, p. 448: The foreign character of a corporation is not to be determined by the place where its business is transacted, or even where the incorporators reside, but by the place where its charter was granted. With reference to inhabitancy, it is to be considered as an inhabitant of the State in which it was incorporated.

SECTION 1266.

In the case of *Connecticut Mutual Life Ins. Co. vs. Duerson's Executor*, 28 Grat., 630, decided July, 1877, it was held: An insurance company chartered by another State, but doing business in this State in compliance with the statute of 1855-'56, is to be considered, for the purpose of being sued, as domiciled in this State, and is entitled to rely on the statute of limitations just as if it were a company which had been chartered by the legislature of this State.

Though such company had after the war expressly revoked the powers of the resident agent it had before the war, and never afterwards appointed another in his place, service of process on such agent will nevertheless be effectual under the statutes in that behalf to give jurisdiction of an action against such company.

The provisions of said statutes, 1855-'56, were amendatory of the previous law, and extended as well to policies previously issued as to policies afterwards issued; and a foreign company doing business in the State under the same at the time said amendments were enacted, and continuing to do business afterwards in compliance with all said statutes, must be taken to have accepted said provisions and to be bound by them.

SECTION 1271.

In the case of *Universal Life Insurance Co. vs. Cogbill*, 30 Grat., 72, decided March 21, 1878, it was held: A foreign insurance company has deposited bonds with the treasurer of the State in pursuance of the statute, and fails. A policy-holder may sue the company in the Circuit Court of the city of Richmond, and make the treasurer a party defendant to subject the bonds in his possession to satisfy the premiums he has paid upon the policy.

In the case of *Mutual Benefit Life Insurance Co. vs. Marye*

(*Auditor*), 85 Va., 643, decided January 17, 1889, it was held: Only such assessment companies as raise money to pay a loss by a member's death by assessment made upon those who survive him are entitled, under act of May 18, 1887, to be licensed without making the deposit of bonds under this section.

SECTION 1276.

In the case of *Universal Life Insurance Co. vs. Binford et als.*, 76 Va., 103.

Insurance Companies—Attachments.—A New York insurance company was reported by the State insurance superintendent to the attorney-general as not in the condition required by law. Thereupon proceedings were started to dissolve the company and appoint a receiver. Soon after each of eight Virginia policy-holders sued out his attachment and levied it on the property of the company in Richmond, and each filed his bill, alleging that the company had become insolvent, and would not be able to fulfil its contract when his policy matured, and praying for the enforcement of his lien. Held: The attachment did not ensue to the benefit of all the policy-holders, whether parties to the suits or not. This case is unlike that of *Finney vs. Bennett et als.*, 27 Grat., 365, where the bank had ceased business, and a "creditors' bill" had been filed to settle its affairs and distribute its assets.

In the case of *Bockover vs. Life Association of America et als.*, 77 Va., 85, decided January 25, 1883, B. was a policy-holder in a company chartered in the State of Missouri. In 1879 the company was regularly adjudged to be insolvent by a court of Missouri. Under a decree and the statute of Missouri, passed that year, all its assets were vested in R. for the benefit of its creditors. In 1880, in the Chancery Court of Richmond, B. attached debts due the company by citizens of Virginia. The company answered, admitting the claim of B., but denying that the debts were liable to the attachments, and R. became a party, claiming to be entitled to all the company's assets, including those debts. On motion to abate the attachments, held:

1. Statute providing mode for winding up insolvent corporations and distributing its assets equitably among those thereto entitled impairs no contract, and is valid. Such is the Missouri statute of 1879.

2. If a State allows a foreign corporation to do business within her limits, the corporation comes as it is created, and brings its charter as the law of its existence.

3. Everyone dealing with it everywhere must notice the provisions of its charter for managing and controlling its affairs, both in life and after dissolution.

4. Under the decree and statute, the company's assets were

validly vested in R. as trustee of an express trust, and the debts due the company in Virginia could not be attached by a policy-holder in Virginia.

CHAPTER LIV.

SECTION 1287.

In the case of *Western Union Telegraph Co. vs. Williams*, 86 Va., 696, decided March 27, 1890, it was held: Condemnation of land for public highway gives only right of passage over it. The absolute property in the land remains in the owner. Erection of telegraph poles and wires constitutes an additional servitude on the land. Act of February 10, 1880, (this section authorizing construction of telegraph lines along any public road, if the use of the highway be not obstructed, without providing any compensation to the land owners,) violates the constitutional intention when taking private property for public use without compensation.

In the case of *Postal Telegraph Cable Co. vs. Norfolk & Western Railroad Company*, 88 Va., 920, decided March 24, 1892, it was held: This section does not authorize the condemnation of a right of way along and upon the right of way of a railroad company.

SECTION 1290.

In the case of *Western Union Telegraph Co. vs. Williams*, 86 Va., 696, decided March 27, 1890, it was held: Condemnation of land for public highway gives only right of passage over it. The absolute property in the land remains in the owner. Erection of telegraph wires and poles constitutes an additional servitude on the land. Act February 10, 1880, (this section authorizing construction of telegraph lines along any public road, if the use of the highway be not obstructed, without providing any compensation to the land owners,) violates the constitutional intention when taking private property for public use without compensation.

SECTION 1291.

In the case of *Washington & New Orleans Telegraph Co. vs. Hobson & Son*, 15 Grat., 122, decided April, 1859, it was held: In an action against a telegraph company, the line of which extends through several States, though it appears that some of the defendants live out of the State, this is not cause for arresting judgment against the company; if it is good ground for the objection to the jurisdiction of the State court, it must be taken by plea in abatement before the defendants plead in bar.

In an action against a telegraph company for damages sustained by the plaintiffs by the alteration of a message sent on their line, whereby an order to the plaintiff's factor in Mobile to buy five hundred bales of cotton was altered to twenty-five hun-

dred, but not charging negligence in the company, an instruction that the defendants are not responsible as common carriers, but only as general agents, for such gross negligence as in law amounts to fraud, is not authorized by the pleadings, and properly refused.

In such case, the factors having bought two thousand and seventy-eight bales of cotton before the mistake in the message was ascertained, if the company is liable to the plaintiffs for the damages arising from the alteration of the message, the commissions of the factors upon the purchase of the cotton are a part of the damages for which the company is liable, and the plaintiffs are not bound to accept any offer of the company to pay the damages which excludes these commissions.

In such case, if the company is liable to the plaintiffs for damages from the alteration of a message, the measure of these damages is what is lost on the sale of the cotton at Mobile in the condition and circumstances in which it was when the mistake was ascertained; including in such loss all the proper costs and charges thereon.

When the mistake was ascertained, a part of the cotton was on board of a ship to be sent to Liverpool; a part was under a contract of affreightment to the same place, but not on board. The whole should have been sold as it was at Mobile, and the plaintiffs having sent it to Liverpool and sold it there, the loss to the company is not to be increased by this act of the plaintiffs, but must be based upon an estimate of what it would have sold for, a part on shipboard and a part under a contract of affreightment. If the plaintiffs sent the cotton to Liverpool for the purpose of speculating, with the intention of taking to themselves the profits, if any, and in the event of a loss on the company, they are not entitled to recover any loss sustained upon it.

But if the plaintiffs sent the cotton to Liverpool not with a purpose of taking the profits, if any, but only to indemnify themselves out of the proceeds to the extent of the cost and the obligations incurred by them, they do not thereby lose their right to recover from the company the damages which they would have sustained if the cotton had been sold at Mobile. The plaintiffs, if they intended to hold the company responsible for the excess of cotton purchased, should, as soon as they were apprised of the purchase, have notified the company of such intention; should have made a tender of such excess to the company on the condition of its paying the price and all the charges incident to the purchase, and also, in case of its refusal to accept said tender and comply with its conditions, they would proceed to sell such excess at Mobile, and, after crediting said company with the profits, would look to it for the difference between the

amount of such proceeds and the cost of the excess, including all proper charges; and upon the failure of the company after notice to accede to their offer, they should have proceeded accordingly.

The case of *Western Union Telegraph Co. vs. Reynolds Bros.*, 77 Va., 173, does not construe the Code, but is ruled by it.

SECTION 1292.

In the case of *Western Union Telegraph Co. vs. Pettyjohn*, 88 Va., 296, decided July 19, 1891, it was held: The penalty of one hundred dollars imposed by this section upon a telegraph company for failure to deliver a dispatch, being a fine, a justice of the peace has not jurisdiction of a claim to recover the same, as it exceeds twenty dollars. See Section 2939.

In the case of *Western Union Telegraph Co. vs. Tyler*, 18 Southeastern Reporter, 280, decided November 16, 1893. This section provides that every telegraph company shall deliver a telegram promptly to the person to whom it is addressed, and that for every failure to forward or deliver a dispatch as promptly as practicable the company shall forfeit \$100 to the person sending the dispatch or to the person to whom it was addressed. Held: That a suit to enforce such forfeiture need not be brought in the name of the Commonwealth. Said statute is not repugnant to the interstate commerce clause of the Constitution of the United States.

CHAPTER LV.

SECTION 1295.

In the case of *Southern Express Co. vs. McVeigh*, 20 Grat., 264, decided January, 1871, it was held: An action on the case lies against the party who has a public employment—as a common carrier or other bailee—for a breach of duty which the law implies from his employment or general relation.

Where there is a public employment, from which arises a common law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing something contrary to an agreement made in the course of such employment by the party on whom such general duty is imposed.

Though the declaration does not allege that the defendants are common carriers, yet if the facts set out constitute them such in law, it is sufficient to sustain the action against them as common carriers. An express company is to be regarded as a common carrier, and its responsibilities for the safe delivery of the property entrusted to it is the same as that of the carrier.

Though the declaration in a case does not allege the duty of the defendants, as common carriers, to carry the goods, and the

breach of that duty, if it avers facts from which the law infers the duty, and that the defendants, not regarding their said duty, etc., and assigns the breach, that is sufficient. To subject a party to the responsibility of a carrier for goods lost, it must appear that he received the goods, and that they were delivered to and received by him as a carrier.

V., owner of certain goods about to arrive at the depot of the railroad in Charlotte, N. C., wishes them to be carried from thence to Richmond, Va., and an express company, by their agent at Charlotte, undertakes to remove and deposit said goods in their warehouse as soon as possible on the arrival of the goods at the depot at Charlotte, and to carry them from Charlotte to Richmond within a reasonable time for a reward paid. The goods arrive at the depot, and the express company has notice of their arrival. This is a delivery to the express company as carriers. When goods are delivered to parties to be carried and transported, and these parties are expressmen, and receive compensation for forwarding and transporting, the goods are in their custody as carriers. If the goods are under the control of parties as forwarders, and not as common carriers, and are consumed by accidental fire in a warehouse, without any fault or negligence on their part, they are not liable, unless they had expressly agreed, for compensation paid, to insure them, and had failed to do so.

In the case of *Wilson vs. C. & O. R. R. Co.*, 21 Grat., 654, decided January, 1872, it was held: The Chesapeake & Ohio Railway Company is the Virginia Central Railroad Company under another name, and is liable under any contract or for the negligence of the Virginia Central Railroad Company. A railroad company is liable as a common carrier for the baggage of a passenger to the same extent, if the passenger is travelling with his baggage, as if it were carried without him.

Under the contract between the Virginia Central Railroad Company and Trotter & Bro., stage proprietors, for the carriage by the latter of passengers from the terminus of the railroad to the White Sulphur Springs, Trotter & Bro. are the agents for the railroad company, and the company is liable for the loss of the baggage of a passenger by Trotter & Bro.

Though the contract stipulates that each party shall be responsible for losses occurring on their part of the line, the railroad company is responsible for the loss of a passenger's baggage by the stage line.

Through passengers from Richmond to the White Sulphur Springs are allowed to stay all night at the terminus of the road and go on in the stages the next morning. Though a passenger takes her baggage with her to the hotel where she stays, yet

if she the next morning brings it with her to the stage, and commits it to the agent of the line, and it is lost, the railroad company is responsible for the loss.

Though the through ticket given to the passenger at Richmond specifies on its face that each party to the contract is only liable for losses on their part of the line, the railroad company is liable for the losses on the stage line.

To restrict the liability of a railroad company as a common carrier for the loss of the baggage of a passenger, there must be proof of actual notice to the passenger of each restriction before the cars are started; and an endorsement on the ticket given to the passenger is not enough, unless it is shown that he knew its purport before the cars started.

In the case of *Virginia & Tennessee Railroad Company vs. Sayers*, 26 Grat., 328, decided July 7, 1875, it was held: It seems a railroad company may, by express contract, or notice brought home to the employers, relieve itself from its liability as insurer of freight, or for money or valuable articles liable to be stolen or damaged, unless apprised of their character and value, or for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or animals become injured without the fault or negligence of the company or its agents. But a railroad company cannot by express contract, though, upon the consideration of a reduced charge upon the freight, relieve itself from its liability as carrier of the freight for injury to or the loss of freight, resulting in any degree from the want of care or faithfulness of themselves or their agents.

SECTION 1296.

In the case of *Richmond & Danville Railroad Company vs. Payne*, 86 Va., 481, decided January 30, 1890, it was held: By Code 1887, this section, no agreement to exempt a common carrier from liability for injury or loss occasioned by his own neglect or misconduct shall be valid; yet the weight of authority favors the proposition that a carrier may, by special agreement fairly made, in consideration of a reduced rate of transportation, limit his liability to a certain amount less than the value of the property, in case of loss or damage occurring through his negligence.

In the case of *Johnson's Adm'x vs. Richmond & Danville Railroad Company*, 86 Va., 975, decided June 19, 1890, it was held: A contract whereby a party stipulates for his exemption from liability for the consequences of his own negligence is against public policy and void. This is so independently of this section.

CHAPTER LVI.

TITLE XIX.
CHAPTER LVII.

SECTION 1315.

In the case of *Kelly vs. Board of Public Works*, 25 Grat., 755, decided January 21, 1875, it was held: An action may be maintained against the present board of public works upon a contract made with the board as organized under the former constitution and laws.

In the case of *The Commonwealth vs. Johnson et als.*, 33 Grat., 294, decided July, 1880, it was held: The contract made on the 27th of February, 1867, by the board of public works with B. T. Johnson, N. Poe, and J. P. Poe, for prosecuting the claims of the State of Virginia against the Chesapeake & Ohio Canal Company, was authorized by the resolution of the General Assembly of February 26, 1867, and a full and final and honest settlement of all the matters involved in the contract having been made by the board and Johnson, &c., the same is conclusive upon the State.

In the case of *Kelly vs. Board of Public Works*, Va. Reports, 75, 263, decided February 10, 1881: K. was the agent of the public works of Virginia in constructing the railroad and Blue Ridge tunnel; the board to pay for the work and materials, and K. to receive a commission on the cost for his compensation. The board provided the money to pay for the work by a sale of State bonds; and these bonds having fallen below par, there was a deficiency of funds to pay the expenses, and K. advanced his own funds to meet these expenses, he claiming that the board of public works had agreed to repay the advances that he might make. In an action by K. against the said board, held:

1. If there was an express or implied contract between K. and the said board that K. should be paid for his advancements to carry on the work, he is entitled to recover in this action.

2. That such contract may exist and be binding on the board, although there is no entry of it on the records of the board, and may be proved, as well as in other modes, by parol evidence, that at a regular session of the board, a majority of the members being present, the plaintiff was told by a member of the board in the presence of the board then in session, that it was the wish of the board that he should advance the money necessary to make up the deficiency occasioned by the sale of the State bonds at less than par for the prosecution of the work, and that the same should be refunded to him, which was then and there agreed to by the said K.

If these advances were made by K. with the knowledge of the board, without objections on their part, and were applied so as to continue the work, which the board regarded as important to preserve valuable property of the State from loss, and the successful prosecution of the work, a contract on the part of the board to refund the money to K. for the advances so made by him may thereby be implied, unless it be shown that K. agreed to receive the State bonds at their par value in payment of the cost of the work *pro tanto*.

The right of the plaintiff to recover in this action is not affected by the question whether the sale of said bonds under the direction of the board of public works was with or without the authority of law, or in violation of law or not.

CHAPTER LVIII.

CHAPTER LIX.

TITLE XX.

CHAPTER LX.

SECTION 1338.

In the case of *Norfolk City vs. Cooke*, 27 Grat., 430, decided April 13, 1876, it was held: A patent for land constituting a part of the bed of a navigable river conveys no title to it.

In the case of *McCandlish vs. The Commonwealth*, 76 Va., 1002.

Jurisdiction—Construction of Statutes—Cargoes—Case at Bar.—On board of vessels seized whilst employed in violating the act of March 6, 1880 (Acts 1879-'80, p. 197), were cargoes of oysters. These the justices examining the captains, who were prisoners, ordered the sheriff to sell, and hold the net proceeds until the decision of the cases. The prisoners, in writing, directed the sheriff to pay the proceeds to their attorney, M., for his services. After the prisoners had been convicted in the county court M. petitioned that court to order the sheriff to pay him the proceeds. The Commonwealth resisted, but the county court entered the order, which, on error, the circuit court reversed, and adjudged the Commonwealth entitled to receive the money. On error to this court, held:

1. The State can only be sued in the tribunals designated by her, and she has not designated the county courts; but the State instituted these proceedings in the county courts, and the demand made by M.'s petition is in the nature of a counter claim, and is not a direct, original suit against the State.

2. As that act does not attempt to forfeit the cargoes of ves-

sels employed in violating its provisions, the Commonwealth acquired no title to the oysters by forfeiture.

3. As the oyster beds belonging to the Commonwealth are common to all her citizens, subject to certain restrictions as to the mode of taking them, and as it does not appear affirmatively that the oysters were tortuously taken, the Commonwealth acquired no right of detention or recaption. Mere seizure gave no right of property.

4. As the Commonwealth had no title to the oysters, she could not, of course, be entitled to receive the proceeds.

As to the Title to the Bed of a Water-course.—In the case of *Home vs. Richards*, 4th Call, 441, decided April, 1798, it was held: The bed of a navigable river is in the Commonwealth, and cannot be granted. In a river not navigable the owner of the soil on one side is proprietor of the bed to the middle of the stream.

In the case of *Hayes's Executor et als. vs. Bowman*, 1 Rand., 417, decided April, 1823, it was held: Where land is conveyed which is bounded by a water-course not navigable, such conveyance carries with it the title to a moiety of the bed of the water-course.

In the case of *Mead et als. vs. Haynes*, 3 Rand., 33, decided November, 1824, it was held: A person owning lands on one side of a stream not navigable is entitled to a moiety of the bed of the stream.

In the case of *Crenshaw vs. Slate River Company*, 6 Rand., 245, decided March, 1828, it was held: Although grants of lands to individuals may include the bed and banks of streams or rivers, yet the public have a right to the use of all such streams or rivers for the purposes of navigation; but the legislature (representing the sovereign power) may confer on individuals, by general law or particular grants, rights in opposition to and paramount to this public right, and such paramount rights have been conferred on owners of mills by the general law authorizing the courts to establish mills.

In the case of *Commonwealth vs. Garner*, 3 Grat., 655, decided December, 1846, by the General Court: A sovereign State owning the country on both sides of a large navigable river grants the country northwest of the river to another sovereign State. *Quære*: Is the bank bounded on the river by the top of the bank, or the edge of the water, or low water mark?

CHAPTER LXI.

SECTION 1347.

In the case of *Richards vs. Hoome*, 2 Washington, 46 (1st edition, p. 36), decided at October term, 1794, it was held: Upon an appeal from an order giving leave to build a mill the

record should state that it appeared to the court granting the order that the bed of the water-course was in the applicant or in the Commonwealth.

This decision was approved in the case of *Wroe vs. Harris*, 2 Washington, 126, decided at October term, 1795, when it was held: Where the person applying for leave to build a mill has land on one side of the stream only, it should be stated in the petition that the bed of the stream is in himself or the Commonwealth, but this is unnecessary if he own the land on both sides.

In the case of *Hoome vs. Richards*, 4 Call, 441, decided April, 1798, it was held: It is immaterial whether the bed of the river is in the Commonwealth or the petitioner. He must own the lands on which he proposes to build the mill, machine, manufactory or engine.

In the case of *Martin vs. Beverly*, 5 Call, 444, decided April, 1805, it was held: It is necessary to state in a petition for a mill on a navigable river that the bed is in the Commonwealth.

In the case of *Wilkinson vs. Mayo*, 3 H. & M., 565, decided April 25, 1809, it was held: The county or corporation courts, at quarterly terms, may, in their discretion, receive the probate of wills or deeds, or decide on troversies concerning mills, or, indeed, transact any business embraced by the general jurisdiction of such courts; but at the monthly session they cannot take jurisdiction of any expressly and exclusively assigned to a quarterly term.

If the applicant for leave to build a mill state that he is the owner of the land on both sides of the water-course, when, in truth, he is not, the writ of *ad quod damnum* and inquisition taken upon it ought to be quashed.

In the case of *Rowlett's Executor vs. Moody*, 4 H. & M., 2, decided May 3, 1809, the mentioning in the writ of *ad quod damnum* a certain height for the mill-dam is no ground for setting aside the proceedings at the instance of the opposing party, notwithstanding no particular height was specified in the order directing the writ.

It is sufficient for the clerk to state in the record that the writ of *ad quod damnum*, with the inquisition annexed, was returned by the sheriff without inserting a copy of the signature of the sheriff or of his deputy to the return, a copy of the inquisition itself with the signatures of the jury being inserted.

In the case of *Mead vs. Haynes*, 3 Rand., 33, decided November, 1824, it was held: A person owning lands on one side of a stream not navigable is entitled to a moiety of the bed of the stream.

: A petition for leave to build a mill where the bed of the stream belongs in part to the petitioner will be sufficient upon

showing that fact, although the petition itself does not state it, but, on the contrary, states that the bed of the stream belongs to the Commonwealth.

A petition for leave to build a mill may be *ore tenus*.

In the case of *Pitzer vs. Williams*, 2 Rob., 241, decided August, 1843, a person owning real estate died intestate, leaving a widow and children, and dower not being assigned to the widow, she continued in the mansion-house and the plantation thereto belonging. Under the statute notice was given the widow, as proprietor of the land, by a person desiring to build a machine useful to the public, and to abut his dam against said land, that application would be made for a writ of *ad quod damnum*, and the writ was accordingly awarded, and an inquisition returned. After which, one of the heirs, who resided on the plantation with his mother, being made a defendant, on his motion moved the court to dismiss the case upon the ground that notice of the application ought to have been given to him as one of the proprietors; but his motion was overruled. He then offered to introduce evidence to prove that the applicant did not own the land on which he proposed to erect his machine, but it being proved that the applicant was in possession of the land, claiming title to it, and had built a house thereon, the court refused to permit the evidence offered to be introduced. Held: There is no error in these proceedings; for it was sufficient that the person making the application was in the actual possession and occupation of the land on which the machine was to be built, and that the person to whom notice was given was the tenant in possession, and appeared as the visible owner.

In the case of *Whitworth et ux vs. Puckett*, 2 Grat., 528, decided January, 1846, it was held: On an application for leave to erect a mill, or other machine, the petitioner must show he has proceeded in the mode prescribed by law to suit his particular case.

If it appears upon the hearing of the case before the court that a greater quantity of the land of the adjoining proprietors will be overflowed than the jury estimated, the inquisition should be quashed, and a new writ directed to issue.

The court has no authority to increase or diminish the damages to the adjoining proprietors assessed by the jury.

The applicant for leave to build a mill, or other machine, is not entitled to the ownership of the land overflowed by the erection of the dam, upon paying the damages assessed by the jury.

In the case of *Mairs vs. Gallahue*, 9 Grat., 94, decided July 26, 1852, it was held: In a petition for leave to erect a dam, the petition, which was *ore tenus*, states that the applicant is the

owner of the banks on both sides of the stream. This is, in effect, the statement that he is the owner of the land, and especially if it appears from the other parts of the proceedings that he is the owner of the land on both sides of the stream. The petition states that the applicant desired a writ of *ad quod damnum* to issue for the purpose of erecting a water grist-mill, etc. This is a sufficient compliance with the statute.

When, upon a fair and reasonable construction of the inquisition, it is substantially responsive to the requirements of the statute, that is sufficient. When the petition or the order of the court directing the writ of *ad quod damnum* to issue does not specify the height of the dam proposed to be erected, it is proper and correct for the jury to specify it in their inquisition. There is an exception for the refusal of the county court to continue the cause on account of the absence of a material witness; but on appeal to the circuit court by the exceptant, the case is again heard upon the record of the county court and upon the testimony of witnesses then examined before the court, one of whom is the witness referred to in the exception, and the judgment of the county court is affirmed. The want of the witness's testimony before the county court cannot be the subject of complaint in the court of appeals.

An exception is taken to the judgment of the county court authorizing the erection of the dam, on the ground that it would be injurious to the health of the neighborhood; and the evidence is stated in the exception. The circuit court passes on that question upon full evidence, and to its opinions there is no exception; and as both the county and circuit courts were satisfied upon that point, the court of appeals will presume that the proofs showed that the health of the neighborhood would not be affected by the erection of the dam. The judgment of the court giving leave to erect the dam provides that the appellant shall keep a ferry-boat at the crossing of a public road over the stream across which the dam is to be erected. Held: This is authorized by the statute; and as the county and circuit courts have held upon the proofs that a ferry-boat at that place will sufficiently remedy any impediment to the crossing of the stream, the court of appeals will presume that they acted rightly, nothing being shown to the contrary.

The duty of keeping up the ferry-boat is not merely personal to the grantee of the privilege of erecting the dam, but it is a condition of the grant, and attaches to it into whose hands soever it may pass. The kind of boat to be kept must be such an one as the exigencies of the travel and trade on the road shall require. It is the duty of the party required to keep up the ferry-boat to ferry the public over the stream without charge.

SECTION 1348.

In the case of *Rowlett's Executor vs. Moody*, 4 H. & M., 2, decided May 3, 1809, it was held: An inquisition on a writ of *ad quod damnum* in a mill case having found that the lands of T. R., deceased, would be overflowed, and a summons having issued to T. C., acting executor and trustee of the decedent, to show cause why leave should not be granted to erect the mill, and T. C. having appeared and contested the motion, he was precluded from afterwards saying that he was not legally summoned as the tenant or proprietor of the land.

SECTION 1349.

In the case of *Noel vs. Sale*, 1 Call, 495, 2d edition, 431, decided April 27, 1799, it was held: If an inquisition be improperly quashed, the plaintiff should pray a new writ or except to the court's opinion.

The deputy sheriff may take an inquisition.

In the case of *Coleman (Executor and Trustee of Rowlett) vs. Moody*, 4 H. & M., 1, decided May, 1809, it was held: The mentioning in the writ of *ad quod damnum* a certain height for a mill-dam, is no ground for setting aside the proceedings at the instance of the opposing party; notwithstanding no particular height was specified in the order directing the writ.

SECTION 1350.

In the case of *Wroe vs. Harris*, 2 Washington, 162, 1st edition, p. 126, decided October term, 1795, it was held: It is not necessary that the inquisition should set forth the injury which the land below the dam may sustain.

In the case of *Eppes vs. Cralle*, 1 Munf., 258, decided May 1, 1810, it was held: On a petition for leave to add to the height of a mill-dam, the only proper subject of inquiry is, what damages will be occasioned by the proposed addition. It is error, therefore, to direct the jury to assess such other damages accruing from the dam already erected as were not contemplated by the original jury. But an error in this respect should be regarded as surplusage (the petition for the writ of *ad quod damnum* having prayed only for such inquiry as the law authorizes) if the jury assessed such erroneous damages separately, and the court did not direct the same to be paid, but only the damages properly assessed.

In the case of *Dawson vs. Moons*, 4 Munf., 535, decided March 24, 1815, it was held: A date to the inquisition, upon a writ of *ad quod damnum*, is not essential, if it be stated, under the hands and seals of the jurors, that, "in obedience to the annexed writ, they viewed the lands in question," etc. If the jury in a mill case find that a certain number of acres of land

belonging to A. B. will be overflowed, estimated at a certain price; and that all other damages which the said A. B. will sustain for probable injury to other lands, and inconveniences, are estimated by them at a further sum, expressed in their inquest, it is special enough.

In the case of *Coleman (Executor and Trustee of Rowlett) vs. Moody*, 4 H. & M., 1, decided May, 1809, it was held: If the jury find a certain number of acres of land will be overflowed, "together with all other damages to the value of a specified sum," it is special enough, and will not bar an action for any damages not foreseen and estimated by them.

An order of court granting leave to erect a mill is valid, though no order be made directing the payment of the damages found by the inquisition.

An inquisition in a mill case ought not to be set aside on the ground that the jurors, before they were sworn, and afterwards, when their verdict had been agreed upon, but before they had signed it, ate and drank moderately at the expense of the appellant, no corruption appearing, and the opposite party consenting.

It is sufficient for the clerk to state in the record that the writ of *ad quod damnum*, with the inquisition annexed, was returned by the sheriff, without inserting a copy of the signature of the sheriff, or of his deputy, to the return; a copy of the inquisition itself, with the signatures of the jurors, being inserted in the record.

In the case of *Kovnslar vs. Ward*, 1 Va. (Gilmer), 127, decided October 14, 1820, it was held: It is as necessary that an inquest should be had as to injuring the health of neighbors, obstructing navigation, etc., on an application to raise a mill-dam already erected, as to construct it originally. The verdict in such a case responding only to the damage done a contiguous owner by flooding his lands, and not to the health of the neighborhood, is imperfect, and the writ will be quashed.

In the case of *Smith vs. Waddill*, 11 Leigh, 532, decided February, 1841, S. applied to the county court for leave to build a water grist-mill and dam. Upon an *ad quod damnum* the inquisition found "that the health of the neighbors would be less or as little annoyed as it was possible it should be by the erection of any dam" upon return of the inquisition. W. opposed the grant of leave, objecting that the inquisition was insufficient and defective in regard to the effect upon health, and intimated that if that objection should be overruled, he should offer testimony on that point. The county court overruled the objection to the inquisition, and then refused to hear W.'s testimony, and gave S. leave to build the mill and dam; W. appealed to the circuit superior court, which heard the testimony he had to offer, but,

without deciding upon it, held: That the inquisition should be quashed, and the cause remanded to the county court. Upon appeal taken by S. to this court, held: That the inquisition was sufficient, and the circuit superior court erred in quashing it, but the county court also erred in refusing to hear the testimony offered by W., and so the orders of both courts were erroneous; that the order of the circuit superior court should be reversed with costs, and the cause remanded to that court, to be there heard and decided upon the evidence and the merits.

SECTION 1353.

In the case of *Wood vs. Boughan*, 1 Call, 330, 2d edition, 285, decided May 14, 1798, the court below directed an issue to try the title, and as the parties acquiesced therein, it was held that the error was waived. But such a verdict is not conclusive, as it can only be for the information of the court. See *Eppes vs. Cralle*, 1 Munf., 258; see 1350, *supra*.

In the case of *Harwell vs. Bennett & Walker*, 1 Rand., 282, decided January, 1823, it was held: On the trial of a writ of *ad quod damnum* to erect a mill-dam, one of the jurors who signed the inquisition gave evidence that the sheriff who took the inquisition declared, in the presence of himself and another juror, that the defendant had consented to the erection of the mill-dam, in consequence of which he, the juror, had agreed to sign the inquisition. This will not be a sufficient reason for quashing the inquisition.

In the case of *Crenshaw vs. The Slate River Company*, 6 Rand., 245, decided March, 1828, it was held: Mills are considered by our laws as great public conveniences and benefits: they are regulated by law; they are never established except on the inquisition of a jury; amongst other things, the jury are bound to inquire whether ordinary navigation will be obstructed, and if they report that it will not, then leave is granted to erect the mill, without any condition as to navigation. Such a grant, under such precautionary proceedings, is a perfect one, and vests in the grantee all the public right to the stream, or so much thereof as is necessary to the full enjoyment of the mill erected under the order.

After a mill has been established and a mill erected according to law, whereby the use of the water for grinding has been granted to the mill owner, a subsequent act of assembly which imposes on him the burden of erecting locks through his dam, of keeping the locks in repair, and of giving attendance at the locks, so as to admit the passage of boats, and, on his failure, vests in a company the power to abate the dam as a nuisance, without a full indemnification and equivalent for the injury thus done to his vested rights, is contrary to the Constitution of the State, and void.

In the case of *Anthony et als. vs. Lawhorne*, 1 Leigh, 1, decided January, 1829, it was held: L., owning lands on both sides of a stream, asked leave of court to build a mill upon and dam across it; it was found by inquest, on an *ad quod damnum*, that lands in the possession of A. of the value of thirty-five dollars would be overflowed; the court on a hearing, being of opinion that these lands belonged not to A. but to L. himself, granted L. leave to build his dam without paying any damages to A. Held: Error, for the right in the lands could not be thus collaterally tried.

In such case leave should be granted only on condition that L. pay A. the damages assessed by the jury; and L. might build his dam at his peril without paying them, and then defend A.'s action against him on the ground that the lands overflowed were his own, and thus put the title directly in issue.

In the case of *Humes vs. Shugart*, 10 Leigh, 332, 2d edition, 343, decided July, 1839, it was held: After a county court has granted leave to one applicant to build a mill, if application be made by another to build a mill lower down upon the same stream, and the party who first obtained leave show that the dam for the second mill would be several feet higher than the fall between the two mill-seats, and would, if built, destroy the privilege previously granted to him, the court, in the exercise of a sound discretion, ought to refuse the second application. Though the leave first given to build a mill be granted while a prior application to build lower down upon the same stream is pending, yet if the order granting this privilege remain in full force, unreversed and not appealed from, and it be shown that the privilege so granted would be destroyed by allowing the other, that other ought not to be granted.

In the case of *Hunter vs. Matthews*, 12 Leigh, 228, decided April, 1841, petition for leave to build a mill and dam across water-course; *ad quod damnum* awarded, and inquisition returned; motion by a person appearing by the inquisition to be interested, and admitted defendant to oppose the application, to quash the inquisition on the ground that two of the jurors empannelled on the inquest had been of the jury who had found an inquisition on a former *ad quod damnum* in the same case; though it appeared that the point now in controversy could not have been presented for consideration of the jury on the first inquest, yet held: That the inquisition ought for that cause to be quashed.

In a mill case, county court overrules motion to quash the inquisition, proceeds to hear the cause on the merits, and gives leave to build mill and dam; upon appeal to circuit superior court, judgment reversed, inquisition quashed, and judgment for defendant, without prejudice to a future application for a new

ad quod damnum. Held: The circuit superior court ought to have remanded the cause to the county court for further proceedings to be there had.

In the case of *Hunter vs. Matthews*, 1 Rob., 468, 2d edition, 494.

The jury, empannelled under a writ of *ad quod damnum*, awarded on an application for leave to build a mill, having found difficulty in agreeing upon the damages to be assessed for the overflowing of certain land, it is announced by the sheriff that they are not likely to agree on a verdict; whereupon the applicant requests that the jury will make another effort to come to an agreement, saying the business is a tedious and troublesome one, and he is willing to pay whatever damages they may think reasonable. A juror then states that the other jurors wish to assess an amount of damages which he himself thinks too large, and that he is unwilling to concur with them unless the applicant will consent to pay the damages; and he puts the question to the applicant whether he is willing to pay the amount (naming it) which the other jurors have fixed upon. The applicant replies that he is, and this juror thereupon concurring with the others, the inquisition is completed. The communications aforesaid take place openly, before the sheriff and all the jurors, as well as other persons assembled, though the owner of the land to be overflowed is not present at the taking of the inquisition. Held: This is not such an interference of the applicant with the jury as to make it proper to set aside the inquisition.

In the case of *Musie vs. Smith*, 2 Rob., 458, decided November, 1843, it was held: The finding of a jury in such case is merely evidence, and the weight of it, under all the circumstances, a matter for the discretion of the court.

Upon the return of the certificate of the jury that, in their opinion, public convenience would result from the establishment of a proposed ferry, evidence is introduced—

1. Of one of the jurors, who proved that before he was sworn he had made up an opinion that the ferry would be a public convenience; that he thought it probable that he might have expressed this opinion, though he did not recollect to have done so; that he had, before he was sworn, signed a petition for said ferry; and that at the time he was sworn he was uninfluenced by the said opinion, and prepared to render an impartial verdict.

2. Of another juror, who proved the like facts with regard to himself, and also that he had expressed his opinion.

3. Of another juror, who proved the same facts with regard to himself that the second had proved with regard to himself, and also that he had circulated a petition for the ferry.

Upon this evidence the county court quashed the finding of the jury, and the circuit court reversed the judgment of the county court. Held: The judgment of the circuit court is right.

In the case of *Mairs vs. Gallahue*, 9 Grat., 94, decided July 26, 1852, the judgment of the court giving leave to erect a dam provides that the applicant shall keep a ferry-boat at the crossing of a public road over the stream across which the dam is to be erected. Held: This is authorized by the statute (2 Rev. Code, 225, Sec. 5; 1887, Sec. 1353); and as the county and circuit courts have held, upon the proofs, that a ferry-boat at that place will sufficiently remedy any impediment to the crossing of the stream, the court of appeals will presume they acted rightly, nothing being shown to the contrary.

The duty of keeping up the ferry-boat is not merely personal to the grantee of the privilege of erecting the dam, but it is a condition and incident of the grant, and attaches to it into whose hands soever it may come. The kind of boat to be kept must be such an one as the exigencies of the travel and trade on the road shall require. It is the duty of the party required to keep up the ferry-boat to ferry the public over the stream without charge.

In the case of *Ellis vs. Harris's Executor*, 32 Grat., 684, decided February 6, 1880, it was held: In an action by E. against H.'s executors to recover damages for injury to his land by the overflowing and sobbing of his land lying on a stream on which H. had built a dam in 1848, in the county of Louisa, evidence of the effect of a dam in raising the bottom of the stream above the dams in the county of Albemarle is inadmissible.

A person who all his lifetime had been familiar with the effect of the dam upon the channel of a stream, and who had twice superintended the putting up the dam, and was also familiar with its effect upon the channel of the stream when the dam was washed away by the flood, but who was not a millright or a mechanic of any sort, but only a farmer and owner of the mill, is not competent to give witness as an expert as to the effect of a dam upon a stream in another county thirty miles distant.

H., who built the dam, being dead, the plaintiff, E., is not a competent witness to prove anything occurring in the lifetime of H. The executor of H., though a part owner of the land on which the mill was built, is a competent witness in the case.

E. having sued H. in his lifetime for damages to his land from the erection of the dam, and a judgment in that case having been rendered in 1859 in favor of H., in this second suit E. can only recover for damages occasioned by the continuance of the dam subsequently.

E. may recover full damage for all the land owned by him at

the time of the erection of the dam. But for land since acquired by him he can only recover such damages as were not actually foreseen and estimated for by the jury when the dam was built; and the jury must presume that the jury of inquest and the county court did foresee and estimate for all damages which it was then practicable to foresee and estimate for.

SECTION 1354.

In the case of *Rowlett's Executor vs. Moody*, 4 H. & M., 2, decided May 3, 1809, it was held: An order of the court granting leave to erect a mill is valid, though no order be made directing payment of damages found by the inquisition.

In the case of *Young vs. Price et als.*, 2 Munf., 534, decided December 1, 1811, it was held: Under circumstances, the payment of the damages assessed in a mill case ought to be presumed, especially if great length of time has elapsed, during which the owner of the land, to whom such damages were assessed, acquiesced in the building of the mill, without claim or objection on his part.

In the case of *Dimmett et als. vs. Eskridge*, 6 Munf., 308, decided March 3, 1819, it was held: In trespass for destroying a mill-dam erected by the plaintiff, who gives in evidence the transcript of an inquisition upon a writ of *ad quod damnum*, the county court, on the defendant's motion, ought to instruct the jury that it was incumbent upon the plaintiff to erect his dam in the position prescribed in the said inquisition, and if they be satisfied that the said dam was erected in a different position, in consequence whereof a ford across the stream, being a part of a public road legally established, was obstructed and shut up, that such dam was a public nuisance and abatable by the defendants.

In trespass for destroying a mill-dam, if the defendants plead that the said dam was unlawfully erected by the plaintiff in a ford where a public road crossed the stream, whereby the said road and ford were obstructed, to the great damage and nuisance of the citizens of the Commonwealth; and that the defendants, in order to abate the said nuisance peaceably, cut down and removed a part of the said dam; and the plaintiff's reply, that he did not, by erecting the said dam, entirely obstruct the said public road and ford, and that the citizens of this Commonwealth were not altogether prevented from passing the same; whereupon issue being joined, such issue is immaterial, and, after a verdict for the plaintiff, ought to be set aside, and a repleader directed.

In the case of *Hunter vs. Matthews*, 1 Rob., 468, 2d edition, 494, where, upon an application to a county court for leave to erect a mill and dam, the inquisition finds that a certain quantity

of land not belonging to the applicant will be overflowed, and assesses damages to the proprietor, it is erroneous for the judgment granting leave to erect the mill and dam to provide that upon payment of the damages so assessed, the land overflowed shall become vested in the applicant in fee-simple; and upon appeal to the circuit court by the proprietor of the land, that court must reverse the judgment with costs, though the appellee himself suggest the error and move that it be corrected.

The decision in the case of *Pitzer vs. Williams*, 2 Rob., 253, does not construe this section. It is an error. This section was only used in that case as an argument to prove that notice can only be given a fee-simple owner where land is to be taken for public improvements, which position the supreme court held untenable.

SECTION 1358.

In the case of *Commonwealth vs. Farris*, 5 Rand., 691, decided in the General Court November, 1827, it was held: Although leave has been given by the county court to erect a mill according to the provisions of the statute, yet that is no bar to a public prosecution or private action for injuries other than those actually foreseen and estimated by the inquest.

An indictment for a nuisance which concludes to the common nuisance of divers of the Commonwealth's citizens is not sufficient. It ought to be laid to the common nuisance of all the citizens of the Commonwealth residing in the neighborhood; of all the citizens, etc., residing, etc., and passing thereby.

In the case of *Miller vs. Trueheart*, 4 Leigh, 569, decided November, 1833, a mill and mill-dam is erected in 1815, by leave of court, according to the statute concerning mills, etc. The stagnation of the water in the mill-pond proves injurious to the health of the neighborhood, and one of the neighbors thereby injured brings action against the mill-owners and recovers damages at law. About the time of this recovery the mill-dam is carried away and the pond drained, and the mill owners, after the recovery, are proceeding to rebuild the mill-dam, proposing certain expedients to prevent the stagnation of the water from again being injurious to the health of the neighborhood. Held: A court of chancery, upon a bill filed by the person who recovered the judgment at law against the mill owners, may and ought to interfere and enjoin them from rebuilding the dam, unless it shall appear that the expedients proposed by the mill owners will be effectual to prevent the mischief in future, which ought to be ascertained by a jury upon an issue directed for the purpose.

In the case of *Calhoun vs. Palmer*, 8 Grat., 88, decided September 4, 1851, A. gives and conveys to his son B. a lot of land, on which is a mill-seat. B. then applies to the county court for

leave to build a mill and dam, and when the inquest meets on the land A. attends, and when the jury propose to level the stream to ascertain how high B. may be permitted to build his dam, A. tells them he has levelled it, and that B. may be permitted to build a dam twelve feet high without flowing the water on the land of any person but A. ; that such a dam will hurt no one but himself, and he does not believe it will hurt himself. The jury acts upon his opinions and information, and allows B. to build a dam twelve feet high, and reports that it will inflict no damage on any person ; and this inquisition is confirmed by the court, and leave is given to build the dam. B. builds his dam ten feet high. Afterwards he raises the water about six inches by putting boards on the top of the dam, and of this A. complains, and B. takes them off ; and in the ten years that B. keeps the mill he does not attempt to raise the dam. A. becoming embarrassed, B. determines to sell the property to relieve him, and A. adds twenty acres to that owned by B., and they join in the conveyance of the whole to C. After C. takes possession of the mill he ascertains that the inquisition authorized the dam to be built twelve feet high, and he elevates it eight inches, which seriously injures the land of A., which lies immediately above on the stream ; whereupon A. sues C. for the damages occasioned by the raising of the dam. Held :

1. That the inquest and judgment of the court is no bar to an action for damages sustained by A. which were not actually foreseen and estimated by the inquest.

2. That as C. relied on the inquisition and judgment of the court authorizing the dam as the ground of his defence, it is not competent for him to deny the ownership of the land by B. at the time of said proceedings, or to assert the continued ownership of the land by A.

3. That the right of A. to recover damages for the injury arising from raising the dam by C. is not defeated by the conduct of A. at the time the inquest was taken.

4. That the fact that B. did not raise the dam in the first instance to the height authorized by the inquest did not have the effect of precluding him from raising it to the full height authorized by the inquest, provided by so doing he did not occasion injury to others.

5. That A., having united in the conveyance to C., he cannot recover damages against C. for any injury done him by any reflow of the water to the extent the injury existed at the time of the conveyance.

In the case of *S. S. R. R. Co. vs. Daniel*, 20 Grat., 344, decided March 13, 1871, a railroad company has the land of R. condemned for its road, and the commissioners assess the damages, and their report is confirmed, and the company pay the

amount of damages assessed to R. R. sells the land to D. Held: D. may maintain an action against the company for injury done his land since the purchase, which could not be foreseen and estimated by the commission.

In such cases the assessment of damages is only a bar to an action for such injuries as could have been properly included in such assessment. The commissioners are bound that the company will construct its works in a proper manner, and they have no right to award damages upon the supposition that the company will negligently and improperly perform its work. A failure to do so by the company will therefore impose a liability on any one who may sustain any loss or injury by reason of such negligence.

In the case of *Field vs. Brown*, 24 Grat., 74 and 96, decided November 26, 1873. In an action by F. against B. for injury to his land by B. continuing a dam across the stream which had been erected by a previous owner, the defence of B. is that of adversary possession by him and those under whom he claims for more than twenty years. To rebut the presumption arising from the possession, F. may prove what passed between his agent and M., a former occupant of the premises of B., showing that the agent of B. denied the right of M. to raise the dam, and that M. asked it as a privilege for a short time.

Proof of adversary possession for twenty years, such as would create the presumption of a grant, is only presumptive, and not conclusive, and may be rebutted by evidence showing that the adversary use and enjoyment relied on was not acquiesced in, but the right thereto was contested, and any evidence tending to show such resistance is proper evidence to rebut such presumption.

To rebut the defendant's evidence of adversary possession for twenty years under such circumstances as would give him a prescriptive right to a dam across a stream, the record of a suit by the plaintiff against the administrator of a former owner of the premises, under whom the defendant claims, brought within twenty years from the date of the raising of the dam for the injury sustained by the same, and in which the plaintiff recovered damages, is competent evidence for the plaintiff.

Instructions asked by the plaintiff, based upon the assumption that there can be no legal dam across a water-course, unless established by legal proceeding under the act of Assembly, ignoring entirely rights acquired by actual grant, by permission, and by presumptive right, derived from long use and enjoyment, where there is any evidence in respect to such right, were properly refused.

The fact that a dam was built in 1824 by G., and that from that time he and those claiming under him have claimed and

held the possession and use thereof, and of the water-power on the stream afforded by said dam, and used in working the mill, for the use of which it was built, adversely and uninterruptedly as to the plaintiff and those under whom he claims, for twenty years from the building of the dam, is not conclusive of the defendant to continue said possession and use of said dam and mill, but is only presumptive, and may be rebutted by circumstances.

In 1824, G. built a dam across H. river, and that did the land of F. on H. above the dam no injury; but in 1845, G. raised his dam, and that did injure the land of F. F. sues B., who claims under G., for continuing the dam to the injury of his land, and in his declaration recites that G. erected the dam without authority of law. Under this declaration F. may prove that the dam was raised in 1845, and the injury to his land done by raising it.

CHAPTER LXII.

SECTION 1374.

In the case of *Carter vs. Commonwealth*, 2 Va. Cases, 354, decided by the general court, it was held: The discontinuance of a ferry is a penalty which the law attaches to the failure of the ferry-keeper to exercise his privilege of keeping up his ferry. It is not an offence, much less an indictable offence.

SECTION 1375.

In the case of *Zane vs. Zane*, 2 Va. Cases, 63, decided by the General Court, it was held: In an application to the county court to establish a ferry, the applicant should show in his petition that he owns the land either on both sides or on one side of the stream, and that a public road has been established through the land to the place where the ferry is sought to be established. The statute does not authorize the county court to establish a ferry across a stream which is the boundary of the State.

In the case of *Somerville vs. Wimbish*, 7 Grat., 205, decided December 9, 1850, it was held: A ferry franchise in Virginia is the creature of the statute law, and the rights of the owner of the franchise are to be measured by the statute. Though a ferry has been established any length of time across a river, it is competent for the legislature to establish another ferry from the opposite side of the river, to pass along the same line used by the first; and this is no invasion of the franchise of the owner of the first ferry.

The establishment of such a ferry confers upon the owner no title to any portion of the soil on the opposite side of the stream, and no easement there beyond the incidental delegation of such as has been theretofore or may thereafter be acquired

by the public as a highway. *Quære*, if in such a case the ferry franchise will carry with it the privilege of using any public roads on the opposite lands for the purpose of landing or taking in passengers? The order of the county court directing the justices to be summoned to consider the verdict of the jury in ferry cases may be executed by leaving a notice in the mode described in the general law in relation to notices. A person who signed a memorial to the legislature for the establishment of a ferry is not thereby rendered incompetent to act on the jury.

In the case of *Wimbish vs. Breeden*, 77 Va., 324, decided March 29, 1883, it was held: Code 1873, Chapter 64, confers on the county courts jurisdiction to establish ferries; when in any particular case jurisdiction is acquired, the failure of the court in the progress of the case to comply with the statute in details may be error reviewable on appeal, but is no ground to attack the judgment collaterally.

Section 12 of that chapter requires the person desiring to establish a ferry "to own or to have contracted for the use of land at the point at which he wishes to establish the same." Where the lessee of such land, the owner of the equity of redemption therein, and trustees holding the legal title unite in the application, that statute is complied with.

SECTION 1376.

In the case of *Muire vs. Smith*, 2 Rob., 458, decided November, 1843, it was held: The finding of the jury in such a case is merely evidence, and the weight of it, under all the circumstances, a matter for the discretion of the court. Upon the return of the certificate of a jury, that, in their opinion, public convenience would result from the establishment of a proposed ferry, evidence is introduced:

1. Of one of the jurors, who proved that before he was sworn he had made up an opinion that the ferry would be a public convenience; that he thought it probable he might have expressed this opinion, though he did not recollect having done so; that he had, before being sworn, signed a petition for said ferry, and that at the time he was sworn he was uninfluenced by the said opinion, and prepared to render an impartial verdict.

2. Of another juror, who proved like facts with regard to himself, and also that he had expressed his opinion.

3. Of another juror, who proved the same facts in regard to himself that the second had proved with regard to himself, and also that he had circulated a petition for the ferry.

Upon this evidence the county court quashed the finding of the jury, and the circuit court reversed the judgment of the county court. Held: The judgment of the circuit court is right.

SECTION 1381.

In the case of *Trent vs. Cartersville Bridge Company*, 11 Leigh, 521, decided February, 1841, it was held: If a public ferry has been disused for more than three years, though the franchise of the ferry owner has not been declared forfeited on *quo warranto* or other like proceedings, he is not entitled to the aid of a court of equity to prevent others from invading the franchise which he has abandoned by such *non user* under the statute. And it seems he cannot maintain an action at law to vindicate such a franchise so abandoned by *non user*.

SECTION 1386.

In the case of *The Tuckahoe Canal Company vs. The Tuckahoe & James River Railroad Company*, 11 Leigh, 42, decided March, 1840, it was held: A monopoly cannot be implied from the mere grant of a charter to a company to construct a work of public improvement, and to take the profits; to give such monopoly, there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for rival and competing works.

SECTION 1388.

In the case of *Plecker vs. Rhodes*, 30 Grat., 795, decided September, 1878, it was held, p. 801: The General Assembly has the power to authorize an individual to build a toll-bridge over a river.

The act authorizing the building of the toll-bridge authorizes the individual to purchase or condemn the land necessary for the abutments or way to the bridge in the mode prescribed by the law. The act, Chapter 56 of the Code of 1873, is the act to govern the proceeding to condemn the land. And although that act does not refer to toll-bridges, it will be considered as amended by the act authorizing the bridge. When the statute confers the privilege of building the toll-bridge, that determines the question of public convenience, and the only question to be ascertained by the proceedings in the court is the damages to the owners of the land condemned.

The act authorizing the building of the bridge requires that it shall be commenced in six months and completed in two years. The notice to owner of land, of motion to the court for the appointment of commissioners to value the land supposed to be condemned was more than six months after the passage of the act. This notice was not necessary to the commencement of the bridge, and does not, therefore, show that the bridge was not commenced in six months. The completion of the bridge in two years having been hindered by the owner of the land in delaying the work by his appeal from the judgment

of the county court confirming the report of the commissioners, he will not be allowed to set up the forfeiture. It is a matter for the Commonwealth to determine whether the forfeiture shall be enforced.

TITLE XXI.

CHAPTER LXIII.

SECTION 1394.

In the case of *Protestant Episcopal Educational Society vs. Churchman's Repts.*, 80 Va., 718, decided September 25, 1885: Testator, in 1880, bequeathed money to be invested by a fiduciary, giving ample security in safe interest-bearing funds, the interest only to be applied to the use of his legatee during her life, and at her death "the principal and any unexpended interest to be paid to the trustees of the Protestant Episcopal Educational Society of Virginia" (incorporated in 1875), "said bequest to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established." Held: The bequest to the legatee corporation is not null and void, because not absolute for its own use as a corporate body, but in trust to be exclusively used for the trusts therein named, and because those trusts are religious in their character, and too vague and indefinite to be upheld by the law of this State, or to be administered as contemplated by Code of 1873, Chapter 77, Section 2, and is enforceable by the chancery courts of this State.

Corporations may take and hold estates for the use of another, if not for purposes foreign to the objects of their creation; and a devise or bequest to a corporation in trust, if otherwise valid, is not for that reason void. Where in the nature of things a trust is created, it is immaterial that it is not expressly declared in terms.

In a legal sense, a charity is a gift to be applied consistently with the laws, for the purpose of benefiting an indefinite number of persons in any respect whatever, and it is not material that the purpose should be expressly designated as charitable.

As exhibited by the legislation of this State, there has never been any hostility here to bequests for religious uses. This court has never decided that bequests for religious uses were void, for that reason alone.

At common law, chancery courts had jurisdiction to enforce bequests for charitable uses. Statute of 43 Elizabeth did not confer such jurisdiction, but only created an auxiliary remedy by commission, etc. Said statute was local, and never in force here. But if it was general in operation in some respects,

it was not repealed by the act of 1792, but in those respects was preserved by the saving clause of that act. In any event, the act of 1839, Code 1873, Chapter 77, clearly validates and makes enforceable all gifts for such purposes, subject to certain restrictions therein contained.

CHAPTER LXIV.

In the case of *Hardy et als. vs. Wiley et als.*, 87 Va., 125, decided November 20, 1890, it was held: Deed conveying to trustees land on condition that they build thereon, when they thought fit, a church, and permit it to be preached in by certain persons, and to be used "for such other purposes as should be deemed appropriate and necessary to further the cause of Christ," contained no covenant to rebuild on condition that the land revert upon failure of the trustees to maintain the church. A church was built thereon, and used as long as it was fit to use. Held: The trustees may sell the land and invest the proceeds in a parsonage for the same congregation in connection with a new church on a different lot; but it should be sold in accordance with this section for the sale of church property.

SECTION 1396.

In the case of *Claughton et als. vs. MacNaughton*, 2 Munf., 513, decided November 23, 1811, it was held: According to the spirit of the act "concerning the glebe lands and churches within this Commonwealth," passed January 12, 1802, no glebe land was to be considered vacant, and as such liable to be sold, if there was any minister who, in behalf of the Protestant Episcopal Church, had been put into possession, and was the incumbent thereof on that day, whether the persons acted as a vestry, by whom he was inducted, and had been canonically elected, or not.

In the case of *Cheatham's Adm'r vs. Burfoot*, 9 Leigh, 580, decided December, 1838. The glebe land in a parish having been sold by the overseers of the poor under the statute, the proceeds of the sale are paid over, by direction of the freeholders and housekeepers of the parish, to an agent, by them appointed, to invest the same in bank stock. The agent makes the investment, receives the dividend on the stock during his life, and dies without having accounted for such dividends. Then a bill is exhibited against one of his administrators by one of the freeholders and housekeepers of the parish, suing as well for himself as on behalf of the others (of whom he states that he is the duly appointed agent), setting forth the above facts, and praying that the defendant may be decreed to pay to the plaintiff the amount of dividends received by the defendant in his lifetime. On demurrer to the bill, held: The freeholders and housekeepers acquired no property in the proceeds of the

glebe land by the disposition thereof made as aforesaid, and this suit cannot be maintained.

SECTION 1397.

In the case of *Overseers of the Poor of Richmond County vs. Tayloe's Adm'rs*, 1 Va. (Gilmer), 336, decided June 18, 1821, it was held: A charity for the benefit of the poor of a parish was given in trust to the minister and vestry. When there ceased to be either, it was vested in the overseers of the poor for the parish by the act of 1805, and they may recover the charity in equity.

SECTION 1398.

In the case of *Brooke vs. Shacklett*, 13 Grat., 301, decided May 23, 1856, it was held; The act relates only to conveyances, devises, and dedications of property for the use of religious congregations in the local and limited sense of the term, viz., for the members of those religious congregations who, from their residence at or near the place of public worship, may be expected to use it for such purpose. No deed which does not respect the rights of the local society or religious congregation, and no deed which does not design the enjoyment of the uses of the property conveyed by the local religious society or congregation, can be placed within the influence of the statute.

A deed conveying property interest for the use of the local society is not without the operation of the statute by reason that it sanctions the appointment of the ministers, and authorizes them to use the house for preaching, without any reference to the vote or wish of the congregation, it being a Methodist church, and the ministers being appointed by the Conference, according to the constitution of that church.

Deed conveys a house of worship in trust for a local religious congregation, and provides that the trustees are at all times to permit the ministers belonging to the Methodist Episcopal Church, who shall be duly authorized by the conferences of the church, to preach in the house. Upon a question of the right of a minister to preach in the house, that question is to be determined by inquiring not whether he represents the wishes of a majority of the members of the society, but whether he has been appointed and assigned to the society in accordance with the laws of the church.

The General Conference of the Methodist Episcopal Church in the United States had the constitutional power to adopt the plan for the separation of the church adopted in 1844.

A society of the church, which, according to the plan of separation, is a border society, having, by a majority of its members, resolved to adhere to the Methodist Episcopal Church, South, is entitled to the use of the church house in exclusion of those

who repudiate the authority of said church and refuse to receive the pastors appointed by it.

In the case of *Hopkinson et als. vs. Pusey, et als.*, 32 Grat., 428, decided November, 1879, it was held: The Baltimore Conference of the Methodist Episcopal Church having in its meeting in 1845 declared its adherence to the Methodist Episcopal Church, could not afterwards in 1861 secede from that church, so as to entitle it to the benefit of the plan of division adopted in the General Conference of the church in 1844, though in 1866 it united with the Methodist Episcopal Church, South.

Except as to the border circuits of the church, the division of the churches of which is provided by the plan of 1844, the property in the churches, etc., of the congregations within the bounds of the Baltimore Conference, properly belongs to the churches in connection with the Baltimore Conference composed of those members of that conference who refused to concur in the action of the conference in 1862, and continued to adhere to the Methodist Church.

The Harmony church, in Loudoun county, was not a border church, and the plan of division in 1844 did not apply to it, and though a majority of members of that church decided to go with the Baltimore Conference, South, the other party remaining in connection with the Baltimore Conference are entitled to the possession of the church property.

In the case of *Boxwell et als. vs. Affleck et als.*, 79 Va., 402, decided September 25, 1884. In 1854, N. devised after C.'s death a house and lot at B. to the trustees of the Methodist Episcopal Church at B. for the use of said church. B. was in the limits of the Baltimore Conference, then attached to the Methodist Episcopal Church, but afterwards in 1866 attached to the Methodist Episcopal Church, South. In 1876 a joint commission, appointed by the general conferences of the two churches, awarded this house and lot to the Methodist Episcopal Church, South. C., the life tenant, died in 1881. Upon a bill by the trustees of the Methodist Episcopal Church, South, at B., to determine the title to this house and lot, held: Baltimore Conference by its said action in 1866 did not become entitled to the benefit of the plan of division adopted in the General Conference of the church in 1844.

The devise was to a particular congregation of the Methodist Episcopal Church, and hence was valid. It was not to that church in a general sense. If it had been, it would have been invalid.

The General Conference of the Methodist Episcopal Church had no power, directly or indirectly, to transfer the property of the said congregation of the Methodist Episcopal Church at B. to the Methodist Episcopal Church, South. Hence the joint commission at Cape May had no power to make such award.

In the case of *Protestant Episcopal Educational Soc. vs. Church-*

man's Reps. 80 Va., 718, decided September 25, 1885, testator in 1880 bequeathed money to be invested by a fiduciary, giving ample security in safe interest-bearing funds, the interest only to be applied to the use of his legatee during her life, and at her death "the principal and any unexpended interest to be paid to the trustees of the Protestant Episcopal Educational Society of Virginia" (incorporated in 1875), "said bequest to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established." Held: The bequest to the legatee corporation is not null and void, because not absolute for its own use as a corporate body, but in trust to be exclusively used for the trusts therein named, and because those trusts are religious in their character, and too vague and indefinite to be upheld by the law of this State, or to be administered by a court of chancery, even if merely educational as contemplated by the Code 1873, Chapter 77, Section 2, the bequest is not contrary to public policy, but is valid both at common law and under Code 1873, Chapter 77, and is enforceable by the chancery courts of this State.

SECTION 1399.

For the reference to 32 Grat., 428, see *supra* Section 1398.

In the case of *Wade et als vs. Hancock & Agee*, 76 Va., 620.

4. *Idem.*—Statutory.—In summary proceedings under Code 1873, Chapter 76, Section 9, circuit courts have jurisdiction to appoint, change, and remove church trustees; but not to determine how they shall administer their trust.

5. *Idem.*—*Idem.*—Appointment, change, and removal of trustees, under that section, must be "on application of the proper authorities of the congregation," and not of any volunteer.

SECTION 1400.

In the case of *Finley et als. vs. Brent et als.*, 87 Va., 103, decided November 20, 1890, it was held: Act of February 18, 1867 (Acts 1866-'67, p. 649), when applied to property theretofore granted in trust for a particular congregation, alters the terms of the trust and impairs the obligation of the contract, and is repugnant both to the Federal and State Constitutions.

SECTION 1405.

In the case of *Linn et als. (Trustees) vs. Carson's Administrator et als.*, 32 Grat., 170, decided September, 1879, it was held, p. 182: The act, Chapter 76, Sections 12, 13, Code of 1873, does not prohibit the sale of church property for the payment of debts incurred in the purchase thereof, or to reimburse a party who has advanced money or made himself liable for any such debts at the instance of the trustees of the church, and the

discipline of the church authorizing parties so advancing money on account of such property to raise said sum of money by mortgage or sale, a court of equity will, at the suit of a party so liable or so advancing money, subject the lot and buildings to sale for the purpose of satisfying the claim.

SECTION 1408.

In the case of *Linn et als. (Trustees) vs. Carson's Administrator et als.*, 32 Grat., 170, decided September, 1879, it was held, p. 182: The act, Chapter 76, Sections 12, 13, Code of 1873, does not prohibit the use of church property for the payment of debts incurred in the purchase thereof, or to reimburse a party who has advanced money or made himself liable for any such debts at the instance of the trustees of the church; and the discipline of the church authorizing parties so advancing money on account of such property to raise said sums of money by mortgage or sale, a court of equity will, at the suit of a party so liable or so advancing money, subject the lot and buildings to sale for the purpose of satisfying such claim.

TITLE XXII.

CHAPTER LXV.

SECTION 1420.

In the case of *Protestant Episcopal Educational Society vs. Churchman's Reps.*, 80 Va., 718, decided September 25, 1885. Testator in 1880 bequeathed money to be invested by a fiduciary, giving ample security in safe interest-bearing funds, the interest only to be applied to the use of his legatee during her life, and at her death "the principal and any unexpended interest to be paid to the trustees of the Protestant Episcopal Educational Society of Virginia" (incorporated in 1875), "said bequest to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established." Held: The bequest to the legatee corporation is not null and void, because not absolute for its own use as a corporate body, but in trust to be exclusively used for the trusts therein named, and because those trusts are religious in their character, and too vague and indefinite to be upheld by the law of this State, or to be administered by a court of chancery, even if merely educational, as contemplated by Code of 1873, Chapter 77, Section 2. The bequest is not contrary to public policy, and, under Code of 1873, Chapter 77, is enforceable by the chancery courts of this State.

CHAPTER LXVI.

SECTION 1429.

In the case of *Childrey et als. vs. Rady et als.*, 77 Va., 518, decided May 11, 1883, it was held: Constitution, Article 8, Section 2, constitutes the governor, attorney-general, and superintendent of public instruction, a board of education for the State. Act approved 11th July, 1870 (Code, 1873, Chapter 78, Section 7, clause 4), empowers this board to appoint and remove district school trustees, until otherwise provided, and applies as well to cities and towns as to counties.

In the case of *Kilpatrick et als. vs. Smith et als.*, 77 Va., 347, decided March 29, 1883, it was held: Article 9, Section 2, of the Constitution provides for a board of education, composed of the governor, superintendent of public instruction, and attorney-general, and prescribes its duty; and section directs that the General Assembly shall make all needful rules and regulations to carry into effect the public free school system provided for by this article.

Acts 1869-'70, Chapter 259, Section 2, declares that the public free school system shall be administered by a board of education, a superintendent of public instruction, county superintendent of schools, and district school trustees; and Section 7 prescribes the duties of the board of education; among which is that of appointing and removing district school trustees, until otherwise provided.

SECTION 1437.

In the case of *Pendleton vs. Miller*, 82 Va., 390, decided September 16, 1886, it was held: The office of these superintendents is a constitutional office, and the term of office is fixed by the State Constitution at four years.

The joint resolution approved February 26, 1886, is repugnant to the Constitution, and void. This is the case cited from 10 Virginia Law Journal, 606.

In the case of *Roller vs. Jordan*, 10 Virginia Law Journal, 628, decided October 8, 1886: On June 7, 1883, Roller was appointed superintendent of schools for Augusta county, and held the office until July 1, 1886, when Jordan, who was appointed thereto on March 20, 1886, took possession thereof, upon petition for *mandamus* by R. to recover the office. Held: Under the repeated decisions of this court, Roller was appointed to fill the unexpired term ending June 30, 1885, and since that time has been a mere *locum tenens*, holding by virtue of the constitutional provision which allowed him to hold until his successor was appointed and qualified.

Jordan is entitled to hold the unexpired portion of the term, which began July 1st and will end June 30, 1889; his appoint-

ment is valid (the board of education having authority to fill vacancies), notwithstanding the appointment was made under the joint resolution of February 26, 1886, which was held to be null and void in *Pendleton vs. Miller*, 11 Virginia Law Journal, 606.

SECTION 1441.

In the case of *Stewart & Palmer vs. Thornton et als.*, 75 Va., 215, decided January 20, 1881, it was held: The county school boards are, by act of assembly, constituted a corporation, and a suit to recover a fund belonging to the corporation must be brought in its corporate name. A suit by persons styling themselves the directors of the county school board of their county cannot be maintained.

SECTION 1453.

In the case of *Owens vs. O'Brien et als.*, 78 Va., 116, decided December 6, 1883, it was held: Such trustees are required to take and subscribe the oath of office as a condition precedent to entering on the discharge of their official duties, and their failure to take it within the prescribed time, vacates their trusteeship. If the city council fails to act within the time prescribed, it becomes the duty of the board of education to appoint, and such appointees constitute the lawful trustees of the city.

SECTION 1455.

In the case of *Kilpatrick et als. vs. Smith et als.*, 77 Va., 347, decided March 29, 1883, it was held: Article 9, Section 2, of the Constitution provides for a board of education, composed of the governor, superintendent of public instruction, and attorney-general, and prescribes its duty, and this section directs that the General Assembly shall make all needful rules and regulations to carry into effect the public free school system provided for by this article.

Acts 1869-'70, Chapter 259, Section 2, declares that the public free school system shall be administered by a board of education, a superintendent of public instruction, county superintendent of schools, and district school trustees; and Section 7 prescribes the duty of the board of education, among which is that of appointing and removing district school trustees until otherwise provided.

In the case of *Childrey et als. vs. Rady et als.*, 77 Va., 518, decided May 11, 1883, it was held: School trustees are officers, and as such are embraced by the Constitution. Article 8, Section 6, declaring that "all persons, before entering upon the discharge of any functions as officers of this State, must take and subscribe the following oath or affirmation." This oath is a condition precedent to the discharge of official duties as school trustees, and failure to take this oath causes a vacancy, which,

unless filled by the city council within the prescribed period, must be filled by the board of education.

The case of *Childrey et als. vs. Rady et als.*, here referred to, construes a statute now repealed.

CHAPTER LXVII.

SECTION 1523.

The case of *McLeer et als. vs. Caldwell et als.*, 77 Va., 596, does not construe this section, but is ruled by it.

SECTION 1528.

In the case of *Childrey et als. vs. Rady et als.*, 77 Va., 518, decided May 11, 1883, it was held: School trustees are officers, and as such are embraced by the Constitution. Article 8, Section 6, declaring that "all persons, before entering upon the discharge of any functions as officers of this State, must take and subscribe the following oath or affirmation." This oath is a condition precedent to the discharge of official duties as school trustees, and failure to take this oath causes a vacancy, which, unless filled by the city council within the prescribed period, must be filled by the board of education.

In the case of *Kilpatrick et als. vs. Smith et als.*, 77 Va., 347, decided March 29, 1883, it was held: Acts 1870-'71, Chapter 308, Section 3, makes each city ward a school district. Section 7 provides that all vacancies may be supplied at any time within sixty days after occurrence by the city council, which shall divide the trustees into three classes, to hold office one, two, and three years respectively, and enacts that, "should the city council in any case fail to act within the time prescribed, it shall be the duty of the board of education to fill the vacancy or vacancies without further delay."

CHAPTER LXVIII.

CHAPTER LXIX.

SECTION 1563.

In the case of *Frazier vs. Military Institute*, 81 Va., 59, decided October 8, 1885, it was held: The corporate name of the institute at Lexington is, "The Virginia Military Institute."

CHAPTER LXX.

CHAPTER LXXI.

CHAPTER LXXII.

CHAPTER LXXIII.

SECTION 1651.

In the case of *Lewis et als. vs. Whittle et als.*, 77 Va., 415,

decided April 19, 1883. In 1854 the Medical College of Virginia was incorporated with a board of nineteen visitors, named in the charter, and required to make annual reports to the second auditor. Power was reserved by the legislature to modify, alter, or repeal the charter at pleasure. An appropriation of \$30,000 was made to the college in 1860, in consideration that it convey all its property to the literary fund. The conveyance was made. In 1866 an appropriation of \$1,500 was made, and a like sum has been annually appropriated since then. The charter empowers the governor to fill any vacancy which may occur in the board by reason of death, resignation, or otherwise. In 1882 the governor removed the entire board of visitors and appointed a new board. The former refused to surrender, and on the petition of the latter for a writ of *mandamus*, held :

1. The college is a public corporation.
2. The visitorial authority is in the State.
3. The power of removing and appointing the visitors is reserved in the charter to the legislature, and has not been granted to the governor.
4. To him has been given only the power to fill vacancies which may occur by reason of death, resignation, or otherwise, but not to remove, and so create a vacancy in order to fill it.
5. There is no such thing in this State as a visitor holding, as in England, by life-tenure.

CHAPTER LXXIV.

TITLE XXIII.

CHAPTER LXXV.

SECTION 1669.

In the case of *Miller vs. Rutledge et als.*, 82 Va., 863, decided February 10, 1887, it was held: The legal presumption is that all men are sane. The burden of proof is on the allegor of insanity. Legal competency to act is the possession of mental capacity sufficient to transact one's business with intelligence and understanding of what he is doing. Mere weakness of understanding is no objection to a man's disposing of his own property. The test of legal capacity is said to be that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the objects of his bounty; the particular act being attended with the consent of his will and understanding.

In the case of *Porter et als. vs. Porter et als.*, 89 Va., 118, decided June 16, 1892, it was held: The legal presumption is that

all men are sane, and the burden of proof is on him who alleges unsoundness of mind in an individual. *Miller vs. Rutledge*, 82 Va., 867, "Mere weakness of the understanding is no objection to a man's disposing of his own estate." *Beverly vs. Walden*, 20 Grat., 147, "The testimony of witnesses present at the *factum* is more to be relied on than the witnesses based upon facts which may be true, and yet not be the result of unsoundness of mind."

SECTION 1688.

In the case of *Statham vs. Blackford (Superintendent) et als.*, 89 Va., 771, decided March 22, 1893, where a lunatic, who has been confined in an asylum, is released temporarily for her improvement, and after such release completely recovers, *mandamus* will lie against the superintendent of such asylum to grant her a certificate of discharge without her return to the asylum for examination.

Where the superintendent claims the right to retake the lunatic, and it is at the home of herself and all the parties that the apprehended act will be done, held: That *mandamus* proceedings for her discharge are properly commenced in the court at the place of her home.

SECTION 1697.

In the case of *Harrison vs. Garnett*, 86 Va., 763, decided April 3, 1890, it was held: A circuit court has no jurisdiction to adjudge a person insane. When once a person has been adjudged by a county or corporation court, or the justices before whom he is examined, the circuit court has concurrent jurisdiction with such court to appoint a committee for the lunatic.

SECTION 1698.

See the case of *Harrison vs. Garnett*, 86 Va., 763, cited *supra* Section 1697.

SECTION 1700.

In the case of *Harrison vs. Garnett*, 86 Va., 763, decided April 3, 1890, it was held: A circuit court has no jurisdiction to adjudge a person insane. When once a person has been adjudged by a county or corporation court, or the justice before whom he is examined, the circuit court has concurrent jurisdiction with such court to appoint a committee for the lunatic.

SECTION 1701.

In the case of *Bolling vs. Turner*, 6 Rand., 584, decided December 13, 1828, it was held: A committee of a lunatic, appointed by the chancellor, is a mere commissioner of the court, managing the personal estate of the lunatic under the direction of the chancellor, and is responsible to the court as a receiver,

removable in its discretion, and not liable to be sued at law on claims either against the lunatic himself or his estate, as in the case of a committee appointed under the statute.

SECTION 1702.

In the case of *Bird's Committee vs. Bird*, 21 Grat., 712, decided January, 1872, it was held: Where there is a committee of a lunatic, every suit respecting the person or the estate of the lunatic must be in the name of the committee.

But where no committee of a lunatic has been appointed, or where the committee appointed has been removed for an account, and he objects to the parties, the court may make an order for the cause to proceed in the name of the lunatic by some fit person as her next friend, if the one mentioned in the bill is not such an one; or the court may direct the appointment of a committee, and the amendment of the bill by making such committee a co-plaintiff or defendant in the suit.

In such a case, if the defendant does not make such an objection in the court below, and there is an account and decree against them, the appellate court will consider that he has waived the objection, and will not reverse the decree on that account.

In 1836, the committee of a lunatic receives her estate, which consists principally of money, and he does not invest it, but retains it in his own hands. During the war he pays her expenses in Confederate money. These payments are to be scaled as of the date of payment.

Where a committee of a lunatic is charged in his account with the annual interest on the money of the lunatic in his hands, he is entitled to his commission upon such interest.

Whatever may be the correct general rule under the circumstances of the case, interest should be charged upon interest.

In the case of *Cole's Committee vs. Cole's Administrator*, 28 Grat., 365, decided March, 1877, W., committee of a lunatic, C., settled his account in 1858, which showed him indebted to C. in the sum of \$1,761.72. In 1863 W. again settled his account, showing a balance against him of \$1,394.71, as of the 1st of November, 1863, the only charges against him in this account being the balance of the previous account. In March, 1864, upon the petition of W., the judge of the circuit court made an order authorizing him to invest the amount of one thousand dollars in Confederate or State bonds, and in the same month W. deposited this sum with the treasurer of the Confederate States, and received a certificate showing he was entitled to receive a 4 per cent. bond of the Confederate States; but it does

not appear that the bond was ever issued. Held: The money in the hands of W. having been received in good money, the order of the judge was not authorized by the statute, and W. must account for it in good money.

The commissioner, in settling the account of W., makes two statements, the only difference in them being that in one he gives W. credit for the one thousand dollar Confederate bond, and in the other he omits it; and he refers the question of W.'s rights to the credit of the court. The court adopts the statement, giving him the credit, and decrees accordingly. On appeal, held: An exception to the report was not necessary, and the appellate court may direct the decree.

The accounts settled in 1858 and 1863 speak of W. as trustee of C., but in the account by the commissioner he is treated as committee of C. There having been no exception to the report for bringing into the latter account the charges in the first two, W.'s administrator cannot object to the report on this ground in the appellate court, he not having excepted in the circuit court.

A bill says: "Your complainant, C., who, being a person of unsound mind, sues by his next friend and committee, A." It will be considered and treated as a suit by the committee.

In the case of *Creigler's Committee vs. Alexander's Executor*, 33 Grat., 674, decided September, 1880, it was held: As a general rule, a committee of a lunatic is only to be charged simple interest upon the balances found against him on a settlement of his account.

A committee of a lunatic, who qualified as such in 1838, and continued to act until his death, in 1875, and did not settle his accounts, is not entitled to commissions on his receipts from 1838 to 1859, and the statute of March 3, 1867 (Code of 1873, Chapter 128, Section 9), is not retrospective in its operation, and therefore the court has no authority to allow said commissions under that act.

In the case of *Hauser (Guardian ad litem, &c.) vs. King et als.*, 76 Va., 731. (P. 736.)

Idem.—Voluntary Release—Case at Bar.—Insolvent committee of lunatic sister made a trust deed to secure, first, D. and A., his sureties in his bond as committee, and J., his surety, in debt to C.; afterwards other debts. Lunatic was supported by committee, who received her estate, but charged her no board. Reasonable charge for board would absorb her estate and leave no liability on the sureties on his bond. J. died insolvent without paying anything on the debt for which he was surety. On bill to distribute the trust funds, held: Committee was entitled, under Code of 1873, Chapter 82, Section 48, to apply lunatic's personality to her support so far as necessary; and having maintained her out of his own means, has a claim against her

own estate for his reimbursement, which claim he has no right to release, and thus put a burden on the sureties on his bond.

In the case of *Pannill's Adm'r vs. Calloway's Committee et als.*, 78 Va., 387, decided January 31, 1884, it was held: In 1847, J. was appointed committee for G., a lunatic, by an order of the circuit court of H. county. In 1853, P. was, by an order of the county court of said county, appointed committee of said lunatic, so far only as his interest in a certain estate was concerned, and, with two sureties, executed bond; and this order was never reversed, and under it P., as such committee, possessed himself of the lunatic's estate. Held: In 1853 the county court was a court of general jurisdiction, and invested by law with special jurisdiction over the persons and estates of lunatics. Neither the committee nor his sureties can in another proceeding object that the order was void. It might be different if the lunatic objected to the legality of the appointment of the committee. Whatever estate of the lunatic the committee received by virtue and under color of his appointment he is liable for. If one assume to act as a trustee in relation to trust property without just authority, he shall be held liable as if he had been lawfully appointed. J., the committee of G., who had been appointed by the circuit court, was largely indebted, and procured judgment and execution to be obtained against him by J. through H., his next friend, and on the execution slaves and other personal property were received with the approval of H. by P., who had been appointed committee of J. as to a certain estate only by the county court, which slaves, etc., were not converted to P.'s own use, but were lost by the results of the late war. Held: Under the circumstances of this case P. and his sureties cannot be held liable for said slaves, etc. So far as any of the property received by P. on the execution was converted to his own use, he and his sureties are liable. The estate of the committee should be first exhausted before that of his sureties is touched for money for which he is officially liable.

In the case of *Paxton vs. Stuart et als.*, 80 Va., 873, decided October 8, 1885, it was held: Pending a suit against a lunatic represented by his committee, the lunatic dies, the committee *ipso facto* becomes *functus officio* and the suit abates, and must be revived and proceed in the same name of the lunatic's personal representative and heirs, and all the proceedings had after lunatic's death and before such revival, are void.

SECTION 1703.

See the case of *Paxton vs. Stuart et als.*, 80 Va., 873, cited *supra*, Section 1702.

TITLE XXIV.

CHAPTER LXXVI.

SECTION 1719.

In the case of *The City of Richmond vs. Supervisors of Henrico*, 83 Va., 204, decided April 21, 1887, it was held: A municipal government "establishes" a hospital by purchasing, according to the then existing law, a farm and the buildings on it specially for that purpose. This is the case cited from 11 Virginia Law Journal, 651.

SECTION 1721.

In the case of *The City of Richmond vs. Long's Administrator*, 17 Grat., 375, decided April 18, 1867, it was held: The city of Richmond is not responsible for the loss of a slave admitted to the city hospital, on the grounds of the negligence of its agents at the hospital.

CHAPTER LXXVII.

CHAPTER LXXVIII.

CHAPTER LXXIX.

CHAPTER LXXX.

TITLE XXV.

CHAPTER LXXXI.

SECTION 1788.

In the case of *Atlantic & Virginia Fertilizing Company vs. Kishpaugh*, 32 Grat., 578, decided December, 1879, it was held: The acts in relation to the inspection, labelling, etc., of fertilizers, are not in conflict with this section and are in force in this State.

In the case of *Niemeyer et als. vs. Wright*, 75 Va., 239, decided January 27, 1881, it was held: A statute containing a prohibition and a penalty makes the acts which it punishes unlawful; and the same may be implied from a penalty without a prohibition. But it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. Conceding the general rule to be as above stated, the mere imposition of a penalty by a statute for doing or omitting to do an act, does not of itself in

every case necessarily imply an intention by the legislature that every such contract in contravention of the statute shall be void in the sense that it is not to be enforced in a court of justice. The acts of March 29, 1871 (Code of 1873, Chapter 227), and of March 29, 1877 (Acts of 1876-'77, Chapter 249), which requires under heavy penalties certain things to be done by persons selling commercial manures, does not avoid the contract for such sale; and a party selling the said manures may recover upon such contracts in an action at law, though he has not complied with the directions of the statutes.

SECTION 1789.

In the case of *Blanton (Commissioner) vs. Southern Fertilizer Company et als.*, 77 Va., 335, decided March 29, 1883, it was held: Chapter 249, Acts 1876-'77, establishing the department of agriculture, and empowering the commissioner of agriculture to make all necessary rules and regulations for carrying out the intentions of the act, does not authorize him to levy a tax upon manufacturers and sellers of fertilizers for the purpose of raising money for the use of the department, in the shape of the charge on tags, as required by rule number two, or of any charges on such tags. But the commissioner has power to enforce the use of a tag to be attached to each package of fertilizer, showing that the same is registered in the department, without any charge therefor. Hence the statute changing the law.

CHAPTER LXXXII.

CHAPTER LXXXIII.

SECTION 1797.

In the case of *Glass vs. Davis et als.*, 23 Grat., 184, decided March, 1873, it was held: Under the first proviso to the second section of the act of April 29, 1867, in relation to inspection of tobacco (Session Acts, 1866-'67, p. 967), the owners of a public warehouse may close it as such, at any time, in the mode therein prescribed. And thereupon the authority of the inspector ceases, and their lease of the warehouse terminates.

The owners of a public warehouse may close it on a certain day and open it on the same day as a private warehouse, where everything is to be done as in public warehouses, except the inspection of tobacco.

SECTION 1816.

In the case of *Thweat & Hinton vs. Finch*, 1 Washington, 217, decided at the fall term, 1793, the court held: Inspectors are liable to the owner for tobacco delivered to them, though removed by a stranger on a forged order. The declaration

need not show that the inspectors were public inspectors, and the warehouse to be established by law.

In the case of *Commonwealth vs. Colquhouns*, 2 H. & M., 213, decided April, 1808, it was held: The Commonwealth cannot be compelled to make good the loss of tobacco received, inspected, and passed at a public warehouse, but not delivered by the inspectors on application to the persons holding the notes; notwithstanding the same was unlawfully converted to their own use by the inspectors, or is otherwise missing and unaccounted for, and the inspectors are insolvent.

In the case of *Page (Governor) vs. Peyton*, 2 H. & M., 566, decided May 25, 1808, it was held: An action may be maintained on the inspector's bond, in the name of the governor, for the benefit of a person injured by the non-delivery of tobacco, although the law directs the original bond to be transmitted to the treasurer, and is silent as to the prosecution of suits thereon; the person injured in such case having his option either to bring such suit or an action in his own name against the inspectors for the penalty (imposed by the law) of double the value of the tobacco.

In the case of *Thweatt's Administrator vs. Jones' Administrator, &c.*, 1 Rand., 328, decided March, 1823, it was held: In equity, contribution may be claimed by one inspector of tobacco against his co-inspector for the amount of a judgment had against the former, for failing to deliver the tobacco when legally demanded, which judgment he has discharged when the failure does not proceed *ex maleficio*, or from some actual fraud or voluntary wrong. But it is incumbent on the party asking relief to show that he is innocent of such imputations.

CHAPTER LXXXIV.

SECTION 1864.

In the case of *Delaplane vs. Crenshaw & Fisher, Same vs. Haxall, Crenshaw & Co.*, 15 Grat., 457, decided January, 1860, it was held: The inspector of flour is bound to inspect it by boring through the head of the barrel with an auger not exceeding a half inch in diameter.

An inspector of flour refusing to inspect flour by boring through the head of the barrel with a half-inch auger will be compelled to do it by *mandamus* from the court.

SECTION 1878.

In the case of *Delaplane vs. Crenshaw & Fisher, Same vs. Haxall, Crenshaw & Co.*, 15 Grat., 457, it was held: If there could be in Virginia a legal valid usage or custom, the effect of which is to operate *per se* as an exception to the general rule of the common law, a usage or custom for the inspector of flour,

who by the statute is to receive a specified money compensation, and to take to his own use the flour drawn from the barrel in the process of inspection, called a draft flour, as an additional compensation or perquisite, would be bad, as being unreasonable, unjust, and contrary to the policy of the law.

Although a custom when otherwise good may override and displace the common law rule, yet a statute introducing a new principle, with a negative either express or necessarily implied, must be strictly pursued, and no custom can be set up against it.

A custom for the inspector of flour to take the draft flour, may have existed longer than the memory of any living man, yet, as the statute shows the commencement of the inspection of flour in Virginia, and as this period is within the limitation prescribed for the commencement of a custom, the custom is bad.

The doctrine of presumptions cannot be applied to this custom, because (1), The presumption is repelled by the evidence; and (2), Because the doctrine of presumption can only apply to things in grant, and where there is a party by whom the grant could be made as well as one to receive it.

There is no customary law in Virginia which *per se* can vest a party claiming under it.

If a custom had been organized by a statute, either expressly or by necessary implication, it will thereby receive vitality, and the right claimed under it may be asserted as conferred by the statute.

The act, Code, chapter 88, p. 413, does not recognize, either expressly or by implication, the right of the inspector to take the draft flour, or to use an auger or trier more than half an inch in diameter.

The act having directed that an auger of not more than a half of an inch in diameter shall be used in inspecting flour, a custom to use a larger auger is bad, though the inspector says he cannot execute his duty satisfactorily with an auger of the size prescribed by the statute.

The inspector of flour is bound to inspect it by boring through the head of the barrel with an auger not exceeding half an inch in diameter.

An inspector of flour refusing to inspect flour by boring through the head of the barrel with a half-inch auger, he will be compelled to do it by *mandamus* from the court.

The evidence of a member of the legislature is inadmissible to prove the knowledge of the members as to the existence of the custom of the inspector to take the draft flour, when the statute was enacted by them for the purpose of ascertaining the true meaning of the statute.

In a civil suit (whatever may be the law in a criminal case),

after the judge presiding at the trial has given an instruction to the jury the counsel should not be allowed to discuss before the jury the same matter which the court has already decided.

SECTION 1891.

In the case of *Atlantic & Virginia Fertilizer Company vs. Kishpaugh*, 32 Grat., 578, decided November, 1879, Section 48 of Chapter 86 of the Code of 1873, and those sections following in relation to the inspection, labelling, etc., of fertilizers, are not in conflict with the provisions of the act approved March 29, 1877, entitled, "an act to establish a department of agriculture, mining and manufacturing for the State" (Acts 1876-'77, p. 240); are not repealed by the last named act; and are in force in this State. The Atlantic & Virginia Fertilizer Company were the manufacturers of a fertilizer which was labelled on the bags containing it: "Eureka, two hundred pounds ammoniated bone superphosphate of lime," and which was sold by its agents to different parties, some of whom gave their negotiable notes, with Kishpaugh as endorser of the same. The notes were not paid, and in an action of debt by the company against Kishpaugh his sole defence under the plea of *nil debet* was, that the labels on the bags were not in conformity with the statute (Section 48, Chapter 86, Code of 1873), and that consequently the sales made to the makers of the notes for whom he was endorser were illegal and void. Held: The label aforesaid was a sufficient compliance with the terms of the statute, and that the company is entitled to recover on said notes given for the price of said fertilizers.

In the case of *Niemeyer et als. vs. Wright*, 75 Va., 239, decided January 27, 1881, it was held: A statute containing a prohibition and a penalty makes the acts which it punishes unlawful; and the same may be implied from a penalty without a prohibition. But it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. Conceding the general rule to be as above stated, the mere imposition of a penalty by a statute for doing or omitting to do an act does not of itself, in every case, necessarily imply an intention by the legislature that every such contract in contravention of the statute shall be void in the sense that it is not to be enforced in a court of justice. The acts of March 29, 1871 (Code of 1873, Chapter 227), and of March 29, 1877 (Acts of 1876-'77, Chapter 249), which require under heavy penalties certain things to be done by persons selling commercial manures, does not avoid the contract for such sale; and a party selling the said manures may

recover upon such contracts in an action at law, though he has not complied with the directions of the statutes.

In the case of *Blanton (Commissioner) vs. Southern Fertilizing Co. et als.*, 77 Va., 335, decided March 29, 1883, it was held: Chapter 249, Acts 1876-'77, establishing the department of agriculture, and empowering the commissioner of agriculture to make all necessary rules and regulations for carrying out the intentions of the act, does not authorize him to levy a tax upon manufacturers and sellers of fertilizers for the purpose of raising money for the use of the department in the shape of the charge on tags, as required by rule No. 2, or of any charges on such tags. But the commissioner has power to enforce the use of a tag to be attached to each package of fertilizer showing that the same is registered in the department without any charge therefor.

CHAPTER LXXXV.

CHAPTER LXXXVI.

CHAPTER LXXXVII.

TITLE XXVI.

CHAPTER LXXXVIII.

CHAPTER LXXXIX.

CHAPTER XC.

CHAPTER XCI.

SECTION 2004.

In *Ex parte Poole et als.*, 2 Va. Cases, 276, decided by the General Court, it was held: A seaman who signs a contract to perform a voyage is bound to specific performance, and may not elect to pay damages for a breach of it, and the master may, by the maritime law, pursue and bring back his seaman who deserts.

CHAPTER XCII.

SECTION 2007.

In the case of *Groner et als. vs. City Council of Portsmouth*, 77 Va., 488, decided May 10, 1883, it is well settled that a general grant of power carries with it the necessary means to effectuate the purpose of the grant.

Act approved March 3, 1882, Session Acts 1881-'82, page 216, entitled, "An act creating a board of harbor commissioners of Norfolk and Portsmouth," provides that the governor shall appoint seven commissioners, and defines their duties; that

material excavated in the harbor shall be deposited in a designated place; that rules and regulations be made to preserve the harbor; that to defray the expenses there shall be assessed on Norfolk county two-sevenths, on Norfolk city three-sevenths, and on Portsmouth two-sevenths of the estimate. The commissioners designated such a place, and to enforce the deposit there, employed an "inspector of dumping" at \$60 a month salary. In their assessment \$750 was included to pay that salary. Portsmouth admitted that the amount was reasonable, yet refused to pay any part of the assessment, on the ground that the employment of the inspector is unauthorized by law. The testimony shows that his employment is essential to enforce the regulation, and to prevent the obstruction of the approaches to the harbor. Held: The board hath lawful authority to appoint such inspector, and to assess the sum necessary to pay his salary upon the city of Portsmouth, ratably with the county and the city of Norfolk, and the *mandamus* is awarded as prayed for.

TITLE XXVII.

CHAPTER XCIII.

CHAPTER XCIV.

CHAPTER XCV.

CHAPTER XCVI.

SECTION 2091.

In the case of *Alexandria & Fredericksburg Railway Company* vs. *Faunce*, 31 Grat., 761 and 764, decided March, 1879, F. leased from Mrs. O. the land and a fishery in the Potomac River, where the tide ebbed and flowed, with all the privileges attached thereto, for five years, at a rent of \$500 a year. He built the necessary buildings and cleaned out the fish berth, and was largely engaged in carrying on the fishery. Pending the lease the Alexandria and Fredericksburg Railroad Company, upon proceedings against O., had the land for their road-bed condemned, and paid into court the damages assessed. In building the road the company made an embankment along the line of the river, pulling down some of F.'s buildings, throwing obstructions into the fish berth, and materially damaging the fishery. In an action by F. against the company to recover damages for the injury done to him, held: The legislature has frequently recognized the rights of owners in their respective fisheries on the Potomac, and by various statutes has protected them in their rights, and the company could not, in making their road, injure the fishery of F. without making just compen-

sation for the injury. The assessment and payment of the damages into court does not preclude F. from the recovery of damages for the injury he has sustained as lessee of the fishery. The court below certified the evidence in relation to the lease and what had been done by F. under his lease, but certified that as to whether the road was built upon the strip of land condemned, the evidence was conflicting, and the whole of that evidence is not given. The appellate court cannot set aside the judgment and verdict, though the court may not be entirely satisfied that the damages are not excessive.

The reference to 75 Va., 941, is no longer of value, the statute to which it referred having been repealed.

SECTION 2092.

The reference to 31 Grat., 764, is to the case cited *supra*, Section 2091, from page 761.

The reference to 75 Va., 941, is no longer of use, the statute to which it referred having been repealed.

CHAPTER XCVII.

SECTION 2137.

In the case of *Power & Kellog vs. Tazewell*, 25 Grat., 786, decided February 4, 1875, it was held: Tazewell having under the act of April 1, 1873, obtained an assignment of certain oyster beds for the planting and sowing of oysters for one year, and having paid the tax, and having had the beds staked off as required before May 1, 1874, has such an exclusive interest in them, that he may maintain an action of unlawful detainer against a party who enters upon said beds and holds them against him.

In the case of *Hurst vs. Dulaney*, 84 Va., 701, decided April 5, 1888, it was held: There can be but one assignment for planting oysters. If there has been an assignment to the tenant (occupier), the owner is not entitled to another assignment on the same water-front, and such assignment is void.

SECTION 2141.

In the case of *Morgan vs. Commonwealth*, 26 Grat., 992, decided December 2, 1875, it was held: An indictment which charges a party with taking oysters with ordinary oyster tongs, without paying the tax prescribed by law, charges no offence against the law, and is fatally defective.

SECTION 2147.

In the case of *McCready vs. The Commonwealth*, 27 Grat., 985, decided January, 1876, it was held: The act of April 18, 1874, Session Acts of 1874, Chapter 214, Section 22, p. 243,

which forbids the planting of oysters in the waters of the State by any person not a resident of the State, is a constitutional act; not in conflict with either Article I., Section 8, or Article IV., Section 2, of the Constitution of the United States.

The navigable waters and the soil under them within the territorial limits of the State are at its own discretion for the benefit of the people of the State; only so as not to interfere with the authority of the government of the United States in regulating commerce and navigation.

The immunities and privileges secured to all citizens of the United States by the Constitution are the right to protection by the government, the enjoyment of life and liberty; to acquire and possess property of every kind, and to pursue happiness and safety. But they do not include the right to share the property belonging to the people of the State.

CHAPTER XCVIII.

SECTION 2179.

In the case of *Boggs et als. vs. The Commonwealth*, 76 Va., 989:

Idem.—Forfeiture of Vessels, etc. A State is also entitled to exact the forfeiture of vessels employed in violating her oyster law, though the owner be not implicated in the offence, and the vessels so employed without his consent or knowledge.

4. Idem.—Acts of Confiscation. Forfeitures of rights and property cannot be adjudged by the legislative act, and confiscation without a judicial hearing, after due notice, would be void as not being by due process of law, *Mc Veigh vs. United States*, 11 Wallace, 267.

5. Jurisdiction.—Petition. So long as the proceeds of confiscated property paid into court remain under its control, anyone entitled to the money may apply therefor to the court by petition.

In the case of *Commonwealth vs. Mister et als.*, 79 Va., 5, decided March 16, 1884, it was held: Where such issue is, whether or not such petitioners owned the forfeited vessels at the time of the violation of said act, whereof the parties were convicted, the record of conviction of those parties is irrelevant to that issue, and inadmissible as evidence at the trial. And so likewise are all instructions which are predicated on that conviction. But an instruction is proper which tells the jury to find for the petitioners if from the evidence they believe the petitioners owned the vessels at the time of the violation of the act, and that no employment of said vessels in illegal oyster catching shall be considered by the jury in determining the verdict.

CHAPTER XCIX.

TITLE XXVIII.

CHAPTER C.

SECTION 2218.

In the case of *Commonwealth vs. Williamson*, 4 Grat., 554, decided December, 1847, it was held by the General Court: A clerk has no authority when applied to for a marriage license to examine a witness under oath as to the age of the parties.

The authority of the clerk to administer an oath out of court only extends to cases in which, without regard to circumstances, the making the affidavit is a necessary prerequisite to the performance of the official act which the clerk is called upon to perform. The swearing falsely before the clerk, that a person applying for a marriage license is over the age of twenty-one years, does not constitute the offence of perjury.

But if by such false oath the person applying is enabled to obtain a marriage license, and the marriage takes place, the taking the false oath is a misdemeanor.

In the case of *Maybush vs. Commonwealth*, 29 Grat., 857, decided February 7, 1878, it was held: The statute authorizes the clerk of a county or corporation court, when an application is made to him for a marriage license, to require evidence that the female to be married is over the age of twenty-one years, and to administer the oath to the person giving the testimony.

SECTION 2224.

In the case of *The Commonwealth vs. Edmund Perryman and Kiturahman*, 2 Leigh, 717, decided June, 1830, it is provided by statute that, "if the brother hath married or shall marry his brother's wife," the marriage shall be dissolved, the parties fined, &c. Held: The marrying a brother's widow is an offence within the statute.

In the case of *Kelly vs. Scott*, 5 Grat., 479, decided January, 1849, it was held: In prosecutions prior to the act of 1827, for marrying a deceased wife's sister, or for marrying the husband of a deceased sister, the parties may appear by attorney; and upon a plea of guilty by the attorney, judgment may be entered declaring the marriage a nullity.

A judgment declaring a marriage a nullity is valid, though it does not proceed to punish the parties, or to require them to enter into bonds with condition to live separate.

A marriage within the prohibited degrees having been declared null by a sentence of the court, the husband has no interest in the property which was the wife's at the time of the marriage; and his creditors cannot subject it to the payment of his debts.

SECTION 2227.

In the case of *Francis vs. Francis*, 31 Grat., 283, decided January 9, 1879, it was held: This statute includes and applies to colored persons so living together, though they were born free.

It is not necessary that there shall be evidence of an actual agreement to take each other as husband and wife, but the relation may be established by proof, by the acts, conduct, and conversation of the parties.

In the case of *Womack et als. vs. Tankersley et ux.*, 78 Va., 242, decided December 13, 1883, it was held: Marriage is a civil contract. Its existence is provable like any other fact. Registry, certificate, or persons present at its celebration need not be produced. Deliberate admissions and acts of a prisoner, coupled with cohabitation, is sufficient to convict him. Deliberate admissions and acts are also competent evidence of the validity of the marriage, under the *lex loci contractu*.

When the existence of the marriage is the issue, the rule of evidence is the same in civil as in criminal proceedings, and the decision must be on the weight of the evidence.

When the court below has determined the fact of the existence of the marriage upon the weight of the evidence, the appellate tribunal will not overturn its decision, except in cases of manifest error or misconduct.

Here the existence of the marriage was established by the proof of the deliberate admissions and acts of the parties, and by their cohabitation and recognition as husband and wife, without the production of the registry or certificate, or persons present at the celebration.

In the case of *Fitchett et als. vs. Smith's Administrator et als.*, 78 Va., 524, decided February 28, 1884. L. and S., colored persons, were never married, but cohabitated together as man and wife previous to November, 1863, when S. enlisted in the United States army. The result of the cohabitation was a child, J. S. died in 1865, but before his death recognized the child *en ventre sa mere* as his, and declared his intention to marry L., who died a few years after the birth of the child, the latter subsequently dying unmarried and childless. To this child before its death, the United States government paid one thousand two hundred dollars for her father's services. After her death, J.'s maternal next of kin claimed that she was illegitimate, and that they were entitled to her whole estate, which claim was contested by her paternal next of kin, who insisted on the division of the estate into moieties, one of which should be distributed among them. Held: The statute being retrospective, legitimated the child, J., though her parents had ceased to cohabit as man and wife before its passage, and P.'s

estate must be divided into two moieties, one for the maternal, the other for the paternal, next of kin.

In the case of *Smith vs. Perry Administrator, et als.*, 80 Va., 563, decided June 18, 1885, it was held; Under act approved February, 1866, to legalize marriage of colored persons living together as husband and wife at the time of the passage, children of such persons are deemed legitimate whether born before or after the passage of the said act, and whether any sort of marriage ceremony has taken place between the parents or not.

In such cases the question of bastardy must be considered as in any case where bastardy is alleged as to a child born during coverture, or born before and recognized afterwards.

This law presumes legitimacy, where husband recognizes the child as his own, and impossibility of procreation is not established, though the cohabitation had ceased before the passage of this act. Bastards are persons born out of wedlock, lawful or unlawful, or not within competent time after termination of coverture; or, if born out of wedlock, whose parents do not afterwards intermarry, and the father acknowledges them, or who are born in wedlock when procreation by the husband is impossible.

In the case of *Scott vs. Raub*, 88 Va., 721, decided January 28, 1892. Plaintiff was born in 1862 of parents living together as husband and wife from 1861 to 1864, he being a colored man, and she a slave and dying then, and plaintiff was recognized as his child, and as such reared to womanhood. Held: She was a legitimate child, and entitled to share by inheritance in his real estate.

SECTION 2229.

The reference to 78 Va., 242, is to the case of *Womack et als. vs. Tankersley et ux.*, quoted *supra*, Section 2227.

CHAPTER CI.

SECTION 2252.

In the case of *McPherson vs. The Commonwealth*, 28 Grat., 939, decided May 1, 1877, it was held: A marriage between a white man and a woman who is of less than one-fourth of negro blood, however small this quantity may be, is legal. A woman whose father was white and whose mother's father was white, and whose great grandmother was of brown complexion, is not a negro in the sense of the statute.

In the case of *Kinney vs. The Commonwealth*, 30 Grat., 858, decided September, 1878, K., a negro man, and M., a white woman, both domiciled in the county of Augusta, Virginia, left Virginia and went to Washington, D. C., and were married there according to the regular forms for celebrating marriages, and

after remaining absent from Virginia about ten days, returned home, in Augusta county, Virginia, where they have since lived as man and wife. By the laws of Virginia (Code 1873, Chapter 105, Section 1) all marriages between a negro and a white person are absolutely void. On an indictment for lewdly and lasciviously associating and cohabiting together. Held: Although such marriages are not prohibited by the laws of the District of Columbia, and this marriage was performed according to the ceremonies there prescribed, it is void under the laws of Virginia, and the parties are liable to the indictment. While the forms and ceremonies of marriage are governed by the laws of the place where the marriage is celebrated, the essentials of the contract depend upon, and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.

In the case of *Jones vs. The Commonwealth*, *Gray vs. The Commonwealth*, 80 Va., 538, decided June 18, 1885, it was held: In order to sustain an indictment under Section 8, Chapter 7, Acts 1877-'78, making the intermarriage with a white person a felony, it is necessary first to establish that the accused is a person with one-fourth or more of negro blood, *id est*, a negro, and the burden of proving this lies on the Commonwealth.

In the case of *Greenhow et als. vs. James's Executor*, 80 Va., 636, decided April 16, 1885, it was held: The law of the place of its celebration governs as to the forms of ceremony which constitute marriage. The law of the domicile governs as to the capacity of the parties. But the rule which requires that a marriage valid where celebrated is valid everywhere else, has no application to marriage entered into in a foreign country in contravention of the public policy and statutes of the country of the domicile of the parties, which pronounce marriage between them not only absolutely void, but criminal. Code 1873, Chapter 118, Sections 6 and 7, providing "that if a man having had offspring by a woman shall afterwards marry with her, such offspring, if recognized by him before or after the marriage, shall be deemed legitimate," and that the issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate, does not apply to and legitimate the offspring of a cohabitation in this State between a white person and a colored, when the parents subsequently have celebrated between them a ceremony of marriage outside of this State, in some place where marriage between such persons is lawful.

SECTION 2257.

In the case of *Throckmorton vs. Throckmorton*, 86 Va., 768, decided April 10, 1890, it was held: When adultery is charged

as the ground of divorce, the proof thereof should be "such as to lead the guarded discretion of a reasonable and just man to the conclusion of the defendant's guilt," though ocular evidence is seldom affected. A married man going into a known brothel, especially if when there he shuts himself up in a room with a strumpet, is, unexplained, sufficient proof of adultery. In the case here, held: The proof is not sufficient to sustain such charge, nor that of cruelty or desertion.

SECTION 2258.

In the case of *Bailey vs. Bailey*, 21 Grat., 43, decided June, 1871, it was held: Abandonment and desertion, which entitles a husband or wife to a divorce *a mensa et thoro*, consists in the actual breaking off of matrimonial cohabitation, with the intent to abandon and desert in the mind of the party so acting. And the intent to desert being once shown, the same intent will be presumed to continue until the contrary appears.

The statute, Code, Chapter 109, fixes no period for which the desertion must have continued to entitle a party to a divorce *a mensa et thoro*. Desertion for less than five years may be in good cause, and the question is to be determined by the court exercising a sound discretion according to the facts and circumstances of each case and the principles of law applicable thereto.

B. leaves his home and family in November, 1865, and returns in November, 1866. He remains at home two weeks and then leaves it, and had not returned in September, 1867, when Mrs. B. files a bill for a divorce. B.'s intention to desert his wife being clearly proven, she is entitled to a decree for a divorce *a mensa et thoro*.

In the case of *Carr vs. Carr*, 22 Grat., 168, decided April 10, 1872, it was held: That a husband is rude and dictatorial in his speech to his wife, exacting in his demands upon her, and sometimes unkind and negligent in his treatment of her, even when she was sick, and worn and weary in watching and nursing their sick child, is no legal ground for her leaving him.

In the case of *Latham, by, &c., vs. Latham*, 30 Grat., 307, decided July, 1878, it was held: In suits for divorce the pleadings and rules of evidence are the same as in other suits in equity, except that the bill shall not be taken for confessed, and the cause must be heard independent of the admissions of either party on the pleadings. But where the answer is responsive to the allegations of the bill, the defendant is entitled to the benefit of it, as in other cases in equity.

Although the fact that a married man is seen at a house of ill-fame is strong evidence of the crime of adultery, yet it is not of itself conclusive, and the act is open to explanation; and it was satisfactorily explained in this case.

Desertion is a breach of matrimonial duty, and is composed, first, of the breaking off of matrimonial cohabitation; and secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete. A mere separation by mutual consent is not desertion by either party.

The cruelty that authorizes a divorce is anything that tends to bodily harm, and thus renders cohabitation unsafe, or, as expressed in the older decisions, that involves danger of life, limb, or health. There may be cases in which the husband, without violence, actual or threatened, may make the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health as personal violence, and which would therefore afford grounds for relief by the court; but what merely wounds the feelings, without being accompanied by bodily injury or actual menace, does not amount to legal cruelty.

The father is the legal custodian of the minor children, and they will not be taken from his custody without the strongest reasons therefor; and this right is not affected by the voluntary separation of the parties.

If the application by the wife for divorce is refused, if the court is satisfied that she is the chief object in the way of a reconciliation, and that the husband is, under all the circumstances, entitled to the custody of the child, it is impossible to impose terms upon him, and to say that he shall be compelled to have the child, under the decree of the court, at particular places and times, to gratify the feelings and wishes of the mother.

It may be there are many cases in which the court might refuse a divorce, and yet allow alimony to the wife. But if the husband is willing to be reconciled to the wife upon terms she can properly accept, if he has not abandoned her, if his conduct has not been such as to justify her separation from him, she is not entitled to alimony.

In the case of *Myers, by and vs. Myers*, 83 Va., 806, decided October, 1887, it was held: Divorce from bed and board may be granted for any conduct that renders cohabitation unsafe, that involves danger of life, limb, or health. But there may be angry words, coarse and abusive language, humiliating insults, and annoyances in all forms that malice can suggest, which may as effectually endanger life and health as personal violence, and which would therefore afford grounds for relief by the court.

SECTION 2260.

In the case of *Bailey vs. Bailey*, 21 Grat., 43, decided June, 1871, it was held: The Act, Code, Chapter 109, Section 9, is not intended to change the rules of evidence in divorce cases; and

the letters of the parties are admissible in evidence for the plaintiff to show the intention of the defendant to abandon and desert her.

In the case of *Latham, by, &c., vs. Latham*, 30 Grat., 307, decided July, 1878, it was held: In suits for divorce, the pleadings and rules of evidence are the same as in other suits in equity, except that the bill shall not be taken for confessed, and the cause must be heard independent of the admissions of either party on the pleadings. But where the answer is responsive to the allegations of the bill, the defendant is entitled to the benefit of it, as in other cases in equity.

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Desertion is a breach of matrimonial duty, and is composed, first, of the breaking off of matrimonial cohabitation; and secondly, an intent to desert in the mind of the offender. Both must combine to make the desertion complete. A mere separation by mutual consent is not desertion by either party.

The cruelty that authorizes a divorce is anything that tends to bodily harm, and that thus renders cohabitation unsafe, or, as expressed in the older decisions, that involves danger of life, limb, or health. There may be cases in which the husband, without violence, actual or threatened, may make the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health as personal violence, and which would therefore afford grounds for relief by the court; but what merely wounds the feelings without being accompanied by bodily injury or actual menace, does not amount to legal cruelty.

The father is the legal custodian of the minor children, and they will not be taken from his custody without the strongest reasons therefor; and this right is not affected by the voluntary separation of the parties.

If the application by the wife for divorce is refused, if the court is satisfied that she is the chief object in the way of a reconciliation, and that the husband is, under all the circumstances, entitled to the custody of the child, it is impossible to impose terms upon him and to say that he shall be compelled to have the child, under the decree of the court, at particular places and times, to gratify the feelings and wishes of the mother.

It may be there are many cases in which the court might refuse a divorce, and yet allow alimony to the wife. But if the husband is willing to be reconciled to the wife upon terms she

can properly accept, if he has not abandoned her, if his conduct has not been such as to justify her separating from him, she is not entitled to alimony.

In the case of *Cralle vs. Cralle*, 79 Va., 182, decided May 1, 1884, it was held: In suit for divorce, the admissions of the plaintiff are competent evidence to support the averments of the answer. Where husband, in 1874, obtained an order of publication against absent wife, decree of divorce *a vinculo matrimonii* for wilful desertion for five years, and in 1876 wife asks for rehearing and for alimony, and proves at rehearing, by plaintiff's admissions and otherwise, that the desertion was not wilful, in fact not hers but his. Held: The plaintiff's admissions are admissible evidence to support the allegations of defendant's answer. She might have asked to have the decree of divorce set aside, and though not asking for that, she is entitled to her support out of plaintiff's estate. Equity, regarding substance rather than form, will treat her answer as a cross-bill, and give her what on the latter she would be entitled to.

But in estimating the allowance for alimony, no account should be taken of acquisitions of the plaintiff after the date of the decree of divorce.

In the case of *Hampton vs. Hampton*, 87 Va., 148, decided December 4, 1890, it was held: In suit for divorce the bill cannot be taken for confessed, and whether answered or not, shall be heard independently of admissions of either party, and its charges proved by full and clear testimony. An evidence that defendant admitted the charge, and a letter from her purporting to admit it, are inadmissible.

In the case of *Marshall vs. Baynes*, 88 Va., 1040, decided April 21, 1892. Pending suit for divorce *a mensa et thoro*, husband and wife agreed to live separate, each to acquire and hold property free from the claims of the other, and that decree to be entered confirming the agreement. Afterwards decree was entered reciting the taking of depositions, and arguments of counsel and confirming the agreement. Held: The decree was, in substance, for a divorce from bed and board, within Code, Section 2264, and was final and valid, and operated upon after-acquired property, and the legal rights and capacities of the parties as a decree from the bond of matrimony, except that neither party could marry again during the life of the other.

The fact that the decree confirmed the agreement did not make it a decree on the admissions of the parties.

SECTION 2261.

In the case of *Cralle vs. Cralle*, 81 Va., 773, decided April 25, 1886. Pending appeal from decree to which *supersedeas* has been issued and perfected by bond, the only orders the court

below can make in the suit are such as are needed to preserve the *rem* in litigation.

Code 1873, Chapter 105, Section 10, authorizes trial court pending the suit to compel the man to pay the sums necessary to maintain the woman and enable her to carry on the suit; yet it does not justify it to make any order for such purpose, pending appeal here from decree rendered in same suit for alimony. Pending a divorce suit, trial court decreed alimony to the womaa. From the decree, appeal was taken and *supersedeas* awarded. Pending the appeal, trial court decreed to the woman an allowance of one hundred and fifty dollars to enable her to defend the suit in this court, and twenty-five dollars a month for her maintainance during the pendency of the suit. On appeal from last decree. Held:

1. The court below was authorized to make the decree last appealed from.

2. The amount decreed, however, being less than the minimum jurisdictional sum, the appeal must be dismissed.

The appellant's remedy is by writ of prohibition from this court to the execution of the decree.

SECTION 2262.

In the case of *Thockmorton vs. Thockmorton*, 86 Va., 768, decided April 10, 1890, it was held: When adultery is charged as the ground of divorce, the proof thereof should be "such as to lead the guarded discretion of a reasonable and just man to the conclusion of the defendant's guilt," though ocular evidence is seldom affected. A married man going into a known brothel, especially if when there he shuts himself up in a room with a strumpet, if unexplained, is sufficient proof of adultery. In the case here held, the proof is not sufficient to sustain such charge, nor that of cruelty or desertion.

In the case of *Musick vs. Musick*, 88 Va., 12, decided June 11, 1891, it was held: In a suit for divorce, adultery may be proved by circumstantial evidence, such as visiting a house of ill-fame, being shut up with an unchaste woman, consorting with prostitutes and the like, even in the face of denial of defendant and *particeps criminis*.

SECTION 2263.

In the case of *Bailey vs. Bailey*, 21 Grat., 43, decided June, 1871, it was held: Where a wife is compelled to seek a divorce from her husband on account of his misconduct, in fixing the amount of her alimony, the earnings of the husband may be taken into the account, if necessary, as well as his property. In such a case, in fixing the amount of the alimony, the court will not seek to find how light the burden may possibly be made,

but what under all the circumstances will be a fair and just allotment.

In the case of *Carr vs. Carr*, 22 Grat., 168, decided April 10, 1872, it was held: A wife having left her husband without good legal grounds is not entitled to alimony. A wife having left her husband without good legal grounds, and taken their child with her, though there is no other imputation upon her conduct, upon a decree for divorce *a mensa et thoro* at the suit of the husband, on the ground of desertion, the child will be restored to the husband, though it is a female and but three years old; and though the husband's treatment of his wife has been coarse, rude, petulant, close, exacting and penurious, leaving her to bear alone burdens and trials which it should have been his highest pleasure to share and relieve.

This reference to 27 Grat., 307, is an error.

In the case of *Porter vs. Porter*, 27 Grat., 599, decided July 26, 1876, it was held: E. is possessed of an estate in fee in a tract of land, and marries P.; and they have two children born of the marriage. Upon a bill by P., the marriage is dissolved for the adultery and desertion of E., but the decree directs nothing as to the property of the parties. Upon the dissolution of the marriage, all the husband's claims to the wife's land which depended on the marriage were extinguished, and she is entitled to the possession of the lands.

In the case of *Harris vs. Harris*, 31 Grat., 13, decided November, 1878, it was held: Alimony had its origin in the legal obligation of the husband incident to marriage state, to maintain his wife in a manner suited to his means and social position, and although it is her right, she may, by her misconduct, forfeit it, and when she is the offender, she cannot have alimony on a divorce decreed in favor of the husband. So long as he had committed no breach of marital duty, he is under no obligation to provide her a separate maintainance, for she cannot claim it on the ground of her own misconduct.

According to the ecclesiastical law, no alimony was allowed on a decree *a vinculo matrimonii*. And if under the Virginia statute the court has a discretion upon decreeing such a divorce, to allow alimony to the wife, that discretion should be exercised upon the principles which govern in a case of divorce from bed and board.

The circumstances must be very peculiar indeed, if any such case there should be, which justifying a decree for an absolute divorce in behalf of the husband for wilful desertion of the wife, would at the same time warrant a decree in her behalf, that he should out of his own estate maintain her as long as she lived, although after the divorce she would become the wife of another.

The wife having left her husband in 1863 upon the ground that he would not control his servants and maintain her rightful authority as his wife, the husband is entitled to a decree for a divorce *a vinculo matrimonii* on the ground of desertion on a bill filed by him in 1877. And the wife having left her husband without any sufficient cause, the court, upon decreeing the divorce, cannot allow her alimony out of the husband's estate.

In the case of *Francis vs. Francis*, 31 Grat., 283, decided January 9, 1879, it was held: A certain sum monthly having been allowed as alimony to the wife, the husband appeals from the decree, and pending the appeal dies. The appellate court affirming the decree, the wife is entitled to the allowance up to the time of his death.

In the case of *Cralle vs. Cralle*, 79 Va., 182, decided May 1, 1884, it was held: Curtesy and dower are barred by decree of divorce *a vinculo*, and the same principle applies to maintenance in the absence of any provisions in the decree as to the parties' property rights.

In the case of *Cralle vs. Cralle*, 84 Va., 198, decided December 1, 1887, it was held: When the time at which alimony shall begin to be paid has been fixed by a decree, which, on appeal here, has been affirmed in that respect, and the case has gone back to the court below to fix the amount, it is error for the court to change the time of commencing the payment.

When the husband is of good business habits, and owned \$3,800 worth of property at the time of the divorce, \$150 per annum is reasonable alimony, and in fixing the amount, evidence of a decree in favor of the husband for a legacy is admissible.

Unless the commissioner's account, on its face, shows error, exceptions will not be allowed to be made for the first time in this court.

In the case of *Heninger vs. Heninger*, 18 Southeastern Reporter, 193, decided November 9, 1893, it was held: In ascertaining the amount of alimony to which a wife is entitled, where she is granted a divorce and the custody of the children, it is proper to take into consideration the education of the children as an item of expense.

Under Code 1887, Section 2263, providing that the court shall make such further decree as it shall deem expedient concerning the estate and maintenance of the parties, or either of them, and the care and custody and maintenance of their minor children, the court may allow for alimony the sum to educate the husband's children.

In the case of *Purcell vs. Purcell*, 4 H. & M., 507, decided in the Chancery Court of the city of Richmond, February term, 1810, it was held: The court of chancery has jurisdiction in cases of application for alimony, though no divorce is asked.

In the case of *Almond vs. Almond*, 4 Rand., 662, decided July 21, 1826, it was held: A court of chancery has power to grant alimony to a wife in Virginia even without a contract for separation, when the misconduct of the husband is such as to render it unsafe for the wife to live with him, or he turns her out of doors without a support. But such a claim does not give the wife a right to any specific property of the husband.

In the case of *Spencer vs. Ford*, 1 Rob., 608, 2d edition, 685. A suit for alimony being brought by a wife against her husband, who has deserted her and left the Commonwealth, and a sum of money being obtained for her by her attorney at law by a compromise of that suit, held: That on a bill in equity in the name of the *feme* by her next friend against the attorney for the money so obtained by him, a decree may be rendered for the same, although the husband be no party to the suit.

SECTION 2264.

In the case of *Jennings et als. vs. Montague*, 2 Grat., 350, decided October, 1845, it was held: The statute does not authorize the court to interfere with or defeat the vested rights of creditors, or *bona fide* alienees or incumbrancers, which attached upon the property prior to the institution of such proceedings for divorce, and when the property was the absolute property of the husband.

An attachment against the effects of the husband as an absconding debtor, levied before the institution of a suit by the wife for a divorce, entitles the attaching creditor to be satisfied out of the attached effects, in preference to the claim of the wife.

In the case of *Marshall vs. Baynes*, 88 Va., 1040, decided April 21, 1892. Pending suit for divorce *a mensa et thoro*, husband and wife agreed to live separate, each to acquire and hold property free from the claims of the other, and that decree be entered confirming the agreement. Held: The decree was, in substance, for a divorce from bed and board, within this section, and was final and valid, and operated upon after-acquired property, and the legal rights and capacities of the parties as a decree from the bond of matrimony, except that neither party could marry again during the life of the other.

After decree of separation, the woman acquired land and sold it to the appellant. After the death of both the man and woman, her heirs brought ejectment for the land, and the circuit court rendered judgment for the plaintiffs. Held: Error.

SECTION 2265.

In the case of *Musick vs. Musick*, 88 Va., 12, decided June 11, 1891, it was held: Under this section, which is constitutional, the court may, in such suit, decree that the guilty party shall not marry again unless such decree be annulled.

CHAPTER CII.

SECTION 2267.

In the case of *Blow vs. Maynard, Lawrence vs. Blow*, 2 Leigh, 29, decided March, 1830. A husband dies entitled to reversion of lands; his widow is not entitled to dower thereof. A husband makes a fraudulent conveyance of real estate to the use of himself and children, and contingently to the use of his wife, who does not execute the conveyance; the husband dies; a creditor exhibits his bill against his children and the widow to avoid the conveyance as voluntary and fraudulent; the widow claims under the conveyance; it is declared fraudulent and void. Held: The widow is entitled to the dower of the estate.

A father makes a voluntary and fraudulent conveyance of real estate to his children, and dies leaving other real estate which descends; upon a bill by a creditor against the donees and heirs at law, to subject the land conveyed and land descended to debt of the donor and ancestor, chancellor may decree a sale of both, out and out, to satisfy the creditor's demand.

In the case of *Seekright on demise of Gilliam vs. Moore*, 4 Leigh, 30, decided November, 1833. G., by deed of bargain and sale, sells and conveys a parcel of land to M., and M., by the deed of the same date, conveys the same land to trustees upon trust to secure the purchase-money thereof to G. Held: The two conveyances shall be intended parts of the same transaction, and the seizing of M. was instantaneous and transitory, so that M.'s widow is not entitled to dower of the land.

In the case of *Cocke's Executors et als. vs. Phillips*, 12 Leigh, 248, decided April, 1841, it was held: Husband dies entitled to a remainder in fee of real estate, expectant on an estate of freehold therein, his widow is not entitled to dower of the land when the remainder falls in.

In the case of *Wheatley's Heirs vs. Calhoun*, 12 Leigh, 264, decided April, 1841. By articles between C. and W. they agree to join in purchase of mills and two hundred acres of land adjoining, and in case that the purchase shall be effected, C. shall keep the mills at a salary to be paid out of the joint concern, and that "the improvements, privileges, expenses, and profits, shall in all respects be equal to both parties and their legal representatives"; they make the purchase accordingly, the mills, etc., are conveyed to them jointly; they give their joint bonds for the purchase-money, payable in four annual instalments, and a joint mortgage of the property to secure payment of the same, and then commence and carry on the business of millers in partnership for several years; the first instalment is paid out of the social funds, and the residue of the purchase-money out of money borrowed on the credit of the partnership,

but repaid to the lenders by W. alone after C.'s death. Held: Though C. and W. were partners in the milling business, carried on by them at the mills so purchased, yet the mills, etc., were not social property or stock, but real estate purchased by C. and W. individually, of which each was tenant in common with the other of an undivided moiety, and therefore C.'s widow is dowable of his moiety.

Two persons purchased real estate jointly, and one of the terms of their purchase is, that on receiving a conveyance from vendor, they shall, at the same time, execute a mortgage of the property to secure payment of the purchase-money; vendor makes the conveyance to the purchasers; but their mortgage is not then executed, owing to difference between vendor and them as to the provisions to be inserted therein; but the mortgage is executed ten months afterwards, in fulfilment of the original contract of sale and purchase. Held: The rights of the mortgagee are paramount, in equity, to the dower rights of the purchasers' wives; and upon the death of one of them, his widow is dowable of his equity of redemption of his moiety, but of that only.

C. and W. make a joint purchase of real estate, one of the terms of the purchase being, that on receiving a conveyance of the property from vendor, purchasers shall mortgage same property to secure payment of the purchase-money; vendor executes conveyance to C. and W., and they execute a mortgage of the property according to the agreement; C. dies, leaving unpaid three-fourths of the purchase-money with interest thereon, all of which W. pays, except a trivial balance. Held: W. is entitled to subrogate, in equity, to the rights of the mortgagee, and to have satisfaction out of the mortgaged subject, for the excess of the debt paid him above his just proportion, namely, a moiety thereof, and as the rights of the mortgagee were paramount to the rights of C.'s widow to dower, so are the rights of W., by subrogation, likewise paramount to her right of dower.

By articles between C. and W. they agree to make a joint purchase of land, and to divide the same between them by a designated line, W. to pay the whole purchase-money of the whole land to the vendor thereof, and C. to pay W. the purchase-money for his part at a certain appointed time; within the time C. pays W. the greater part, but not the whole of the purchase-money for his part of the land; and then also within the time the contract between C. and W. is rescinded, W. agreeing to take back C.'s part of the land, upon condition that C. shall have credit on another account for the money that he has paid, and C. dies never having been let into possession of the land so by him agreed to be purchased and paid for. Held: That as the contract between C. and W. was wholly executory, and was

rescinded before C. had completed payment of the purchase-money, and he never had legal or equitable possession, he had no such equitable estate as that his widow was dowable thereof.

In the case of *M. Blair vs. Thompson et als.*, 11 Grat., 441, decided July, 1854. In a bill by a widow for dower in land sold in the lifetime of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant.

W. bought land and gave bond with S. as a security for purchase-money; and about eighteen months afterwards he executed a deed of trust upon the land and on personal property as a further security. Afterwards he took an oath as an insolvent debtor, and his equity of redemption was sold to T. and M., to whom the sheriff conveyed it. T., M., and S. then conveyed the land with general warranty to J., and he, T., M., and the trustee, united in a conveyance to secure the purchase-money. In a bill by the widow of W. to recover her dower, she sets out these conveyances and makes all the parties to them defendants. J. in his answer asks that if she is entitled to dower, the present value thereof may be ascertained, and that there may be a decree in plaintiff's favor for that amount against his vendors. M. and S. insist they are only sureties of T. Held: W. having given bond and security for the purchase-money, the vendor's lien was not retained; and his widow is entitled to dower in the land. There cannot be a decree for a specific sum in lieu of dower without the assent of all the parties interested. That the equities between the defendants do not arise out of the pleadings and proofs between the plaintiffs and defendants, and therefore there can be no decree between them.

In the case of *Jones and Wife vs. Hughes et als.*, 27 Grat., 560, decided March, 1876. H., by his will, gave certain lands, which he describes, to his sons, J. and D., and by another clause he says if his son J. should die without issue, he gives certain part of the land given to him to D.; and if both of his sons should die without issue, then all of the aforesaid lands should go to his daughters, naming them. J. died without children, and the lands went into the possession of D., and D. afterwards died without issue, and left a widow, to whom, by his will, he left all of his estate, and appointed her his executrix. He owned, however, only personal estate. More than a year after D.'s will was admitted to probate, his widow filed her bill against the executory devisees of H. to recover dower in the lands which had come to D. under the will. Held: The widow of D. is entitled to dower in the said lands. The act, Code 1873, Chapter 106, Section 4, does not apply to the case, and her right to dower is not barred.

In the case of *Medley et als. vs. Medley*, 27 Grat., 568, decided

April 29, 1876, it was held: M. devised his lands to his son G., and if G. should die without having had lawful issue of his body, the said lands were to be divided among testator's four daughters. G. died, leaving a widow, but without having had lawful issue of his body. G.'s widow is entitled to dower in the lands devised to him.

The case referred to in 31 Grat., 13-33, does not decide anything on this point. The court merely said that it seemed that the court might make a decree reserving dower rights to the wife in a suit for divorce, but set the decree aside on other grounds.

In the case of *Waller vs. Waller's Adm'r et als.*, 33 Grat., 83, decided March, 1880. In 1853, W., before his marriage, sells and conveys a tract of land to B., and takes a deed of trust to secure the unpaid purchase-money. B. returns to the North during the war, and in his absence the land is sold by the trustee under the deed of trust, and W. purchases it for more than the debt. He is then married. After the war B. returns and files a bill to set aside the sale, and the court annuls it and decrees a sale of the land to pay to W. the purchase-money due to him, and it is sold. Held: The sale to W. at the trustee's sale having been decreed to be a nullity, his widow is not entitled to dower in the land.

In the case of *Quarles vs. Lacy*, 4 Munf., 251, decided November 15, 1813, it was held: Although it is not competent for a husband, after his marriage, to defeat or obstruct his creditors by selling or exchanging his property, and taking a conveyance of the money or other property received therefor, to the use or for the benefit of his wife and family (such conveyances being deemed voluntary and fraudulent as to creditors), yet the case may be otherwise in relation to so much of such money or other property as goes to compensate the just interests of the wife. If, therefore, the wife relinquish her right of dower in other land in consideration of such conveyance, the value of such dower ought to be saved to her in opposition to the claims of her husband's creditors.

In the case of *Blanton vs. Taylor*, 1 Va. (Gilmer), 209, decided November 22, 1820, it was held: The participation of a wife in the fraud of her husband will not impair her rights. Provision in lieu of dower will not be disturbed as fraudulent as far as it is only equivalent to dower.

In the case of *Harvey (Surviving Partner, etc.) vs. Alexander, etc.*, 1 Rand., 219, decided December, 1822, it was held: A wife parting with her dower right in real property, forms a sufficient consideration for a subsequent deed conveying other property for her benefit. Although personal property acquired by marriage cannot be considered a valuable consideration to support

a subsequent deed for the benefit of the wife, yet it is meritorious consideration, and the deed will be supported or set aside, according to circumstances.

A deed not lodged to be recorded until eight months after its date, and not proved by the witnesses on whose testimony it was recorded to have been sealed and delivered within eight months before it was recorded, is not good as a recorded deed.

In the case of *Taylor vs. Moore*, 2 Rand., 563, decided June 16, 1824, it was held: If a married woman relinquishes dower in lands, under a promise that other property shall be settled on her as a compensation, such settlement will be good, though made after the relinquishment. But if the value of the property settled exceed the value of the dower relinquished, the deed should be set aside as to the excess, and supported as to the residue.

In the case of *Harrison vs. Carrol*, 11 Leigh, 476, decided January, 1841: Husband and wife agree by parol that the husband shall settle personal property to the separate use of the wife, and that the wife shall relinquish her contingent right of dower in certain lands of the husband, which he proposes to convey for the benefit of creditors. The settlement upon wife is executed accordingly. Afterwards a creditor of the husband obtains judgment against him, sues out a *fieri facias* thereon, and delivers it to the sheriff; and then the wife, in pursuance of her agreement, joins her husband in a deed conveying the lands. Held: The property settled on the wife is liable to the execution of the judgment creditor, and equity will not restrain him from proceeding to make his debt out of same.

In the case of *William and Mary College vs. Powell et als.*, 12 Grat., 372, decided April, 1855, it was held: A post-nuptial settlement is made by a husband upon his wife. The wife afterwards dies, and then a bill is filed by the creditor of the husband, against her children, to set aside the settlement as fraudulent to the creditor. The husband is not a competent witness to prove the consideration upon which the settlement was made. Such a settlement is made which recites the consideration in part the agreement of the wife to unite in a conveyance of land, a part of which is her own, derived from her father, and in another part of which she has a right of dower, for the purpose of paying a debt of her husband, and she does afterwards unite in the conveyance. The deeds themselves are proofs of the consideration, and the settlements will be sustained to the extent of the value of the interest she conveys.

In the case of *Burwell's Executor vs. Lumsden et als.*, 24 Grat., 443, decided March, 1874, it was held: It is settled law in this State, that if a married woman relinquishes her claim

for dower on the faith of a settlement of other property made by her husband, or even if she make a relinquishment under a mere promise that other property shall be settled on her for a compensation; in either case such settlement in her favor will be held good to the extent of a just compensation for the interest so relinquished. If the value of the property exceeds the value of the dower, or other interest relinquished by the wife, the deed will be vacated as to the excess, and supported as to the residue.

In the absence of fraud the settlement will not be disturbed, unless it manifestly appears to be grossly excessive.

In the case of *Davis's widow vs. Davis's Creditors*, 25 Grat., 587, decided December, 1874. D., who was seventy years old, and his wife A., thirty-five, on the consideration that A. would unite with him to convey to trustees three tracts of land in trust to pay his debts, conveyed to a trustee two tracts in trust for A. for her life, and then to her children. On the same day D. and A. conveyed the three tracts to trustees to pay his debts. At the time it was supposed the tracts and personal estate conveyed to pay D.'s debts were sufficient for the purpose, but owing to the decline in prices, they fell short of doing it. After the death of D., some of his creditors filed their bill to set aside the deed in trust for A., on the ground that the settlement was grossly excessive, and this is ascertained to be a fact. Held: The settlement will be set aside as to excess. Where a wife is induced to unite with her husband in conveying away her interest in his real estate, upon condition that certain and specific property shall be settled on her in consideration of her thus parting with her rights, if such settlement is set aside and annulled, she has the right to be placed in the same position, and restored to the same rights with which she was invested by law before she united in the deed, of which the specific settlement was the consideration; provided this can be done without prejudice to the rights of creditors or purchasers.

In this case A. is entitled to be restored as far as possible to the same position, and invested with the same rights she had before she united in the deed with her husband; the value either to be commuted in money, or laid off in kind in the lands not sold by the trustees. And this may be done without prejudice to the rights of creditors or purchasers, as the value of her dower in the five tracts may be laid off to her in two tracts conveyed in trust for her which are still unsold.

In the case of *Hurst vs. Dulaney*, 87 Va., 444, decided February 12, 1891, it was held: Conveyance of land to buyer, and trust-deed by him to secure price, executed same day, are deemed one inequity, and wife of buyer is not entitled to dower in the land, the seisin of the husband being only for an instant.

The principal applies equally where the trust deed is for the benefit of an assignee.

In the case of *Deering & Co. vs. Kerfoot's Executor et als.*, 89 Va., 491, decided December 15, 1892, it was held: Land bought with partnership funds for partnership purposes is so far considered as personalty, that widow of deceased partner is not entitled to dower therein, but only to her distributive share thereof.

SECTION 2269.

In the case of *Wilson vs. Davisson*, 2 Rob., 384, decided August, 1843, it was held, p. 398: When land in which there is a right of dower is sold in a suit to which the tenant in dower is a party, the other parties interested have a right to insist that instead of a sum in gross, one-third of the purchase-money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life.

In the case of *Teage, etc., vs. Boisseux*, 15 Grat., 83, decided January, 1859, it was held: Before decreeing the sale of a house and lot, the court should determine the priorities as between the building fund companies and the assignee of the mechanic's lien; and it is error merely to decree a sale and direct the proceeds to be brought into court.

A copy of the valuations of the referees is filed with the bill, and though noticed in the answer is not objected to. It is received by the commissioner who settles the accounts as evidence, and no call is made for the original before him, but there is an exception without date endorsed upon it as being a copy. The exception either came too late or was waived by the party.

In the case of *Robinson vs. Shacklett*, 29 Grat., 99, decided September, 1877. In 1853 S. and wife sold and conveyed to B. land for two thousand one hundred dollars, retaining a vendor's lien. B. paid one thousand five hundred dollars, and gave three bonds, each of two hundred dollars, two of which were assigned to H. and one to T. B. conveyed the land to T. in trust to secure a debt of six hundred and twenty-seven dollars to W. In May, 1858, B. and T. made a private sale of this land to A. and his wife for two thousand one hundred dollars, payable seven hundred dollars on the first of August, 1858, and the balance in payments extending to 1863; and A. and wife paid of the purchase-money five hundred and ninety-two dollars, which was applied to the debt of W. In 1860 H. and T. filed a bill against A. and wife and others for specific execution of the contract and to sell the land to pay the vendor's lien held by H. and T. In May, 1860, before a decree in the cause, T., B. and A. and wife made a private sale of the land to R. for two thousand one hundred dollars, payable one thousand dollars October 1, 1860, and three annual payments. R. paid to T. one thousand dollars,

and gave his bond to T. for the balance. This sale was confirmed by the court at the October term, 1860. T. was appointed a receiver to collect the money and pay it out to the persons entitled. But he was directed not to pay H. until he filed the bonds held by him among the payers. T. paid the debt of W., retained enough to pay H., and paid the balance to B. The bond of R., due in 1862, was assigned by B. and T. to S., who recovered a judgment upon it, and then R. filed a bill against S. to enjoin the judgment. The injunction was granted, and afterwards dissolved; and then R. filed a bill of review, on the ground that the wives of B. and A. were entitled to a contingent right of dower in the land, and that H. had a lien on the land. The bill of review was dismissed, and R. appealed. Held: As the bonds of R. were left in the hands of T., the receiver, to pay the debt of H., and were sufficient for that purpose if R. had paid them to T., H. can have no lien on the land. A.'s wife having been a party to the suit, she cannot claim dower in the land; and the proceeds of the land having been exhausted by the prior liens upon it, there is no surplus out of which she may be endowed.

In the case of *Coffman vs. Coffman*, 79 Va., 504, decided October 6, 1884, it was held: When land is conveyed on condition that grantee shall pay grantor's debts, and by deed executed later on the same day, that grantee conveys the land to secure money loaned him to pay his grantor's debts, that grantee's widow is entitled to dower, but not until the said debts are paid, though she did not join in the trust deed.

In the case of *Hurst vs. Dulaney*, 87 Va., 444, decided February 12, 1891, it was held: Conveyance of land to buyer and trust deed by him to secure price, executed the same day, are deemed one in equity, and wife of buyer is not entitled to dower in the land, the seisin of the husband being only for an instant. The principle applies equally where the trust deed is for the benefit of an assignee.

SECTION 2270.

In the case of *Blair vs. Thompson et als.*, 11 Grat., 441, decided July, 1854, in a bill by a widow for dower in land sold in the life time of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant.

W. bought land, and gave bond with S. as a security for purchase-money; and about eighteen months afterwards he executed a deed of trust upon the land and on personal property as a further security. Afterwards he took an oath of an insolvent debtor, and his equity of redemption was sold to T. and M. to whom the sheriff conveyed it. T., M., and S. then conveyed the land with general warranty to J., and he, T., M., and

the trustee united in a conveyance to secure the purchase-money. In a bill by the widow of W. to recover her dower, she sets out these conveyances and makes all the parties to them defendants. J. in his answer asks that if she is entitled to dower, the present value thereof may be ascertained, and that there may be a decree in plaintiff's favor for that amount against his vendors. M. and S. insist they are only sureties of T. Held: W. having given bond and security for the purchase-money, the vendor's lien was not retained; and his widow is entitled to dower in the land. There cannot be a decree for a specific sum in lieu of dower without the assent of all the parties interested. That the equities between the defendants do not arise out of the pleadings and proofs between the plaintiffs and defendants, and therefore there can be no decree between them.

In the case of *Bolling vs. Bolling*, 88 Va., 524, decided December 14, 1891, it was held: It is a rule of the common law that wills of personal property are to be construed according to the law of the place of testator's domicile, wheresoever the judicial inquiry may be made as to its meaning, and there is nothing in this section indicating an intention to abrogate or change it. Where a testator domiciled in New York bequeathed personal property to his wife, but made no disposition of his realty in Virginia, and there is no incompatibility between her claim for dower and her claim to the provision, the testator's intention must be construed according to the law of New York, which is: Where there are no express words, there must be on the face of the will a demonstration of the testator's intent that the widow shall not take both dower and the provision.

SECTION 2271.

In the case of *Wilson vs. Davisson*, 2 Rob., 384, decided August, 1843, it was held: The vendor of land conveys the same to the vendee in fee-simple and receives part of the purchase-money, but no security for the residue. On a bill in equity against the vendee to enforce the implied equitable lien of the vendor, a decree is made for the sale of the land, and the proceeds are more than sufficient to satisfy what remains due to the vendor. The surplus is claimed by creditors of the vendee, who have obtained judgments against him and taken him in execution, from which he escaped; with the vendee's assent, a decree is made in favor of those creditors for the surplus. Afterwards, the vendee dying, a bill is filed by his widow against those in possession of the land, to-wit, one to whom the purchaser, at the sale under the decree, had aliened the whole, and two others to whom that one had aliened a part claiming to be endowed. Held: (by two judges) That the lands in the hands of the purchasers are not chargeable to the

widow, and that her bill must be dismissed; dissented to by Allen, J., whose opinion was, that the widow was entitled to dower in the surplus which remained after satisfying the vendor's lien, and that the amount to which she was entitled constituted a charge upon the land in the hands of the purchaser at the sale under the decree, and of those claiming under him.

In the case of *Cocke's Executors et als. vs. Phillips*, 12 Leigh, 248, decided April, 1841: A married man dies possessed of personal estate, leaving a will wherein he bequeaths his whole estate to his nephews and nieces, and makes no provision for or mention of his wife. Held: Upon the construction of the statute 1 Rev. Code, Chapter 104, Sections 26 and 29, that in order to entitle herself to a distributive share of her husband's personal estate, the widow must declare her dissatisfaction with the will, all benefit under the same, within the time, and in the manner prescribed by the statute.

In the case of *Higginbotham vs. Cornwell*, 8 Grat., 83, decided July, 1851: Husband, during the coverture, sells and conveys the land with general warranty, but his wife does not join in the deed. By this will he gives his whole estate, real and personal, to his wife for her life, remainder to his children. Held: She is entitled to take under the will, and also to have her dower in the land sold.

That a provision for a wife in a will of her husband shall be held to be in lieu of her dower, the will must so declare in terms; or the conclusion from the provisions of the will ought to be as clear and satisfactory as if it were expressed.

In the case of *Dixon vs. McCue*, 14 Grat., 540, decided August 28, 1858, it was held: The principles applicable to the case of a widow as to the necessity of electing between her right of dower and the provisions of her husband's will, are the same as those applicable to other persons. If the widow's taking dower in the real estate will clearly interfere with the provisions of the will, she must elect.

In the case above stated, though the widow kept possession of the land for the five years, and cultivated it, and took a legacy of property to the value of five hundred dollars to aid her in carrying on the farm, still she, having been under a mistake as to her rights under the will, will not be held to have elected to take under it, but may still take her dower.

In the case of *Rutherford vs. Mayo*, 76 Va., 117, decided January 19, 1882, it was held: Doctrine of election is founded on the same reasons, and governed by the same rules, when applied to a widow claiming dower as to any other case.

One entitled to a benefit under an instrument must, if he claims that benefit, abandon every right, the assertion of which

would defeat, even partially, any of the provisions of that instrument.

If the widow's taking dower would interfere with any of the provisions of the will, she must elect.

Testator died in February, 1862, leaving considerable estate in lands, slaves, choses in action, etc., and a widow and five children. He gave each child one thousand dollars in money or lands, and to the widow all the residue, *durantee viduitate*, or if she married, only one half of the same; how much not fully ascertained, but much more than her distributive share, and more than all the children together received; she did not renounce but enjoyed all these provisions, or those thereof which the war spared, for thirteen years. Held: The provision was intended for her jointure, and she elected in lieu of dower.

In the case of *Nelson's Administrator vs. Kownslar Executor*, 79 Va., 468, decided October 6, 1884, it was held: In order that provision for wife in will of husband shall be held to be in lieu of dower, the will must so declare in terms, or the conclusion from the will must be as clear and satisfactory to that effect as if it was so expressed.

No question of election under Code of 1860, between dower and provision in lieu thereof arises, unless the intention to bar dower is clear. Under Code of 1873, unless the instruction plainly appears not to bar dower, the election must be made by the widow between the dower and the provision.

But when any provision for a wife is made in her husband's will, she may within one year from the admission of the will, probate, renounce such provision, and take such share of his personal estate as she would have had if he had died intestate.

SECTION 2274.

In the case of *Simmons vs. Lyle's Adm'r et als.*, 32 Grat., 752, decided January, 1880. A widow remains in the mansion house, having with her her two infant children, who she supports, and no assignment of dower is made to her. She pays a balance of the purchase-money for the property secured by the vendor's lien, and she pays the taxes due upon the property. As against judgment creditors of her late husband, held: She is entitled to be paid for the amount of the taxes she has paid, and they are the prior lien upon the property. She is to be paid for so much of the purchase-money paid by her as was properly payable by the heirs; and this is also a prior lien on the property as against the creditors. Having held the mansion house, and the heirs being infants, unable to assign dower, she must be considered as holding one-third of the house as doweress, and liable to pay one-third of the interest of the said purchase-money during her life. It being necessary to sell the

property, and therefore to fix the present amount chargeable to her on account of said interest, the annual interest is to be treated as an annuity, to be computed for so many years as she may be supposed to live, regard being had to her state of health; and the sum so ascertained in gross is to be deducted from the amount of the purchase-money paid by her. There being accounts to be taken in the cause, so that the property cannot be sold at once, the court should appoint two or more discreet persons to fix a rent upon the house, and if the widow will take it at the rate so fixed, she to pay two-thirds thereof, it should be rented to her; and as the court has funds of hers under its control sufficient to pay the rent, no security should be required of her.

In the case of *Hamon et als. vs. Honnihan et als.*, 85 Va., 429, decided September 20, 1888. Under this section the widow being entitled to hold mansion and curtilage until dower is assigned. Held: Her possession not being adverse, will not in law be so deemed, and the statute of limitations will not begin to run until such possession ends, or she publishes her claim and her possession to be adverse and hostile by open and actual disseizin.

SECTION 2275.

In the case of *Moore's et ux. vs. Waller*, 2 Rand., 418, decided March 30, 1824, it was held: An assignment of dower, made by commissioners under an order of court at the instance of one of several co-heirs, is binding on the widow, provided it be a full and just assignment; and it is binding also on the co-heirs, even if they are infants, provided the assignment is not excessive.

At common law the heir had the power of assigning dower without resorting to any court whatever, and that power is not impaired by the act of assembly. If the widow keeps possession in such case of the whole land under pretence that the assignment of dower was not legal, she will be accountable to the heirs for the rents and profits of all but her dower lands.

In the case of *Raper vs. Sanders*, 21 Grat., 60, decided June, 1871, testator directs: *First*, That so long as his wife, L., remains his widow, all his property, real and personal, shall be kept together, and subject to the control of his executor, but the possession to remain with his wife during her widowhood. *Second*, If she marries, she is to take one-third of his estate, and the remainder to go into the possession of his executor, and if in his opinion it should at any time thereafter be for the interest of testator's children to sell the entire estate and loan the money for their benefit, the executor may sell the same in his discretion. The widow renounces the will, and dower is assigned to her by an order of the court, to which the children are not parties.

The executor and widow, she selling her dower interest, join in selling and conveying the land, the executor acting under the power. Held: The executor had no authority to sell under the power during the widowhood of L.

On a bill to set aside the sale by the children, the court may set aside the sale so far as made by the executor, and confirm it so far as made by the widow; and direct a new assignment of dower. Though the bill does not pray that the sale may be set aside, yet if it makes a proper case for such relief, it may be given under the prayer for general relief.

In the case of *Helm vs. Helm's Administrator et als.*, 30 Grat., 404, decided July 18, 1878, it was held: A widow whose husband has died leaving no children and no debts, and has not claimed the homestead in his lifetime, is not entitled to a homestead in the estate as against his heirs. An order of the county court setting apart a homestead, made upon *ex parte* application of the widow, is of no effect as against the heirs.

SECTION 2276.

In the case of *Wilson vs. Davisson*, 2 Rob., 384, decided August, 1843, it was held: When the present value of a dower interest is to be calculated, the probable duration of the life by which it is limited, and the sum derived from it annually, are first to be ascertained, and then the calculation is to be made, not by discounting simple interest, but by discounting compound interest. For the present value of an annuity is that sum which, being improved at compound interest, will be sufficient to pay the annuity.

In the case of *Blair vs. Thompson et als.*, 11 Grat., 441, decided August 15, 1854, it was held: In a bill by a widow for dower in land sold in the lifetime of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant.

In the case of *White vs. White*, 16 Grat., 264, decided April 23, 1861, it was held: Unless it is impossible to assign to a widow her dower in real estate in specie, a court of equity has no power, under its general jurisdiction, against her will, to decree a sale of the real estate and to provide her a compensation in money in lieu of her dower.

A widow, entitled to a dower in the real estate of her deceased husband, is neither a joint tenant in common nor coparcener with the heirs at law, within the meaning of the statute concerning partition, so as to authorize a court of equity to sell the whole estate against her will, and compel her to receive a moneyed compensation out of the proceeds in lieu of her dower.

In decreeing a sale at the suit of the heirs of a decedent's estate, real and personal, except the widow's share of the slaves,

the court should protect and secure to her her interest in the proceeds of the other personal property.

A conveyance of slaves in trust for S. for her life, and after her death to B. and the heirs of her body forever. But should B. die without heirs, or heirs of her body, in that case to C. The conveyance does not give B. a separate estate; but upon her marriage, and her husband's possession of the slaves, the right of B. in the slaves is vested in him.

In the case of *Simmons vs. Lyles et als.*, 27 Grat., 922, decided November, 1876. A vendor of land, who has retained the title, files a bill against the widow and infant children of the vendee, for a sale of the land to satisfy his debt. The widow answers, claiming dower in the land subject to the vendor's lien. Judgment creditors of the vendee may make themselves parties to the cause, and have the land subject to the vendor's lien, and the widow's dower applied to the payment of their debts.

In such case the debt of the vendor is ascertained, and a commissioner is appointed to sell the land. He reports that a friend of the widow and children of the vendee has paid to the vendor his debt, and therefore he did not sell the land. The vendor then ceases to be interested in the case, and it becomes the suit of the creditors of the vendee.

In such a case, a commissioner is directed to settle the account of the administrator of the vendee, to take an account of the vendee's debts and their priorities, and also of the present value of the widow's dower in the land; and before the commissioner makes report, the court decrees a sale of the land. Held: It was premature to decree a sale of the land before the debts of the vendee and their priorities were ascertained; that it could not be so assigned before a moneyed compensation to her in lieu of her dower has been ascertained.

A widow is entitled as against creditors of her husband by lien created since her marriage to have her dower in his real estate assigned in kind, if it can be done without regard to its effect upon the interest of his creditors. If from the nature of the property, or of the husband's interest in it, the dower cannot be assigned in kind, the court may sell the property and make to her a moneyed compensation.

In this case the vendor having acquiesced in the decree for the payment of the amount ascertained to be due to him, and received the money, upon appeal by the widow and children of the vendee from a subsequent decree for the sale of the land for the payment of creditors, the appeal does not bring up the first decree so as to entitle him as an appellee to have that first decree reviewed and reversed for error against him.

In the case of *Harrison's Executors et als. vs. Payne et als.*, 32 Grat., 387, decided November, 1879, it was held: Where, in

a suit in equity, brought for the purpose of subjecting the real estate of a decedent to the payment of his lien debts and an assignment of dower to his widow, the dower cannot be assigned in kind, and it is necessary to sell the whole real estate, and to satisfy the claim of dower out of the proceeds, the court cannot, without the consent of all parties, satisfy said claim by the payment of a gross sum out of said proceeds, but must securely invest one-third of said proceeds and direct the interest on such investment to be paid to the widow during her life in satisfaction of her claim of dower.

In the case of *Wilson vs. Branch et als.*, 77 Va., 65, decided January 25, 1883. Unless impracticable to assign widow dower in kind, a court of equity has no power against her will to decree sale of the real estate and give her money in lieu of dower. The dower right of the widow must be settled before decreeing sale of the real estate.

It is an acknowledged rule, that when there are two or more coexisting disabilities in the same person when his right of action accrues, he is not obliged to act until the last is removed. This is the rule under the statute of limitations.

If an infant, who is a married woman, makes an instrument avoidable because of her infancy, the disability of coverture enables her to postpone the act of avoidance to a reasonable time after coverture ended.

Where there is nothing more than silence, many cases hold that an infant's deed may be avoided at any time after reaching his majority until he is barred by the statute of limitations, and that silent acquiescence for any period short of the period of limitation is no bar.

An infant *feme covert* and her husband, in 1845, granted her "maiden land"—half of "Cedar Lawn"—to G., who next day conveyed it to her husband, who owned the other half. In 1876 he and she conveyed the whole in trust to secure his debt. He died in October, 1877. His will was probated in December, 1878. In March, 1879, B. and others filed a creditors' bill to settle his estate and subject his lands to pay his debts. In April, 1879, she answered, renouncing her husband's will, demanding dower in his lands, disaffirming her deed of 1845 as void by reason of her then infancy, and denying that she had in any way ratified it. An account showed that the trust debt, amounting to \$1,532.89, was the only debt paramount to dower. The fee-simple value of "Cedar Lawn" was \$2,750. The court below decreed that she had ratified the deed of 1845 when free from the disability of infancy, and without assigning dower, but reserving right to make all orders to protect the right of dower, decreed the sale of the whole tract to pay her husband's debts. On appeal here, held:

1. The decree, without previous assignment of dower in kind, if practicable or if impracticable by compensation, was premature and erroneous.

2. The record discloses no act done by the widow to affirm the deed of 1845, made during her infancy.

3. Within a short period after she became of age, and was relieved of the disability of coverture, she disaffirmed her deed made during her infancy, and thereby rendered it void.

4. The trust deed of 1876 having been made during her coverture, cannot be regarded as affirming the deed made in infancy.

5. The trust debt, however, having been acknowledged in the mode prescribed by law for married women, is binding upon the widow to the extent of the debt therein secured, and no further.

SECTION 2277.

In the case of *Tod vs. Baylor*, 4 Leigh, 498, decided May, 1833, it was held: Upon a bill in equity by a widow against the alienee of her husband for dower of lands aliened by her husband in his lifetime, the widow is dowable of the lands as of the value thereof at the time of alienation, not at the time of assignment of dower; she is entitled to no advantage from enhancement of the value, either by improvements made by the alienee, or from general rise in value, or from any cause whatever.

Upon a bill in equity by a widow against an alienee of the husband for dower of lands sold, she is not entitled to an account of profits from the death of the husband, but only from the date of the *subpœna* in the cause; otherwise upon a bill against the heir.

In the case of *Thomas vs. Gammel and Wife*, 6 Leigh, 9, decided January, 1835, it was held: An infant *feme covert*, joining her husband in a deed of lands, and acknowledging the same before justices, upon privy examination, duly made, certified and recorded, according to the statute of 1792, is nowise bound by such deed. Therefore, she is entitled to dower of the lands conveyed; but, as her husband did not die seised, she is not entitled to damages.

SECTION 2281.

For the case of *Wilson vs. Davisson*, 2 Rob., 384, see *Ante*, Section 2276.

In the case of *Fisher vs. Clement's Executor*, 82 Va., 813, decided February 3, 1887: In suit against widow and heirs of decedent, to subject his lands to his debts, commissioner was directed to inquire and report if she elected dower in kind or commutation. Commissioner reported that she elected commutation; report confirmed. The lands were sold free of dower.

With her consent, and by leave of court, a lot in town was assigned to her for her dower; up to her death she possessed it. After her death, on petition to subject the lot to her husband's debts, held: The lot was the widow's property in fee, and passed to her heirs.

CHAPTER CIII.

SECTION 2284.

In the case of *McDearman vs. Hodnett et als.*, 83 Va., 281, decided April, 1887, it was held: The married woman's act does not affect the question of advancement.

In the case of *Dugger's Children vs. Dugger et als.*, 84 Va., 130, decided December 1, 1887, it was held: A separate estate created by the gift, conveyance or settlement of the husband to or for his wife, whether directly or indirectly through a trustee, presumptively excludes the husband from tenancy by the curtesy in said estate. Gift from husband to wife is construed to be for her separate use.

In the case of *Crabtree vs. Dunn et als.*, 86 Va., 953, decided June 19, 1890, it was held: Where land is claimed by wife as her separate property against her husband's creditors, she is not a competent witness in support of her claims.

SECTION 2286.

In the case of *Chapman et als. vs. Price et als.*, 83 Va., 392, decided June, 1886, it was held: At common law, in grant of estate of inheritance to married women, husband's right to curtesy could not be excluded; and the same as to equitable estates. But as to married woman's "separate estate," the same may be limited as to give her the inheritance and to exclude the husband from the curtesy.

The power of alienation by deed *inter vivos*, or by will, is an incident to the "separate estate," and, if not expressly or impliedly restricted, always exists in a married woman, just as if she were sole; and if exercised, effectually excludes husband's rights by curtesy or otherwise.

In grant by parents of an estate of inheritance in lands to married daughter, occurs the following *habendum*: "To have and to hold in her own right, free from any claims or demands from her husband, or any person claiming under, through, or against him in any way, now or at any time hereafter." Afterwards the wife, by her will, devised the land to her children, died, leaving her husband her surviving heir. His creditors brought their bill to subject his supposed curtesy in the land to his debts.

The terms of the devise created a separate estate in the wife, with power of alienation, which she exercised, and thereby ex-

cluded her husband and all claiming under him from all claims on the land.

In the case of *Yates vs. Law*, 86 Va., 117, decided May 2, 1889, it was held: It is a presumption of law, not affected by the married woman's act, that husband owns all property in possession of wife, especially if living together; and to overcome it she must show by affirmative proof that the property is her own, and was acquired by means not derived from him, if he be insolvent; and this rule exists in favor of all persons having the right to have his property applied to pay his debts.

SECTION 2285.

In the case of *Geiger vs. Blackley et als.*, 86 Va., 328, decided September 26, 1889, it was held: Where wife contracts for such domestic matters as husband is held by law responsible for, the presumption is that the contract is on the behalf of her husband.

In the case of *McDonald and Wife vs. Hurst, Purnell & Co.*, 86 Va., 885, decided May 8, 1890. Where a bill against husband and wife to subject her separate estate to judgments against them fails to charge that at the time she signs the notes whereon the judgments were had, she had separate property, and that she signed them with intent, expressed or implied, to charge it. Held: A demurrer lies.

SECTION 2286.

In the case of *Gentry vs. Gentry*, 87 Va., 478, decided March 5, 1891. As under this section a married woman may dispose of her separate estate, make contracts in respect thereto, and be sued on them, and have a personal judgment rendered and enforced against her and such estate, as though she were a *feme sole*. Held: Specific performance of her contract to convey her separate estate in land may be decreed.

SECTION 2288.

In the case of *Tate vs. Perkins*, 85 Va., 169, decided July 19, 1888. In action on bond by a married woman described in declaration "as assignee of obligee," and her husband described therein as "having no interest in subject-matter, but joined by way of conformity" upon demurrer. Held: Declaration unobjectionable.

In the case of *Gentry vs. Gentry*, 87 Va., 478, decided March 5, 1891. As under this section a married woman may dispose of her separate estate, make contracts in respect thereto, and be sued on them, and have a personal judgment rendered and enforced against her and such estate, as though she were a *feme sole*. Held: Specific performance of her contract to convey her separate estate in land may be decreed.

In the case of *Virginia Coal and Iron Co. vs. Roberson*, 88 Va., 116, decided June 25, 1891. Previous to act of April 4, 1877, specific performance of a married woman's contract could not be enforced. After that date, and previous to May 1, 1888, her contract could only be specifically enforced as to her separate estate, and while her husband united with her. Since the date last named, her executory contract may be specifically enforced under the rule as to specific performances generally. The case at the bar was as follows: In 1880, husband and wife executed a deed conveying her separate estate in land. The certificate of acknowledgment was defective as to her. The purchase-money was paid and possession delivered. Held: The deed constituted a contract, whereof, under act of April 4, 1876, specific performance was enforceable.

SECTION 2289.

In the case of *Gentry vs. Gentry*, 87 Va., 478, decided March 5, 1891. As under this section a married woman may dispose of her separate estate, make contracts in respect thereto, and be sued on them, and have a personal judgment rendered and enforced against her and such estate, as though she were a *feme sole*. Held: Specific performance of her contract to convey her separate estate in land may be decreed.

SECTION 2297.

In the case of *Tate vs. Perkins*, 85 Va., 169, decided July 19, 1888. In action on bond by a married woman described in declaration "as assignee of obligee," and her husband described therein "as having no interest in subject matter, but joined by way of conformity" upon demurrer. Held: Declaration unobjectionable.

TITLE XXIX.

CHAPTER CIV.

SECTION 2304.

In the case of *Hunter et als. vs. Hall*, 1 Call., 206 (2d. edition, 178), decided April 20, 1798, it was held: A reasonable degree of strictures is necessary in entries for land. The dismissal of a *caveat*, unless it be on its merits, is not binding.

In the case of *Miller vs. Page*, 6 Call., 28, decided April, 1806, it was held: An entry in these words, J. M. enters one thousand acres "between the lines of H. C., deceased, on both sides of Hatcher's creek beginning on the same," is void for uncertainty.

In the case of *Lewis et als. vs. Billups et als.*, 1 Leigh, 353, decided June, 1829. In the location of a land war-

rant, the entry calls to begin at three marked red oaks, and to extend down for quantity; these three oaks are on the headwaters of a stream called Popular Fork; the survey does not extend down that stream for quantity, but leaving it entirely, extends down the general course of the country; and there is evidence that the call of the entry to extend down for quantity, in the usual sense of that phrase in locations, required the locator to extend down Popular Fork for quantity. Held: The survey is naught for not conforming with the entry.

In the case of *McNeel vs. Herold*, 11 Grat., 309, decided July, 1854, it was held: An entry of waste and unappropriated land, to be valid, must call for objects which possess that notoriety in themselves, or they must be so particularly described that other persons, by using due care and reasonable diligence, may readily find them.

The general or descriptive calls, and the particular or locative calls of the entry, must possess that reasonable degree of certainty which will put a subsequent adventurer duly upon his guard; and the locative calls must be found to be embraced within the descriptive calls, and they should properly be consistent with the latter and with one another; though in certain cases, where all the calls of an entry cannot be satisfied, the courts, for the purpose of sustaining it, will reject such as appear vague and repugnant, and hold to those appearing to be certain and consistent.

Where there are several distinct and independent calls in an entry, it is not necessary that all the objects thus called for should be shown and recognized by the public, or that they should be described with that speciality that a subsequent locator can readily find them; but it is necessary that some one of the leading calls should be thus known, or so described that other persons, with due care and proper diligence, may be led to ascertain their positions, and thus distinguish the land appropriated from the adjacent residuum.

The objects called for are so connected with the general history or geography of the country, or its legislation, that the courts will take notice of them and they will be deemed of general notoriety, and sufficiently identified without further proof. An entry call for such objects may be supported without proof of notoriety or identity.

When the objects called for possess but a local notoriety, the party affirming the validity of the entry must prove the identity of the land intended to be appropriated, and that the calls of the entry are such that a subsequent locator, in the exercise of proper judgment and reasonable diligence, would be enabled to distinguish them from the surrounding lands, so as to appropriate for himself the adjacent residuum.

In a *caveat*, where the objects called for in the entry are not of such public notoriety as that the courts will take notice of them, a special verdict must find that the objects called for have a real existence, and are such as are required to make it a valid entry; and a finding defective in these respects will not be remedied by finding that the survey was made in conformity with the entry.

SECTION 2321.

In the case of *Lewis et als. vs. Billups et als.*, 1 Leigh, 353, decided June, 1829, it was held: An entry calls to begin one mile above a marked tree and a rock on Big Hurricane Creek, eight or nine miles above its mouth; the marked tree and the rock are on the east side of the creek, thirteen miles from its mouth by the meanders, and more than nine miles in a straight line; the survey of this entry begins at a point on the west side of the creek, sixty-five poles from the stream, and one mile and eighty-four poles from the designated tree and rock. Held: 1. The entry is special and precise enough. 2. The survey conforms with the entry with reasonable exactness, especially as a jury had so found shortly after the survey, upon a *caveat* to which, though not all, yet some of the parties now contesting the right under this survey were parties.

SECTION 2324.

In the case of *Preston vs. Bowen*, 6 Munf., 271, decided February 3, 1819, it was held: A special action on the case lies against the surveyor of a county for fraudulently refusing to furnish copies of surveys when lawfully demanded, and thereby enabling a third person to locate the lands therein described before the plaintiff. It is a part of the official duty of the surveyor of a county to furnish in reasonable time, when demanded, copies of all surveys not specially excepted in the land law.

Where the declaration declares that the defendant, contrary to his official duty, refused to furnish copies of certain surveys when demanded by the plaintiff, if the defendant be excused by any provision in the land law from furnishing the copies so demanded, he ought to plead it specially.

SECTION 2327.

In the case of *Wilcox vs. Calloway*, 1 Wash., 38 (2d. edition, p. 50), it was held: The effect of a *caveat* is to prevent the emanation of a grant, not to set one aside.

In the case of *Curry vs. Martin*, 3 Call, 28 (2d. edition, 26), argued May 11, 1801, reargued and decided act 29, 1802, it was held: The party who *caveats* must show a title to the warrant

under which his own survey is made. The reference to 3 Call, 59, is an error.

In the case of *Stever vs. Gillis*, 3 Call, 417 (2d. edition, 361), decided October 15, 1803. G. in 1770 surveyed and took a patent for a tract of one hundred and sixty acres of land, the lines of which were all surveyed, except two, which were the lines of A. H., under a former patent, and which formed a small angle containing twenty-six acres. These two lines in the survey and patent of G. were thus described: Thence along Andrew Henry's lines one hundred and eighty-three poles to the beginning. Held: The survey and patent are good, and entitle G. to a pre-emption in the twenty-six acres.

In the case of *Preston vs. Harvey*, 3 Call, 495 (2d. edition, 427), decided November 3, 1803, it was held: The time of the return of the survey into the office is the period from whence the six months are to be calculated for entering a *caveat*, in such case the *caveat* must show the fact. A *caveat* lies to an inclusive survey, though there be no certificate from the county court that it is reasonable.

In the case of *Hamilton vs. Maize*, 4 Call, 196, decided June, 1791, it was held: A party who can *caveat* ought to do so; but circumstances may excuse it.

In the case of *Tanner's Administrator vs. Saddler*, 2 H. & M., 370, decided April 28, 1808, it was held: A patent or grant for lands may, under circumstances, be presumed to have formerly issued, of which circumstances and of the conclusion to be drawn from them, it is the province of the jury and not of the court to judge. In this case the circumstances of upwards of sixty years' peaceable and uninterrupted possession in the caveator and those under whom he claimed together, with the payment of quit-rents before and taxes since the revolution, was considered as sufficient ground for such presumption.

In the case of *Depew vs. Howard et ux*, 1 Munf., 293, decided April 19, 1810, it was held: In cases where the regular remedy is by *caveat*, a court of equity may entertain jurisdiction under circumstances which renders its interposition just and proper, but such circumstances must be made to appear to the satisfaction of the court.

A legal title to land ought not to be disturbed in favor of a party not having a superior right in equity to the identical land in question.

In the case of *Noland vs. Cromwell*, 4 Munf., 155, decided January 26, 1814, it was held: Although a party may be let into a court of equity on grounds which he could not have used on the trial of a *caveat*, and which, in fact, make another case (in reference to that which he might have availed himself of on such trial), or upon a case suggesting and proving that he was

prevented by fraud or accident from prosecuting his *caveat*, he is not to be sustained in the court of equity on such grounds as were or might have been brought forward on the trial of the *caveat*.

In the case of *Christian's Devisee vs. Christian et als.*, 6 Munf., 534, decided March 18, 1820, it was held: The general principle laid down in the case of *Noland vs. Cromwell*, 4 Munf., 155, does not apply to a case in which the rights of the parties cannot be adjudicated in the court of *caveat*, but the aid of a court of equity is necessary to give each his proper share of the land for which one has improperly obtained a patent.

In the case of *Lyne vs. Jackson* and *Lyne vs. Wilson*, 1 Rand., 114, decided April, 1822, it was held: Where a party applies to a court of chancery to prevent the issuing of a patent or an assignment of a survey, and alleges a fraud committed by the defendant in forging an agreement between him and the complainant, the court of chancery has jurisdiction without the party resorting to a *caveat* in the first instance. During the pendency of such suit no person can obtain a patent for the same land under a treasury warrant located since the institution of the suit, but he will be regarded as a purchaser with notice.

In the case of *McClung vs. Hughes*, 5 Randolph, 453, decided June, 1827, it was held: After a grant issued, any one claiming a prior equity against the grantee, can in no case have relief in equity, unless upon the ground of actual fraud in the acquisition of the legal title, or unless the party was prevented from prosecuting a *caveat* by fraud, accident, or mistake.

In the case of *Jackson vs. McGavock*, 5 Rand., 509, decided June, 1827, the decision in *McClung vs. Hughes*, 5 Rand., 453, cited *supra*, was affirmed and followed.

In the case of *Hardman vs. Boardman*, 4 Leigh, 377, decided April, 1833. Upon the construction of the 38th section of the general law, 1 Rev. Code, Chapter 86. Held: That a person holding a perfect legal title to lands by grant from the Commonwealth, may maintain a *caveat* to prevent the issuing of a junior grant to another person.

In the case of *Donnell & Preston vs. King's Heirs and Devisees*, 7 Leigh, 393, decided March, 1836. Entry of land by A. in 1783, patent in 1800. Survey of same land by B. in 1790, without any entry thereof made by him, and patent to B. in 1793. A. in 1815 brings *scire facias* in chancery against B. to repeal his patent. *Quære*: Whether equity will entertain the suit, A. having failed to *caveat*, and there being no proof that B. had actual notice of A.'s entry?

In the case of *Wilson's Heirs vs. Daggs*, 8 Leigh, 681, decided August, 1837. After the dismissal of a *caveat* upon the merits,

the *caveatee* files in the land office a copy of the judgment, and obtains a patent. A *supersedeas* being awarded to the judgment, the patent is relied on as a bar. Held: Notwithstanding the emanation of the patent, the court may examine into the correctness of the judgment; but if the same be reversed, then a dismissal will be without prejudice to any proceeding which may be instituted to vacate the patent.

A *caveator*, whose survey had not been made twelve months before he entered his *caveat*, will not have judgment rendered against him merely because the twelve months allowed for returning the plat and certificate of survey into the land office have elapsed pending the *caveat*.

In the case of *Warwick and Wife and Another vs. Norvell*, 1 Rob., 308 (2d edition), 326. The statute of May, 1779, Chapter 13, giving the remedy by *caveat* for determining the right to waste and unappropriated lands, did not extend to lands which, having been once granted by patent, had afterwards lapsed and become forfeited to the State.

In the case of *Walton vs. Hale*, 9 Grat., 194, decided August 16, 1852, it was held: In a case of *caveat*, the *caveat* rests upon the ground of the better right in the *caveator* to the land surveyed. Unless he can show such better right, the *caveator* is entitled to the judgment, though it might appear that as against a party showing a right, his entry and survey were defective.

Quære: If a tenant in common of an undivided interest in land may not maintain a *caveat* against the issuing of a grant to a third person, upon a survey of part of the land embraced within the limits of the grant in which he holds an undivided interest?

In the case of *Harper & Western vs. Baugh & Seguire*, 9 Grat., 508, decided November 17, 1852, it was held: In a *caveat* the *caveator* must show the better title to the land in controversy to be in him. He cannot recover upon the ground of the weakness of his adversary's title. The *caveator* must state in his *caveat* the grounds on which he claims the better right to the land in controversy, and he will not be permitted to abandon on the trial the right which he has set out in his *caveat* as that under which he claims, and prove a different right.

In the case of *McNeel vs. Herold*, 11 Grat., 309, decided July, 1854, it was held: In a *caveat*, where the objects called for in the entry are not of such public notoriety as that the courts will take notice of it, a special verdict must find that the objects called for have a real existence, and are such as are required to make it a valid entry; and a finding defective in these respects will not be remedied by finding that the survey was made in conformity with the entry. A party who files a *caveat* must show a title to the warrant under which his own entry and

survey were made; and if he fails to do so, his *caveat* will be dismissed.

In the case of *Hamilton vs. McNeil et als.*, 13 Grat., 389, decided July 28, 1856, it was held: In a case of *caveat* all the facts agreed by the parties or found by the jury, or if a jury is dispensed with, ascertained by the court, necessarily become, and should be made a part of the record of the cause. In a case of *caveat*, if the court shall certify the evidence instead of the facts, yet if there is no conflict in the parol evidence, and taking the whole as true, the appellate court may proceed safely to judgment upon the same, it is the duty of such court to proceed and give judgment according to the very right of the case.

In a case of *caveat* where a jury is dispensed with, and the whole cause is submitted to the court, it is not necessary for the loosing party to file a bill of exceptions to the judgment of the court, or to move for a new trial, and if it is refused to except to the opinion of the court refusing it; but it is sufficient that the circuit court shall make the facts agreed and ascertained, or the evidence, where the parol evidence is in no respect conflicting, a part of the record by its order to that effect upon rendering judgment.

In a case of *caveat* upon a question involving the boundary line between two counties, the courts, in construing the acts in relation to their boundaries, may look to the acts forming other counties, both before and subsequent, for the purpose of ascertaining the intention of the legislature as to said boundary line.

In the case of *Clements vs. Kyles*, 13 Grat., 468, decided August 29, 1856, it was held: In a case of *caveat* the caveator should state in his *caveat* the grounds on which he claims to have the better right to the land in controversy; and if this is not done, the *caveatee* may either move the court to dismiss the *caveat*, or to require the *caveator* to file a specification of the alleged better right on which his claim is founded. But after the jury is sworn to ascertain the facts, it is then too late to object to the form of the *caveat*.

In a case of *caveat* the *caveator* claims under a patent issued to W. in 1756, which does not refer to any survey. In order to show that the patent was founded on a survey the *caveator* offers in evidence a copy from the books of the surveyor of Augusta county of a certificate of a survey and plat made for W., dated in November, 1749. The certificate itself does not contain the calls for course and distance or other marks, but these are given on the plat, and they agreed with the grant in its general and locative calls. It is competent evidence for the purpose for which it is offered.

To prove the boundaries of W.'s patent, the *caveators* offer the deposition of a witness who had purchased a part of the

land included in that patent from a party claiming under it, but not any part of the land claimed by the *caveators*. The witness then had a controversy with a third person, in which it was important to him to establish the boundaries of said patent. The deposition had been taken in a *caveat* between the ancestor of the *caveators* and the same *caveatees* in relation to the same land, in which the said *caveator* had suffered a non-suit. Held: He is a competent witness. The deposition is competent testimony. The statement of a person living on the land at the time, made many years before the trial, at which time he was dead, pointing out to the witness two of the corners called for in W.'s patent, is not competent evidence, he not having been the surveyor or chain-carrier at the making of the survey, or owner of that or adjoining lands calling for the same boundaries, or having any motive or interest to inquire or ascertain the facts. Surveys made many years after W.'s survey, and by a different surveyor, are not competent evidence as to the boundaries of W.'s survey. Three or four corners of a large survey are ascertained, but between these ascertained corners the patent calls for several lines and courses. In fixing the boundaries of the land, the lines calling for these ascertained corners must be run thereto, though this may require a variation of both course and distance; but when a corner is called for which is not found, the course and distance called for in the patent must govern, and an average allowance of variation in each course and line called for between the ascertained corners is not to be made.

The land in controversy, lying in the western part of a large survey, it is error to instruct the jury that if they are satisfied certain specified corners of the survey are established, and the courses of the patent between these corners are correctly laid down upon the plot of the survey made in the cause, it is all that is necessary for them to ascertain in this suit, as it is that portion of said patent that the survey of the *caveatees* lies, as appears by the plat, and it is only to that portion that they have set up title.

The will of W. having been made in 1746, before the survey or patent to him, the land embraced in said patent did not pass by his will to Mrs. W., but descended to his heir at law.

In the case of *Carter vs. Ramey*, 15 Grat., 346, decided July, 1859, it was held: The entry and the survey of both the *caveator* and the *caveatee* being upon land which was previously granted by the Commonwealth, and which had never been forfeited, the Commonwealth having no interest in the land which could be vested in the *caveator*, he can have no right to it, and therefore cannot maintain a *caveat*, though the *caveatee* may have no better right.

In the case of *Troter et als. vs. Newton et als.*, 30 Grat., 582, decided September, 1877. In a case of *caveat* founded on the

alleged better right of the *caveator* to the land in controversy, the first inquiry is as to the title or interest in the subject. The *caveator* cannot recover upon the mere infirmity of the title of the *caveatee*, for however defective that may be, no one has a right to interpose for the purpose of preventing him from carrying his entry into grant, unless he has a better right, legal or equitable in himself.

The *caveator* must state in his *caveat* the grounds on which he claims the better right to the land in controversy, and he will not be permitted to abandon on the trial the right which he has set out in his *caveat*, as that under which he claims, and prove a different right.

In February, 1796, D. obtained a grant for four thousand six hundred and sixty acres of waste mountain land, the grant showing that there was excluded from the grant forty-seven and one-half acres of prior claims of F. In 1854, T. bought D.'s land at a judicial sale. In 1873, N. laid a warrant on the forty-seven and one-half acres, and applied for a grant, and stated as the grounds of his claim, among others, (1st), That F. had entered and surveyed the land, and it did not appear that his right had ever been forfeited; and (2d), That T. had been in possession of the land under the color of title for more than twenty years, paying taxes upon it. Held: T. cannot set up title in F. to defeat the *caveatee*, but must show a better right in himself.

As. T. only purchased the land of D., which did not include the land in controversy, and does not connect himself with the right of F., he must show an exclusive, actual and continued possession under a colorable claim of title for the period required by the statute to ripen his possession into a valid title.

The whole tract being waste mountain land, and the evidence not showing any continued possession of the land in controversy, T. cannot maintain his *caveat*.

In the petition for an appeal, T. states that he had located a warrant on the land in controversy, and claims that he is protected by the provisions of Section 14, Chapter 108, Code of 1873. Held: That the statute only applies to a party who has actual possession and claim which T. did not have. The claim not having been made in the court below, cannot be considered in the appellate court. This ground of claim not having been stated in the *caveat*, cannot afterwards be set up.

In the case of *Carter vs. Hagan*, 75 Va., 557, decided August 11, 1881, it was held: A patent is the consummation of the legal title, and passes to the grantee the legal estate and seisin of the Commonwealth. Accordingly where a patent contains a reservation in favor of a prior claimant, who relies only on his entry and survey, and under these circumstances, a patent, including the land so claimed, and without a reservation, is issued

to a junior patentee, the latter acquires the legal title, and must prevail in a court of law over such prior claimant, whatever may be the date of his survey.

A party claiming under such prior survey must resort to his *caveat* to prevent the emanation of a grant to his adversary, and if he fails in that, without sufficient excuse, he is without remedy, unless by some proceeding in equity, having for its object the annulment of the patent upon equitable grounds.

Where a patent contains a reservation, the title and seisin of the land so reserved does not pass to the patentee, but remains in the Commonwealth.

SECTION 2336.

See the case of *Hunter et als. vs. Hall*, 1 Call, 206, (2d edition, 178), see Section 2304.

SECTION 2338.

The reference to 8 Leigh, 681, is an error. The case does not apply.

SECTION 2339.

In the case of *French & Brown vs. Commonwealth*, 5 Leigh, 512, decided December, 1834, it was held: This section has no application to escheated lands.

In the case of *Tichanel vs. Roe*, 2 Rob., 288, decided August, 1843. In 1796 a person settled upon, cleared and improved a tract of land. In 1806 he conveyed a part of it by metes and bounds, and in 1834 the land embraced in this conveyance was granted by the Commonwealth, in conformity with a survey made in 1833. It appearing that the tenant claiming under the deed of 1806 had entered upon, settled and improved the land conveyed by this deed, and had, during the period he held it, paid the taxes thereon, and that a portion of this land was actually enclosed in 1796, when the tract of which it then formed a part was settled, held: It is competent for the tenant to connect his possession with the possession of those under whom he claims (the same having never been interrupted), and it thus appearing that the location on which the Commonwealth's grant was founded was on lands which had been settled thirty years prior to the date of the location, and upon which taxes had been paid within that time, held, further, that the location was invalid, and that no title passed by the Commonwealth's grant.

In the case of *Matthews vs. Burton*, 17 Grat., 312, decided February 14, 1867, it was held: In eastern Virginia, a party in possession of land, tracing back his title for upwards of seventy years, it is a presumption of law, that a grant has issued for the land, and it is not, therefore, subject to entry and grant as waste and unappropriated.

SECTION 2340.

In the case of *Nichols et als. vs. Covey &c.*, 4 Rand., 365, decided June, 1826, it was held: Where a patent is issued in pursuance of the act of 1788, which includes, in its general courses, a prior claim, it does not pass to the patentee the title of the Commonwealth in and to the other lands covered by such prior claim, subject only to the title whatever it may be in the prior claimant; but, if that title is only a prior entry, and becomes vacated by neglect to survey and return the plat, any one may lay a warrant on the same, as in other cases of vacant and unappropriated lands.

In the case of *Carter vs. Hagan*, 75 Va., 557, decided August 11, 1881, it was held: A party claiming under such prior survey must resort to his *caveat* to prevent the emanation of a grant to his adversary, and if he fails in that, without sufficient excuse, he is without remedy, unless by some proceeding in equity, having for its object the annulment of the patent upon equitable grounds.

SECTION 2344.

In the case of *Morrison vs. Campbell et als.*, 2 Rand., 206, decided January, 1824, it was held: An inchoate right to land, held by entry and survey only, is real estate, and will descend to the heirs, and not the executors, warrants and surveys of land may be assigned but not entries.

In the case of *Nichols et als. vs. Covey, etc.*, 4 Rand., 365, decided June, 1826, it was held: The purchase of a warrant from the Commonwealth, and an entry in consequence thereof, is not a purchase of the land itself, until the entry is carried into grant.

SECTION 2349.

In the case of *Blankenpickler vs. Anderson's Heirs*, 16 Grat., 59, decided August 21, 1860, it was held: If the grantee in a patent for land was dead at the time the grant issued, the patent is void; and this may be shown on a trial in ejectment in which one party claims under the grant.

In the case of *Carter vs. Hagan*, 75 Va., 557, decided August 11, 1881, it was held: A patent is the consummation of the legal title, and passes to the grantee the legal estate and seisin of the Commonwealth. Accordingly, where a patent contains a reservation in favor of a prior claimant who relies only on his entry and survey, and under these circumstances, a patent claiming the land so claimed and without a reservation is issued to a junior patentee, the latter acquires the legal title, and must prevail in a court of law over such prior claimant, whatever may be the date of his survey.

A party claiming under such prior survey must resort to his *caveat* to prevent the emanation of a grant to his adversary,

and if he fails in that, without sufficient excuse, he is without remedy, unless by some proceeding in equity, having for its object the annulment of the patent upon equitable grounds. Where a patent contains a reservation, the title and siesin of the land so reserved does not pass to the patentee, but remains in the Commonwealth.

SECTION 2351.

In the case of *Blankenpickler vs. Anderson's Heirs*, 16 Grat., 59, decided August 21, 1860, it was held: If the grantee in a patent for land was dead at the time the grant issued, the patent is void; and this may be shown on a trial in ejectment in which one party claims under the patent.

SECTION 2357. .

In the case of *Preston vs. Harvey*, 3 Call, 495 (2d. edition, 427), decided November 2, 1803, it was held: The Act of Assembly, concerning inclusive surveys, does not extend to lands held by entry only.

In the case of *Preston vs. Harvey*, 2 H. & M., 55, decided March 4, 1808, it was held: An inclusive survey cannot lawfully be made of lands held by entry only. A judgment on a *caveat* that no grant shall issue to a caveatee on his inclusive survey, where it appears that he has any other claim or survey by which he may possibly hold part of the land, ought to be so worded as not to affect his right under such claim or survey.

In such case the judgment ought not to be that no grant issue to the caveatee for the land mentioned and described in his inclusive survey, *caveated*, etc., but "that no grant issue to him in pursuance of his inclusive survey made under the order of the court granting him leave to comprehend in one survey his several adjoining claims."

SECTION 2360.

In the case of *Jones vs. Jones*, 1 Call, 458 (2d edition, 396), decided November 3, 1798, it was held: Inclusive patent to three creates a joint tenancy.

A father and three sons obtained separate patents for four hundred acres of land each, adjoining one another, and the father obtains a patent for another tract of four hundred acres; afterwards the three take one inclusive patent for all these tracts and another tract of one thousand one hundred and sixty-two acres. This destroys the separate estates in the first three tracts, and creates a joint tenancy in the whole two thousand seven hundred and sixty-two acres comprised in the patent.

SECTION 2368.

In the case of *Hambleton vs. Wells*, 4 Call, 213, decided June, 1791, it was held: In ejectment it is competent to the defendant

to give in evidence that the patent under which the plaintiff claims was obtained contrary to law, although upon the face it appears to have been regularly issued.

In the case of *White vs. Jones*, 4 Call, 253, decided October, 1792, it was held: A court of law can avoid a patent for fraud in obtaining it, but neither a court of equity nor a court of law can afford relief unless the fraud be proved.

In the case of *Alexander vs. Greenup*, 1 Munf., 135, decided April, 1810, it was held: A patent from the Commonwealth, containing a recital "that the land was escheated from a certain J. M., dec'd," and granting the same "by virtue of an entry made in the office of the late lord proprietor of the Northern Neck, and in consideration of the ancient composition of one pound, five shillings, sterling, paid by the grantee into the treasury," is illegal and void, and not to be received as evidence of title on the general issue in ejectment.

The Commonwealth, under existing laws, cannot grant escheated lands without a previous inquest of office, and then not (as waste and unappropriated lands) upon entry and surveys, but upon sales by the escheators. A patent may be declared void for defects apparent on its face, without the necessity of resorting to a *scire facias* to repeal it.

In the case of *Witherinton vs. McDonald*, 1 H. & M., 306, decided June 10, 1807, it was held: In an action of ejectment, evidence cannot be introduced to prove that a patent was irregularly obtained. *Quære*: Whether in such case evidence is admissible that a patent was obtained by fraud?

The reference to 6 Munf., 308, is an error.

In the case of *Morrison vs. Campbell et als.*, 2 Rand., 206, decided January, 1824, it was held: A man deriving title under a forged assignment of an entry, and who afterwards obtains a legal title from the Commonwealth, ought not to be preferred to one who holds a regular assignment of a survey of the same lands.

In the case of *Warwick and Wife, and Another vs. Norvell*, 1 Rob., 308 (2d edition, 326). Land which had been patented in 1755, being adjudged in 1774, upon petition to the general court to be forfeited and revested in the crown, was, in 1797, granted anew by patent to the holder of a land office treasury warrant as waste and unappropriated land. Held by the court of appeals (following the decision in *Whittington, etc., vs. Christian, etc.*, 2 Rand.), that the patent of 1797 was void.

In the case of *Blankenpickler vs. Anderson's Heirs*, 16 Grat., 59, decided August 21, 1860, it was held, page 62: "If the grantee in a patent for land was dead at the time the grant issued, the patent is void; and this may be shown in an action of ejectment in which one party claims under the patent.

In the case of *Garrison vs. Hall et als.*, 75 Va., 150, decided January 13, 1881, it was held, page 164: A party claiming title to land to which he has the legal title of one-third and an equitable title to the other two-thirds, may go into equity to restrain waste upon the land, and to set aside a conveyance from the board of public works of Virginia to a purchaser of the land, the same having been previously legally granted by a valid grant.

CHAPTER CV.

SECTION 2375.

For 27 Grat., 291, see Section 2398.

SECTION 2376.

In the case of *Bennett vs. The Commonwealth*, 2 Washington, 199 (1st edition, page 154), decided at October term, 1795, it was held: Upon an inquest of office respecting property escheated or forfeited to the Commonwealth, the jury might have been composed of twelve jurors, or of a greater or smaller number, prior to the act of 1794.

In the case of *Dunlop vs. Commonwealth*, 2 Call, 284 (2d edition, 240), decided April 30, 1800. The question was raised, whether an inquisition finding an escheat for want of heirs must say in express words that the deceased died without issue, but as the motion to quash was made by an *amicus curia*, the above point was not decided. It was held: An *amicus curia* cannot move to quash an inquisition of escheat unless he either has an interest himself or represents somebody who has. An *amicus curia* cannot appeal.

SECTION 2378.

As to case cited, 2 Call, 284, see Section 2376 *supra*.

SECTION 2379.

In the case of *French & Brown vs. The Commonwealth*, 5 Leigh, 512, decided December, 1834, it was held: In a *monstrans de droit* to an inquisition of escheat, prosecuted under this section, the monstrant is plaintiff.

The monstrant must show good title in himself in order to entitle him to judgment of *amoveas manus* against the Commonwealth.

SECTION 2388.

In the case of *Fiott et als. vs. The Commonwealth*, 12 Grat., 564, decided September 7, 1855, it was held: A subject and citizen of Great Britain purchased land in Virginia in 1793, and he lived until 1818. By the treaty of 1794 between Great Britain and the United States, he was entitled to hold the land, and no

proceedings having been instituted during the war of 1812 to escheat it, that war did not divest his rights, but the land descended on his death to his heirs.

In a case of escheat between the heirs of the alien and the Commonwealth, both parties claiming under the same person, and the inquisition referring to a deed to the alien for the land, as recorded in the county of K., an office copy of said deed is evidence for the heirs, though it was not recorded upon proper proof.

In the case of *Hauenstein vs. Lynham (Escheator)*, 28 Grat., 62, decided January, 1877. H., of foreign birth, bought real estate in 1856 and 1859, and died in 1861, seised thereof without known heirs. The said real estate was escheated to the Commonwealth, and in May, 1876, persons, natives of and living in Switzerland, instituted proceedings for the recovery of the real estate. Held: The law as it was at the death of H. must govern the case, and under the act of April 7, 1858, Session, Acts of 1857-'58, Chapter 42, Section 44, Code of 1860, Chapter 115, p. 557, persons, natives of another country, and living there, are not entitled to the real estate. The treaty of November, 1855, between the United States and the Republic of Switzerland, 11 U. S. Statute at large, p. 590, Article 5, Clause 3, by its terms depends for its operation and effect upon the legislature of the State in which the real estate lies, and no right in real estate in Virginia will vest in a citizen of that republic under said treaty, there having been, at the death of H., no statute authorizing it.

In the case of *Hauenstein vs. Lynham*, 100 U. S. S. C. Reports, 483, decided October, 1879. A., a citizen of Switzerland, died in 1861 in Virginia, intestate and without issue. For want of an heir capable under the statutes of the State to inherit the lands there situate, whereof he died seized in fee, they were sold by the escheator of the proper district. A.'s next of kin, B., a citizen of Switzerland, filed a petition to recover the proceeds of that sale, upon consideration of the treaty between the United States and the Swiss confederation of November 5, 1850. Held: That the treaty is the supreme law of the land, and by its terms the incapacity of B. as an alien was so far removed as to entitle him to recover and sell the lands, and "withdraw and export the proceeds thereof."

That his rights thus secured are not barred by the lapse of time, inasmuch as no statute of Virginia prescribes the term within which they must be asserted.

That where a treaty admits of two constructions, one restrictive of the rights which may be claimed under it, and the other liberal, the latter is to be preferred.

That the treaty-making clause of the Constitution is retro-active as well as prospective.

That in view of B.'s rights in the premises, the escheator is entitled only to the amount allowed by law for making sales of real estate in ordinary cases.

The counsel cannot be paid out of fund in dispute.

SECTION 2397.

In the case of *The Commonwealth vs. Martin's Executor and Devisee*, 5 Munf., 117, decided March 30, 1816. A testator devised his real estate in Virginia to his executors, to be sold by them or the survivor of them, at such time and in such manner as they, or the survivor of them, should judge most advantageous; and gave and bequeathed the money arising from such sales, and the rents and profits of the said lands which might accrue before the sales, to his sisters, who were aliens, subject, nevertheless, to the payment of his just debts, and of certain legacies to his executors. *Quære*: Whether under this will the title of the alien sisters was good against the Commonwealth claiming the money for which the lands were sold; the testator having died without any lawful heir, and his personal estate being sufficient to pay his debts?

In the case of *Commonwealth vs. Selden, etc.*, 5 Munf., 160, decided April 1, 1816, it was held: The finding of an inquest of escheat in favor of the Commonwealth will not take away the title of a purchaser claiming by a deed of bargain and sale, legally executed and recorded before the inquest was sealed, though without the knowledge of the bargainee till afterwards.

In the case of *Ferguson vs. Franklins*, 6 Munf., 305, decided February 20, 1819, it was held: A sale and conveyance of land by a trustee cannot be set aside on the ground that he was an alien when the deed was made to him, and when he conveyed the land to the purchaser.

In the case of *Hubbard vs. Goodwin, Kennedy, etc., vs. Same*, 3 Leigh, 492, decided, it was held: The court of equity in such case follows the law in relation to escheats of legal estates purchased by aliens; and as the law does not, in cases of escheat, give the Commonwealth the profit received by the alien or any other person before office found, so neither will equity, in the case of the trust estate, give the Commonwealth the profits thereof accrued before decree.

SECTION 2398.

In the case of *Watson vs. Lyle's Administrator*, 4 Leigh, 236, decided February, 1833, it was held: Under a petition under the statute, 1 Rev. Code, Chapter 82, Section 14, by the creditor of a person whose lands have been escheated, the creditor is required to make an affidavit that the amount of his demand is *bona fide* due; but this requisition of the statute does not dispense with

the necessity of other evidence. The court can only render judgment for such sum as is proved to be due.

If judgment has been rendered for the whole amount of the demand, when the whole is not proved to be due, and it is uncertain to what part the proof extends, an appellate court will reverse the judgment and dismiss the petition.

The escheator, who is defendant to the petition, has the same right to plead the statute of limitations in bar of the petition that a representative of the debtor would have to plead the statute in bar of an action.

In the case of *Sands vs. Lyman (Escheator)*, 27 Grat., 291, decided March, 1876. H., of foreign birth, died in 1867, seised and possessed of real estate in R., intestate and without any known heirs. The real estate of which he died seised vested in possession in the State without office found or other proceedings at law.

After the death of H., G. sued his curator, S., for a large debt alleged to be due from H., and there was a judgment by default. G. then sued S., the curator in equity, to subject the real estate of which H. died seised for the payment of the judgment. There was a decree for a sale, and a sale was made in pursuance of the decree, when J. became the purchaser of a part of the property sold. Held: The State not having been a party to the suit, the decree and sale are a nullity as to her, and gave J. no title to the property purchased by him. If J. was a *bona fide* purchaser, he is entitled to be substituted to the rights of the creditor G.; and upon showing that the claim of G. is just, to have the real estate subjected to its payment. After the death of H. an inquisition of escheat was executed in 1868, and the jury, after finding the death of H. without known heirs seised of the real estate, stated that certain parties were in possession, claiming under said sale. The escheator returned the inquisition in June, 1869, when the property was advertised as escheated. J. then filed his petition in the proper court, stating that he held the property under his purchase, and asking for an injunction. The escheator and register were made parties, but before the escheator answered, the court made a decree perpetuating the injunction. The escheator then filed a bill to review the decree. Held: It was error to make a decree passing upon the rights of the purchaser of the property and perpetuating the injunction without the answer of the escheator. (Code of 1860, Chapter 113, Section 8.) As the title of the State does not depend upon the inquisition, it cannot be affected by any errors or irregularities in the proceedings of the escheator. The decree of the court was a decree by default, and the bill of review by the escheator may be treated as a petition for a rehearing of the decree; but it was a proper case for a bill of review.

SECTION 2399.

The reference to 27 Grat., 291, is to the case cited *supra* Section 2398.

CHAPTER CVI.

TITLE XXX.

CHAPTER CVII.

SECTION 2413.

In the case of *The Bank of the United States vs. Carrington et als.*, 7 Leigh, 566, decided November, 1836, it was held: Where land is purchased and paid for by one person, and the conveyance is taken to another, the law will imply a trust for the benefit of the former, and such purchase and payment may be proved by parol evidence.

In the case of *Lyle vs. Higginbotham*, 10 Leigh, 57 (2d. edition, 67), decided February, 1839, it was held: Case in which under the particular circumstances a letter written by a mortgagee to his attorney, informing him that the mortgage debt had been paid, and requesting him to dismiss a suit then pending to foreclose the mortgage, was held to be proper evidence in favor of a subsequent incumbrancer, in a controversy with the executor of the mortgagee, who had revived the proceedings to foreclose, the attorney submitting to produce the letter, if directed by the court to do so.

In the case of *Borst vs. Nalle et als.*, 28 Grat., 423, 435 and 436, decided March, 1877, T., an executor, employs R. to sell a tract of land for him, and to facilitate it, T. executes a deed to B., but does not deliver it. R. makes a sale to B., and B. pays the money to T., and then T. delivers the deed to R., and at the same time R. executes a deed to B. In a suit by a judgment creditor of R. against B. to subject the land to pay his debt. Held: T. is a competent witness to prove the fact that R. sold as his agent, that the conveyance to him was that he could convey to B., and that B. paid the purchase-money to him.

By the conveyance to R. there was an implied or resulting trust in favor of B., who had paid the purchase-money; and this trust may be proved by parol evidence. The trust having been fully executed by R. conveying the land to B. before this litigation was commenced, it seems that on that ground parol evidence is admissible to establish the trust. R. being dead, B. is not a competent witness in his own behalf as to the sale and conveyance of the property.

In the case of *Bolling vs. Teel et als.*, 76 Va., 487 and 492:

1. Chancery Practice.—Partition. Commissioners to make partition allot land to husband instead of his wife, whose inheritance it was, and their report is confirmed by the court; no conveyances are directed or made. Held: The husband acquires no title by the proceedings: 1. Decree of partition does not of itself operate as a conveyance of title. 2. The court usually directs the execution of mutual conveyances by the parties, if *sui juris*, and by a commissioner for those *non sui juris*. 3. Registration of partition, or assignment of dower, does not alter this rule of chancery, but only gives notice of the decree.

2. Coparceners.—At common law coparceners could make partition even by parol. No conveyance is necessary. They are seised of their shares by descent from the common ancestor, and partition only adjusts their rights. *Quære*: Has the rule been changed by statute?

Mutual conveyances are necessary to pass title in all cases where partition can only be made by deed, as between joint tenants

In the case of *Burkholder et als. vs. Ludlam et als.*, 30 Grat., 255, decided March, 1878, it was held: B., who married the daughter of C., bought a lot when he was poor, and C. in good circumstances. B., being unable to pay for the lot, turned it over to C., who paid for it, took the title in his own name, and commenced to build a house on it for his daughter, the wife of B. Before the house was finished B. removed with his family to another town and engaged in business, which was succeeding well, when C. offered that upon condition that he would return, he would turn over the lot and unfinished building to the wife of B. as her own property. B. acceded to this, and with his family returned, and he paid the expenses of doing so, and then with his own earnings and that of his wife, finished the building, took possession, and had remained therein for about twelve years; but no deed was made by C. to the property until the insolvency of C., and after judgments were obtained against him and duly docketed. The house and lot were then conveyed to a trustee for the wife of B., in consideration of five dollars and "love and affection." In a suit by the judgment creditors to annul the deed and enforce their liens, held: That the title to the house and lot was in the trustee for the use of the wife and children of B., and that the liens of the judgments against C. did not attach to the property.

A court of equity will compel the conveyance of the legal title of land claimed under a parol gift, supported by a meritorious consideration, and by reason of which the donee has been induced to alter his condition and make expenditures of money in valuable improvements on the land.

In the case of *Stokes et als. vs. Oliver et als.*, 76 Va., 72:

1. Parol Gifts.—Whenever Valid *Quoad* Creditors of Donor. In 1853 and 1855, S. owned estate of much value, and owed but one debt, for which his sons, H. and R., were sureties. In 1853, he induced H. to sell out in L. and settle on a farm in P. E., assessed at thirteen thousand eight hundred dollars, which he agreed to give H. if H. would pay him two thousand five hundred dollars. H. paid the money. In 1855, S. exchanged with R. a farm in P. E., assessed at fifteen thousand dollars, for lands in L., assessed at two thousand five hundred dollars. S. placed H. and R. in possession of the respective farms, and they held notorious and adverse possession of it and made valuable improvements, and paid taxes on same until 1869. S. also gave to his daughter, B., land in L., adjacent to the land occupied by her already, and she held it openly and cultivated it as her own until 1869, but made no valuable improvements on it. No conveyances were made until December, 1863, when S. conveyed the said farms to H., R., and B., respectively, by deeds declaring that they were, in consideration respectively, “of natural love and affection and two thousand five hundred dollars,” of natural love and affection and certain lands, and of natural love and affection. After these alienations were made, S. retained estate ample to pay not only what he owed in 1855, but what he owed in 1863. In 1865 S. died insolvent. In 1869, O., whose debt was contracted before 1853, and other creditors, whose debts were contracted after that date, filed a bill to annul these deeds as voluntary and void as to them, and to subject the lands to pay their debts. Held: The bill should have been dismissed as to H. and R., the parol gifts to whom were not only in part supported by valuable considerations, but who were also induced by the donor to alter their conditions, and to expend money in valuable improvements on the land.

2. The deed to B. was voluntary, and void as to the creditors of S. B. had not been induced, by reason of the parol, gift to alter her condition and to expend money in valuable improvements on the land. There was nothing in her case whereon she could have founded a claim for specific performance. See *Burkeholder vs. Ludlam, etc.*, 30 Grat., 255.

In the case of *Halsey vs. Peter's Executor*, 79 Va., 60, decided May 1, 1884, it was held: Equity will compel conveyance of legal title of land claimed under parol gift, supported by meritorious consideration, and by reason of which donee has been induced to alter his condition and make expenditures of money in valuable improvements on the land, and will protect such gifts equally with parol agreements to sell land. No writing is necessary to create a good equitable title to real estate.

The statute of frauds has no bearing on parol gifts of land

which are founded on meritorious consideration. If the promise, reduced to writing, could, under the circumstances, be enforced, it may be enforced even when only parole.

In the case of *Grigsby vs. Osborn*, 82 Va., 371, decided September 16, 1886, it was held: A court of equity will compel the conveyance of the legal title to land claimed under a parol gift, accompanied by possession, when the donee, induced by the promise to give it, has made valuable improvements on it. But the promise must be definite in its terms and clearly proved.

This is the case cited from 10 Va. Law Journal, 717.

SECTION 2414.

In the case of *Davis vs. Payne's Administrator*, 4 Rand., 332, decided June, 1826, it was held: A voluntary conveyance of personal property, by a party not indebted at the time, is good against creditors, if the deed be duly recorded, or the possession made solely and *bona fide* with the donee. Otherwise it is void by the Statute of Frauds.

In the case of *Durham and Wife vs. Dunkley*, 6 Rand., 149 (cited as 135), decided February 16, 1828, it was held: A slave is given to an infant by deed, with a reservation expressed in the deed that the donor is to keep the slave and raise it for the donee until she arrives at the age of thirteen. The slave is delivered to the donee on the day of the execution of the deed, and on the same day taken back by the donor. The deed is never recorded, and the donee never lived with the donor.

This gift is void under the act of Assembly.

A gift of slaves can only be evidenced by deed or will duly proved and recorded, or by possession passing from donor to donee, and remaining with him, or one claiming under him.

The possession here meant is an actual, abiding, permanent possession.

In the case of *Hunter vs. Jones*, 6 Rand., 541, decided October, 1828, it was held: A parol gift of a slave by a father to an infant child living with him, by a declaration that the gift is made, without delivery of possession, is not good against a subsequent purchaser of that slave, although the purchaser knew at the time of his purchase that the father had so made the gift.

In the case of *Shirley vs. Long et als.*, 6 Rand., 856, decided by the General Court, August, 1827, it was held: If a father give a slave to a child, and the donor retain possession of the slave and exercise control over it, the gift is not the less fraudulent because the child always lived with the father, and the slave was always called the child's in the family and neighborhood.

A parol gift of a slave to child, without possession in the donee, is void, as between donor and donee, if the slave given

be conveyed by deed (unaccompanied with possession in the donee), and without being recorded, it is void as to creditors and purchasers.

If a defendant in his answer admit that a slave which he claims as a gift was always in the possession and under the control of the donor, with whom the donee lived, proof that the donee had the possession is inadmissible, since it varies from the admissions of the defendant.

In the case of *Hansborough's Executors vs. Thom*, 3 Leigh, 147, decided November, 1831. In detinue for slaves, the question being whether a contract between plaintiff and defendant's testator was a gift or a sale of the slaves by the latter to the former, the defendant demurs to the plaintiff's evidence. Held: The evidence states facts from which it may fairly be inferred that the contract was a sale, though there was no express proof of any valuable consideration paid or stipulated, and that therefore it was a sale.

In the case of *Brown vs. Handley*, 7 Leigh, 119, decided January, 1836, it was held: When a father has declared that he has given a slave to a married daughter, and afterwards tells her to go and take possession of the slave, the declaration of the father's wife, in his absence at the time the daughter takes possession, that she did not give, but only lent her the slave, is of no effect to convert the father's gift into a loan, though the daughter receives the possession from the donor's wife, without complaining of her qualification of the gift.

When a father has made a parol gift of a slave to a married daughter, and delivered her the possession, the gift is consummated, and he cannot afterwards retract it by refusing to execute a deed for the slave.

In the case of *Cross vs. Cross's Administrators*, 9 Leigh, 245, decided February, 1838, it was held: Though a parol gift of slaves may be given in evidence to show the character of the possession held by the donee, yet the gift itself is void.

A father-in-law puts slaves into the possession of his son-in-law on loan; no length of possession will give the lendee title against the lender, till such possession has become adverse by demand and refusal of the possession.

It seems that, as between parent and child, possession of a slave is very equivocal evidence of a gift from the parent to the child, since the delivery of the possession would equally accompany a loan, and the law would rather infer a loan than a gift from a mere transfer of possession.

In the case of *Anderson vs. Thompson*, 11 Leigh, 439, decided November, 1840. A father delivers a slave to his infant son living with him, and calls upon persons present to take notice that he gives that slave to the son, but says, at the same

time, that he claims an estate in the slave for his own life. Held: Nothing passes to the son by such parol gift.

In the case of *Anglin vs. Bottom*, 3 Grat., 1, decided April, 1846, it was held: On a parol gift of slaves, the slaves must come into the actual possession of and remain with the donee, or some person claiming under him, to give to such donee a valid title to the slaves.

When, upon overruling a motion for a new trial, the court below certifies that the donor made an absolute gift of slaves to the donee, this is not sufficient to authorize the appellate court to infer the actual and continued possession of the slaves by the donee, or those claiming under him, which is essential to his title. Such a certificate as to other personal property would imply such a delivery as constituted a valid gift.

The reference to 5 Grat., 364, is to the case of *Tutt vs. Slaughter (Executor)*, and decides the questions of a case of gift, depending not on law, but evidence.

In the case of *Henry vs. Graves*, 16 Grat., 244, decided April 16, 1861, it was held: A husband, in the lifetime of his wife, makes an absolute gift of his wife's remainder in slaves by deed, which is recorded after her death, and he survives both his wife and the life tenant. The gift is valid and effectual against him, though before possession is obtained by the donee he dissents from it.

In the case of *Miller and Wife vs. Jeffress et als.*, 4 Grat., 472, decided January, 1848, it was held: A delivery is indispensable to the validity of a *donatio mortis causa*. It must be an actual delivery of the thing itself, or of the means of getting the possession and enjoyment of the thing; or if the thing be in action of the instrument, by using which the chose is to be reduced into possession. It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*; and after-acquired possession of the donee is nothing; and a previous and continuing possession, though by authority of the donor, is no better.

In the case of *Lee's Executor vs. Boak*, 11 Grat., 182, decided April, 1854. Testator gives a legacy to a nephew, but directs that he shall account for the amount of certain bonds and receipts of the nephew which the testator had paid off for him as his security. After making his will, testator, shortly before his death, and in contemplation of that event, delivers to the nephew the bonds, etc., with the view of them becoming his absolute property in the event of the testator's death, and for the purpose of discharging the nephew from all accountability for the same as one of the legatees, in his settlement with the executor. Held: The intention of the testator being that the nephew shall not account for the moneys paid by the testator

for him, the gift of bonds and receipts is not an advancement in satisfaction of the legacy to the nephew.

A bond may be the subject of a *donatio mortis causa*, whether it be the bond of a stranger or the donee, and in this case the donation was valid.

In the case of *Mayo's Executor et als. vs. Carrington's Executor et als.*, 19 Grat., 74, decided February 23, 1869. The court said: It was stated in *Henry vs. Graves*, 16 Grat., 244, and reaffirmed in this case as the result of all the authorities, that a voluntary gift, valid at law or equity, may be made of any property, real or personal, legal or equitable, in possession, reversion, or remainder, vested or contingent, and including choses in action, unless they be of such a nature as that an assignment of them would be a violation of the law against maintenance and champerty; that such a gift to be valid, must be complete, and not executory, that what is necessary to the completion of the gift depends on the nature of the subject and the circumstances of the case, and that it is always sufficient, though not always necessary to the completion of a gift, at least between the parties, that the donor do everything in his power, or which the nature of the case will admit of, to make it complete.

In the case of *Morrison's Executors vs. Grubb*, 23 Grat., 342, decided March, 1873, it was held: W., executor of M., files a bill against G. in which he says that his testator in his lifetime owned a number of bonds or notes amounting to four thousand dollars, which were drawn payable to him, and were in his possession a few days before his death. That after his death they were in possession or under the control of said G., and were not assigned to him; and that G. gave no consideration for them. The averments do not make a case against G., and do not entitle the plaintiff to any recovery or relief against him.

The bill further alleges that the bonds, etc., were the property of M. at his death, and became assets of said estate which should come to plaintiff's hands, that he is entitled to know what bonds of said M. said G. holds, and to recover them for the said M.'s estate. And he calls for a full answer. G. answers and denies that he had in possession, or under his control at the time of M.'s death, or at any time since, any bonds which were at his death property, or to which the plaintiff, as his executor, or otherwise had any right, title, or interest. These averments of the bills are facts, and necessary to sustain it, and being positively denied by the answer must be proved. The defendant having denied the allegations of the bill, proceeds to state that the bonds were the property of M., and were given to him by M., and when and how it was done. The whole statement must be taken together as his answer.

In the case of *Basket vs. Hassell*, 107 U. S. S. C. Report,

602, decided October, 1882, it was held : A certificate of deposit in these terms :

EVANSVILLE NATIONAL BANK,
Evansville, Ind., September 3, 1875.

H. M. Chaney has deposited in this bank twenty-three thousand five hundred and fourteen dollars and seventy cents, payable in current funds to the order of himself on surrender of this certificate, properly endorsed, with interest at the rate of six per cent. per annum if left for six months.

\$23,514.70.

HENRY REIS, *Cashier*.

may, as a subsisting chose in action, be the subject of a valid gift if the person therein named endorse and deliver it to the donee, and thus vest in him the whole title and interest therein, or so deliver it, without endorsement, as to divest the donor of all present control and dominion over it, and make an equitable assignment of the fund which it represents and describes.

A *donatio mortis causa* must, during the life of the donor, take effect as an executed and complete transfer of his possession of the thing and his title thereto, although the right of the donee is subject to be divested by the actual revocation of the donor, or by his surviving the apprehended peril, or by his outliving the donee, or by the insufficiency of his estate to pay his debts. If, by the terms and conditions of the gift, it is to take effect only upon the death of the donor, it is not such a donation, but is available, if at all, as a testamentary disposition. Where, therefore, during his last illness, and when he was in apprehension of death, the person named in the above certificate made thereon the following endorsement :

"Pay to Martin Basket, of Henderson, Kentucky; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself.

"H. M. CHENEY."

and then delivered it to Basket, and died at his home, in Tennessee. Held : That Basket, by such endorsement and delivery, acquired no title to or interest in the fund.

In the case of *Thomas's Adm'r vs. Bettie Thomas Lewis et als.*, 89 Virginia, 1, decided June 16, 1892, it was held : The words "no gift" in the Code of 1887, Section 2414, refers not to, and the section does not embrace gifts, *causa mortis*.

In the case of *Vaughan et als. vs. Moore et als.*, 89 Va., 925, decided March 30, 1893. A father executed, acknowledged, and delivered a deed of gift of land to his son. After its delivery to the clerk for record, but before it was actually recorded, the father took and destroyed it, and conveyed the land to others having notice of the son's equitable rights. Held : The court below erred in refusing to set up the destroyed deed in behalf of the son.

SECTION 2415.

See the references to Section 2860.

In the case of *Ross vs. Milne and Wife*, 12 Leigh, 204, decided April, 1841, it was held: Upon an indenture between S. and R., wherein R. covenants to pay money to M., a daughter of S., within two months after S.'s death, the representative of S. only can maintain an action against R. for breach of covenant, and M. cannot maintain either covenant for the breach or debt for the money. So, upon a contract between S. and R., whereby R., upon a consideration moving entirely from S., promises to pay S.'s daughter M. a sum of money after S.'s death, M. cannot maintain either debt or assumpsit for the money; the representative of S. only can maintain an action at law.

In the case of *Jones vs. Thomas*, 21 Grat., 96 and 102, decided June, 1871, A. T. executes his bond as follows: March 12, 1863. I hereby bind myself, my heirs, etc., to pay — the amount of principal and interest due from W. A. J. on the tract of land purchased by him of G. W. J. and wife. Witness my hand and seal the day and date above. And he delivers it to W. A. J. Held: W. A. J. may maintain an action of covenant on the bond against A. T.

W. A. J. may recover upon the bond against A. T., if A. T. has not paid the debt, though it is not averred or proved that W. A. J. has paid it, or has been otherwise injured by the failure of A. T. to pay it.

The declaration does not in its commencement aver that A. T. covenanted with the plaintiff to pay the debt, but it does so in a subsequent part of it. This is substantially sufficient.

In a declaration on a covenant it should be set out without any intermediate inducements or statements of the consideration, but if averments are made which may be treated as mere surplusage, they will not vitiate the declaration.

Quære: If G. W. J. might not sue on this bond in his own name to enforce the covenant of A. T., under the act, Code of 1860, Chapter 116, Section 2?

In the case of *Stuart vs. James River & Kanawha Company*, 24 Grat., 294 and 297, decided January, 1874, it was held: The act of March 1, 1867, entitled an "act to authorize the James River & Kanawha Company to borrow money," though when accepted by the company it creates a contract between the company and the State, does not create a contract between the company and the holders of the \$180,000 of State bonds therein mentioned; and a holder of one of these bonds cannot maintain an action thereon against the company. Though the company has executed a mortgage on its property to secure money authorized to be borrowed by said act, yet if the company has not borrowed the money, or made use of the bonds intended to be

secured by the mortgage, it cannot be held to have accepted the terms of the act or become liable under its proviso in relation to said \$180,000 of State bonds.

In the case of *Clemmitt and Wife vs. New York Life Insurance Company*, 76 Va., 355 and 360, decided March 30, 1882:

1. Insurance Policy.—War. Husband took out policy on his life for his wife, and, in case she died before him, then for her children. Premiums paid up to the war. After the war, insurance company repudiated the policy. Then wife died, only one child surviving. Suit was brought by the child during life of insured for damages for breach of policy. Pending suit, insured died. At trial, circuit court instructed the jury that if they believed from the evidence that the insurance company repudiated the policy during wife's life, action accrued to wife; and, after her death, action survived to her personal representative, and they must find for defendant; and refused to give other instructions. Held:

1. The instructions were erroneous. As soon as wife died, the child's rights vested. After insurance company repudiated policy, wife might have sued in her own name (Code 1873, Chapter 12, Section 2) for damages for breach, or await the event on which the sum assured became payable to her if she survived the insured, to her children if she did not survive him.

2. The war only suspended, but did not abrogate the policy.

3. The insurance company's repudiation of the policy after the war, excused thereafter the insured from making any tender of premiums.

In the case of *Tilley vs. Connecticut Fire Insurance Company*, 86 Va., 811, decided April 10, 1890, it was held: Any person having an interest in property insured, though no party to the policy, may institute and maintain an action in his own name to extent of loss occasioned him by its destruction.

SECTION 2416.

In the case of *Martin vs. Flowers*, 8 Leigh, 158, decided March, 1837. A deed for the conveyance of land, purporting to be made by A., attorney in fact for B., witnesses "that the said attorney in fact, A., for and in consideration, etc., doth release and quit claim," etc., and concludes, "in testimony whereof the said B. hath hereunto set his hand and seal," but is signed with the name of A. (not styled attorney), a scroll being annexed to the signature. Held: This is not the deed of B., and does not convey his title to the land.

In the case of *Shanks et als. vs. Lancaster*, 5 Grat., 110, decided July, 1848, it was held: A power of attorney for conveyance of lands falls within both the letter and spirit of the act regulating conveyances.

1 Rev. Code, Chapter 99, Section 7, page 363, authorizing deeds to be acknowledged before any two justices of the peace for any county or corporation of the United States, and the certificate of the justices is sufficient for the admission of the power of attorney to record with the conveyance, although it does not certify the instrument to any court or clerk's office for the purpose of being recorded.

The act, 1 Rev. Code, Chapter 99, Section 15, page 365, does not embrace power of attorney, or authorize two justices to take and certify the privy examination of the wife as to her execution thereof.

A deed executed by an attorney in fact, in which he refers to the power of attorney, but conveys in his own name as attorney, and covenants and warrants in his own name on behalf of his principal, the deed being signed with the name of the principal, as by the attorney, is the deed of the principal.

It is a sufficient execution of a deed by an attorney in fact for his principal if he signs the name of the principal with the seal annexed, stating it to be done by him as attorney by the principal, or if he signs his own name with the seal annexed, stating it to be for the principal.

A deed of husband and wife, executed under a power of attorney, is the deed of the husband, though it is void as to the wife, the power being void as to her.

In the case of *Bryan vs. Stump, etc.*, 8 Grat., 241, decided October, 1851. A trustee in a deed, the trusts of which have been satisfied, executes a power of attorney to a third person, with authority to release the deed. The attorney executes a deed, which commences in the name of the trustee by the attorney, but it is signed in the name of the attorney for the trustee, and it releases the land not to the grantor in the trust deed, but to a purchaser under him. Held: The deed of trust is duly and regularly released.

In the case of *Stinchcomb vs. Marsh*, 15 Grat., 202, decided July, 1858, it was held: M. gives to J. a power of attorney to sell her lands in the county of R., with a power to J. to appoint other agents or attorneys. J. executes a power to C. to sell the lands, but the power only authorizes C. to act in the name of J., and it is signed by J. in his own name, without any reference to his principal. This power does not authorize C. to convey the land as attorney of M.

SECTION 2418.

In the case of *Tab vs. Baird*, 3 Call, 475 (2d edition, 411), decided November 12, 1803, it was held: If the verdict does not find title or possession in the grantor, he can convey neither, and therefore his grantee cannot maintain an ejectment against the tenant in possession.

In the case of *Hall vs. Hall*, 3 Call, 488 (2d edition, 421), decided November 12, 1803, it was held: If the title of the heir be abated by a stranger, he cannot convey it by deed of bargain and sale before entry.

In the case of *Carrington vs. Goddin*, 13 Grat., 587, decided February 3, 1857, it was held: A party having an interest in or claim to land held adversely by another, may, under the Code, sell and convey the same, and his grantee may maintain ejectment for it.

Testator empowers his executors to set apart so much of his estate, not specifically bequeathed, as they may think sufficient to produce a clear annual income by rent or interest of two thousand dollars, which is directed to be distributed among certain legatees for life, and after some other unimportant provisions, he gives the balance of his estate among his nieces and nephews. And then he says: "And for the purpose of making such division with greater facility, I hereby give to my executors, or such of these as may choose to act, full power to sell or otherwise dispose of the whole or any part of said property, in such time and manner, and on such credit as to them may seem most beneficial for the whole. *Quære*: If the legal title to the real estate vested in the executor?"

The executors had full power and authority to sell all or any part of the real estate; and a *bona fide* purchaser from them is not bound to show that such sale was necessary for the purpose of making division among the devisees.

A *bona fide* purchaser will not be affected by the failure of the executors to account for the purchase-money, and therefore evidence to prove such failure is properly excluded in an action at law between a claimant under such purchaser and the devisees. The executors by a deed reciting that it is made in execution of the powers vested in them, in the considering of an exchange of land made with A. (one of the executors), and for the further consideration of one dollar paid by the purchaser, convey a lot belonging to their testator's estate. Such deed on its face is not invalid, but passes the title to the purchaser.

In an action of ejectment by a party claiming under the purchaser against the devisees, evidence to prove that the consideration of the deed was different from that expressed in it is inadmissible.

A deed of trust conveys two small lots in Adam's Valley with other property, and upon its face shows that it was intended to convey all the property of the grantor. In fact, three lots had been conveyed to the grantor, though two of them fronted on the same street, and adjoined each other, and both together fronted but sixty-two feet on the street, and they were unenclosed. Held: It is not competent to prove by the grantor

that he intended to include both parcels of the lot in his deed, though there is no objection to his competency as a witness.

If it is doubtful on the face of the deed whether one or both of the parcels were intended to be conveyed, the deed will be construed most strongly against the grantor, and so as to give it effect rather than that it should be void for uncertainty.

Though it is not competent to prove by the grantor his intention to convey by his deed the land in controversy, yet he may identify the lot, and may show that it answers to the description given in the deed.

In an action of ejectment, the tenant, without disclaiming title to any part of the land in the declaration mentioned, proves upon the trial that he is only in possession, and claiming title to a part of it. A verdict and judgment in favor of the plaintiff for all claimed in the declaration is not erroneous, or if it is, it is not an error by which the tenant is injured, or of which he can complain in an appellate court.

In the case of *Mustard vs. Wohlford's Heirs*, 15 Grat., 329, decided September 5, 1859, it was held: An infant sells his tract of land, puts the purchaser in possession, and executes a bond in a penalty with condition to make the title. The contract is voidable, but not void. In such a case the infant, on coming of age, sells the land to another person, and executes to him a bond in a penalty with condition to make the title. This is an avoiding of the first contract.

In this State a party out of possession may sell and convey his interest in lands; and therefore, though the first purchaser from the infant has been put in possession of the land, and has received a conveyance, the infant, on coming of age, may convey, and his deed will avoid the first deed.

The reference to 15 Grat., 339, is to the case above cited from page 329.

In the case of *Young vs. Young*, 89 Va., 675, decided February 16, 1893, it was held: A contingent remainder, which is a mere possibility, is not within the Code, 1873, Chapter 148, Section 1, allowing an attachment against "estates or debts" in certain cases. A contingent remainder, which is, however, "an interest or claim" to real estate, may be conveyed under Code, Section 2418.

A conveyance of a contingent remainder, if made with general warranty of title, would operate as an estoppel as against the grantor subsequently claiming that he had no estate in the real estate conveyed at the date of the conveyance.

SECTION 2419.

In the case of *Pembleton vs. Van De Vier*, 1 Washington,

381, decided at the fall term, 1794: P., holding under a devise which conveyed either a life estate or a fee-simple (which the court did not decide), made a deed of lease and release to M., whereupon the heir at law of P.'s devisor brought suit to recover the land, under the claim that a lease and release for a term longer than the tenant had therein worked a forfeiture of the estate. P. was living at the time of the suit. Held: No forfeiture, as the deed could only operate to convey such interest as P. had therein.

In the case of *Carter vs. Tyler et als.*, 1 Call, 165 (2d edition, 143), decided November 14, 1797, it was held: By the act of October, 1776, for docking entails, all remainders, as well contingent as vested, are utterly barred, whether the entail be created before or after the passing of the act. Nor will the court, in order to avoid this effect, construe that to be an executory devise which before would have been held to be a contingent remainder; and during the trial of the cause the court announced (page 174, 2d edition, 150) that the alienation or warranty of a grantor cannot give the grantee a better title than the grantor himself possessed, which was so clear as not to require the labor used to prove it.

In the case of *Urquhart et als. vs. Clarke et als.*, 2 Rand., 549, decided June 11, 1824, it was held: Where a husband conveys the property of his wife with warranty against the claims of himself and his heirs, his children, deriving title from their mother, will not be affected by the warranty.

In the case of *Wiseley vs. Findlay et als.*, 3 Rand., 361, decided March, 1825, it was held: Where a purchaser acquires the rights of certain legatees to their undivided portions of their father's estate, and the conveyances recite that the widow is entitled to a life estate in the same property, whereas in truth she has only an estate for years, the conveyance will nevertheless be good for the whole amount of interest possessed by the legatees.

In the case of *Norman's Executor vs. Cunningham and Wife et als.*, 5 Grat., 63, decided April, 1848. Mrs. W. and Miss T., as tenants in common, hold the equitable title to a tract of land by warrant, survey, and possession. N. marries Miss T., and then buys Mrs. W.'s moiety of the land, and a patent issues for the whole tract to N. and his wife T. T. dies in 1805, leaving several children. After her death N. sells the land to *bona fide* purchasers without notice, and conveys to them with general warranty. He marries a second time, and dies in 1838, leaving a widow, and children by both of his wives, and devises and bequeaths to them a large estate. After the death of N. the children of his first wife, T., file their bill against his executrix, claiming compensation from the estate of N. for the moiety of

the tract which had belonged to their mother, T., and they charge that the sales and conveyances were to *bona fide* purchasers without notice. The executrix answers, not admitting the facts, and calling for proof. Held: It was not competent for N., by an act of his, to divest the equitable estate of his wife, T., and vest it in himself, either absolutely or contingently. N. having sold the land to *bona fide* purchasers without notice, equity will compensate the heirs of the wife, T., out of the estate of N.

SECTION 2420.

In the case of *Kennon vs. McRoberts and Wife*, 1 Wash., 96, decided at the fall term, 1792, it was held: A conveyance, unlimited as to duration, will, under the statute, convey the entire interest of the grantor or devisor.

In the case of *Davies vs. Miller et als.*, 1 Call, 127 (2d edition, 110) decided October 30, 1797, it was held: The word "estate" may be transposed from the preamble or other parts of a will, and annexed to the devise so as to fulfil the intention of the testator to give a fee. In this case that intention was further manifested by the use of the same word in the conclusion of the will.

In the case of *Watson vs. Powell*, 3 Call, 306 (2d edition, 265), decided October 27, 1802, it was held: The word "estate," used in describing a devise, is a word of limitation, and conveys a fee-simple. (Words of limitation are expressly dispensed with by this statute. This refers to the common law.)

In the case of *Wyatt vs. Sadler's Heirs*, 1 Munf., 537, decided April 27, 1810: A testator (who died in the year 1768) expressed himself in the introductory part of his will thus: "And as to what worldly goods it hath pleased God to give me, I leave and bequeath as followeth:" In the next clause he wills and devises that his wife should enjoy all his lands during her life, and after her decease, gives and bequeaths to his two sons all his land, to be equally divided between them, his still, likewise, to be between them, to distill for their own use, and after to his eldest son. A fee-simple estate in his share of the land passed to the younger son.

In the case of *Johnson et als. vs. Johnson's Widow and Heirs*, 1 Munf., 549, decided May 9, 1810, it was held: A fee-simple estate in lands might pass by a will (even before the act of 1785, C. 62,) without words of perpetuity, or any words equivalent: provided it appeared from the whole will taken together that such was the intention of the testator. When an illiterate testator uses the same words in disposing of his real estate as in disposing of his personal property, and in the same clause of the will, it is fair to infer that he intended to give them the same effect as to both kinds of property.

In the case of *Mooberry et als. vs. Marye*, 2 Munf., 453, decided April 13, 1811, it was held: A devise of lands (before the first of January, 1787), without words of perpetuity, will not be enlarged to a fee-simple, on the ground of a general charge, arising from a direction that all the testator's debts be first paid, especially if other funds be appropriated for payment of the debts.

In the case of *Goodrich vs. Harding et als.*, 3 Rand., 280, decided March, 1825, it was held: The words "temporal goods" may be borrowed from the preamble of a will and coupled with a devising clause to enlarge a life estate into a fee-simple.

In the case of *Cleary vs. Taylor et als.*, 29 Grat., 448 and 454, decided November, 1877. By a deed made on the 28th of July, 1828, certain land in said deed described was granted to D. by his grandson R., his executors, administrators, and assigns, from and after the grantor's death, for and during his life only; and after his death the said piece of land to go to such person or persons as shall at that time answer the description of heir or heirs at law of the said R.; and such person or persons shall take the said land under that description as purchasers under and by virtue of the deed, and not by inheritance as heirs of the said R. Held: R. took but a life estate in the land, and the persons who at the time of R.'s death answered the description of his heirs at law, took as purchasers under the deed.

By the act of 1785, dispensing with the word "heirs" in the grant of an estate in fee-simple, the grant to the remainderman is a fee; but that act does not, therefore, extend the rule in Shelley's case to the estate given to R., so as to enlarge it into a fee.

In the case of *Wine vs. Markwood et als.*, 31 Grat., 43 and 46, decided November, 1878. P. by his will gave to his four sons, George, Joseph, James, and Sampson, each a parcel of land; to George and Joseph in fee, and to the other two each devise, except as to the land devised the same, and is as follows: *Fourth*, I will and bequeath to my son Sampson the use and benefit of the home place, which I now occupy, containing about three hundred acres, during his natural life; he then says, should my sons, George, Joseph, James, and Sampson, or any of them die without issue, I direct that what has been bequeathed to them shall be equally divided between the surviving brothers, James and Sampson, for their use and benefit during their natural lives. Held: That Sampson took but a life estate in the land devised to him.

The term in the limitation over, under the Virginia statutes, means issue living at the death of the first taker, or born within ten months thereafter. If Sampson has issue living at his death, or born within ten months thereafter, his issue will take the

land devised to Sampson by implication. Sampson sells in fee-simple a part of the land devised to him. The purchaser must elect to give up the land or take such title as Sampson can give him to it.

In the case of *Markells vs. Markells*, 32 Grat., 544 and 557, decided November, 1879. M. by his will in December, 1864, after directing the payment of his debts, gives to his wife all the property of every kind which belonged to her at the time of their marriage, and in addition thereto, he gives to her for her natural life the house in which he lives, with the yard and garden attached, and his servant girl A. and any increase that she may have; and he gives her in absolute right one-half of his personal property. He gives to his nieces, E. and S., certain articles and Confederate bonds, and also A. at the death of his wife. The residuary clause of the will is as follows: All the rest and residue of my estate to be divided into two equal shares, and I give one-half to my sons, J. and A., and the other half to my nieces above named; but if from any cause any alienage or confiscation of either of my said sons cannot take or hold the share hereby given to him, then in that event I give the share of such one to my two nieces above named. Held: The house and lot given to the wife for her life passes under the residuary clause of the will to the sons and nieces in equal shares, and this though there is some evidence of conversations between M. and his wife of an intention that his sons should have the house and lot.

In the case of *Little vs. Bowen et als.*, 76 Va., 724 and 728:

1. Merger.—When greater and less estate co-exists in one person, without any intermediate estate, the less is immediately merged in the greater.

SECTION 2421.

In the case of *Roy et als. vs. Garnett*, 2 Wash., 11 (2d edition, p. 9), decided at October term, 1794. A. devises certain lands to his son J. for life, remainder to his son M. and his heirs in trust, and for the use of the first and every other son of his said son J. who should survive him in tail male, equally to be divided, but if his said son J. should die without male issue, then he gives the said land to his son M. during his life with like remainders to his first and other sons who should survive him in tail male, equally to be divided; but if he should die without heirs male, then in trust for the testator's three grandsons who should survive them in tail male, equally to be divided; remainder to M. in fee. He then desires that the widows of his sons and grandsons should be entitled to dower. Held: J. took an estate for life in possession with remainder in tail male, expectant upon the determination of the estate tail to his surviving sons. The estate for life did not incorporate the implicative branch

of the devise, because the estates were of different natures, the former being a legal estate, and the latter remaining an equitable estate, not executed by the statute of uses for the want of male issue of James.

See the case of *Carter vs. Tyler et als.*, 1 Call, 165 (2d edition, 143), *ante*, Section 2419.

In the case of *Hill vs. Barrow*, 3 Call, 342 (2d edition, 297), decided April 28, 1803, it was held: Devise of lands to T. H., to him and his heirs for ever, but in case T. H. dies without lawful heir, remainder over to R. H. and his heirs forever creates an estate-tail in T. H., and consequently is barred by the act of Assembly docking entails.

In the case of *Tate vs. Tally*, 3 Call, 354 (2d edition, 307), decided April 28, 1803, it was held: Devise of lands to A., and if the said A. should die not having any lawful heir of his body, then the land to go to B.; this is an estate tail.

In the case of *Crump et als. vs. Dudgey et ux.*, 3 Call, 507 (2d edition, 439, quoted in Code as 501), decided June 23, 1790. E. P. devised a slave to her daughter for life, and if she died before testator's son, J. P., then to be given to my son J., after which she gave the remainder of her estate to be equally divided among her four children, T., J., M., and S. Held: It seems that the remainder in the slave passes.

In the case of *Smith vs. Chapman*, 1 H. and M., 240, decided June 5, 1807. A testator made three devises (to his two sons and daughter severally) for the life of each devisee, and after his or her decease, to his or her child or children, if none to the other two devisees for life and then to be equally divided between their children, and annexed a codicil, in which he says that if all his children should die without issue of their bodies, his wife living, the life estate should go to his wife during her natural life, and after her death, remainder to other persons. Held: The two sons and daughter take each an estate for life, and the remainders over are good, and may take effect, the contingencies not being too remote.

In construing wills made since the Acts of Assembly of 1776 and 1785 on the subject of estates tail, it seems that the courts in this country will not, by implication, turn an express estate for life with limitations over in remainder into a fee tail, as in like cases in England, because, although it is done there to effectuate the general intention of the testator, such a construction, under the operation of our statutes, would defeat that intention.

In the case of *Eldridge vs. Fisher*, 1 H. and M., 559, decided November 17, 1807. A testator, by will made in 1784, devised certain lands, with personal estate in the same clause, to his son and his heirs forever, "and if my son, J. F., should die without

a lawful heir," remainder over to testator's grandsons. Held : The first devisee, J. F., took an estate-tail, which was converted into a fee-simple by the act for docking entails.

In the case of *Warner vs. Mason et ux.*, 5 Munf., 242, decided November 20, 1816, it was held : A testator gave to his son W. a tract of land "during his natural life, and then to his heirs lawfully begotten of his body, that is, born at the time of his death, or nine calendar months afterwards"; and for want of such heirs, then heir to his, J.'s two sons, Jacob and George, one of them to set a price on the whole of it, and give or receive half of that amount from the other. This was a good limitation by way of contingent remainder to Jacob and George.

In the case of *Bells vs. Gillepsie*, 5 Randolph, 273, decided June, 1827, it was held : A will is made between the 1st day of January, 1787, and the 1st day of January, 1820, by which the testator gives to his sons several tracts of land, and if either of them should die without lawful issue, the part allotted to him to be equally divided among his surviving brothers; and this is a fee-tail, and not an executory devise.

In the case of *Broaddus and Wife vs. Turner*, 5 Rand., 308, decided June, 1827, it was held : By a will dated in 1778, the testator gave a tract of land to his two sons, to be equally divided between them, to them and their heirs forever, but in case either of his sons should die without issue lawfully begotten, he desired that the survivor should have the whole. But if both his said sons should die without issue, he desired that his land should be sold by his executors, and the money arising therefrom should be equally divided among his daughters then living, etc. This is an estate-tail in the sons, which was converted into a fee-simple by the act of 1776.

In the case of *Jiggetts and Wife vs. Davis*, 1 Leigh, 368, decided June, 1829, it was held : Testator having realty of his own inheritance and personalty, part acquired in his own right and part in right of his wife, devises all his worldly estate in manner following: All the profits of my estate, after providing genteel support for my wife and daughter, to be applied to my debts; and after debts paid, I wish my estate kept together for mutual benefit of my wife and daughter, until my daughter attain full age or marry. After which I wish my estate divided in the following manner: I leave my wife one-half the land I live on, and one-half of my estate during her life. If my wife die without any more issue, the whole of my estate to revert to my wife, and if they both die without issue, then that part of my estate which came by my wife to revert to her brothers and sisters that may then be living, and the balance of my estate to revert to my brother J., or to his heirs, if any; if none, to be equally divided between my two half-brothers. If my wife marry and again

have issue, I wish her to have the disposal of the whole property that came by her. Held:

1. Took by the devise, the moiety of the land that was not devised to the wife.

2. The daughter took an implied estate-tail in the moiety of the land devised to her; and the wife took an implied estate-tail in the moiety devised to her expressly for life; each of which estates was converted into a fee-simple, by force of the statute abolishing estates-tail; consequently:

3. The executory limitations were contingent reminders, and barred by the statute.

In the case of *Seekright on demise of Bramble vs. Billups*, 4 Leigh, 90, decided January, 1833. Testator devises the residue of his real estate to his daughter, L. B., and her husband, J. B., during the life of the longest liver of them, and then to their offspring, if any, by his daughter, L. B., as they shall think best to give it; and, in default of such offspring, to M. B.'s and N. A.'s offspring, if they have any, and as they think best to dispose to their offspring; and if they have none, then to the poor of E. R. parish. At the date of the will, the testator's daughter, L. B., had offspring by her husband, J. B. The daughter died before the testator, her offspring survived him and died in infancy; living, their father, J. B. Held: J. B., the husband, took by the will an estate-tail, which the statute for abolishing entails converted into a fee-simple, and barred the contingent, remainder limited on the estate-tail; *dissentiente*, Tucker, P.

In the case of *Doe on demise of See vs. Craigen*, 8 Leigh, 449, decided August, 1836. Testator devises to his daughter, P. C., the upper half of his plantation, but should she die without heirs of her own body, then the said half of the plantation to be divided between the son-in-law and son of the testator. Held: P. C. took by the will an estate-tail in the land devised to her, which the statute for abolishing entails converted into a fee-simple, and barred the contingent remainder limited on the estate-tail.

In the case of *Deane vs. Hansford*, 9 Leigh, 253, decided February, 1838. Testator, by his will, lends slaves and their increase to his grandson, T. D., and the heirs of his body, and if he shall die without a lawful heir, then he bequeaths them to the children of his daughter, E. S. Held: This is an executory limitation after an indefinite failure of issue of the grandson, and therefore void, and the slaves rest in the grandson in absolute property.

In the case of *Brooke vs. Croxton*, 2 Grat., 506, decided January, 1846, it was held: A testator, after directing that all his estate shall be equally distributed among his seven children, adds: "It is my will and desire that if any of my children

should die before they attain to legal age, or without a lawful heir, in either case that all such property as they may receive in the division of my property, return to my surviving children or their lawful heirs." Held: The limitation over takes place upon the happening of either contingency.

Upon the death of one of the children under age, his share of the estate vested absolutely in the survivors, and upon the death of another child under age, or without children, the property which such child received from the share of the first did not pass under the limitation over to the surviving children.

In the case of *Pryor vs. Duncan et als.*, 6 Grat., 27, decided April, 1849. A testator devises as follows: I lend to my daughter, Lucy, my negro woman Sidney and her child Sarah, and negro boy named John, to her during her natural life, and to her heirs lawfully begotten of her body. And should my said daughter, or her husband, dispose of, convey out of the way, conceal, or attempt to alienate the negroes aforesaid, I do hereby declare her title to cease, and direct my executors to take them in possession; and in such case after her decease, they and their increase to be divided among her children if living; otherwise to be divided among my children, J., E., P., and C., and their heirs. Held: The daughter Lucy had but a life estate in the slaves, and her children took in remainder as purchasers under the will.

In the case of *Lucas and Wife vs. Duffield*, 6 Grat., 456, decided October, 1849, it was held: Every part of a will may be looked to to ascertain the intention of a testator in the particular devise, and thus to limit the phrase, dying without issue, to a dying without issue living at the death of the devisee.

In the case of *Nowlin and Wife vs. Winfree*, 8 Grat., 346, decided January, 1852, it was held: Prior to 1819, a testator devises to his three daughters by name his estate "both real and personal," to them and their heirs lawfully begotten of their bodies. "And in case either of my daughters should die without heir or heirs, as above mentioned, the surviving ones to enjoy their equal part." This is an estate-tail, which by the statute is converted into a fee; and the limitation over is after an indefinite failure of issue, and void.

In the case of *Callis et als. vs. Kemp et als.*, 11 Grat., 78, decided April, 1854: In 1799 testator lends, to his son, B., a tract of land during his natural life, and if he should die without lawful issue, testator gives the land to his grandson, H. B., to him and his heirs forever. But should my son B. leave lawful issue, my will and desire is that he will dispose of said land to such of his issue as he may think fit. Held: That B. took an estate-tail in the land, which by the statute was converted into a fee.

In the case of *Moore et als. vs. Brooks*, 12 Grat., 135, decided February 28, 1855. Testator gives his estate to his wife during her life; and at her death it is to be equally divided amongst all of his children, and the shares of his two daughters, M. and B., to be held by them during their natural lives and no longer, and then equally divided between their heirs lawfully begotten; and at his wife's death, he directs the lands to be sold, and the proceeds divided as aforesaid. Held: The words "lawfully to be begotten," are words of limitation, and M. and B. took the whole interest in their shares of the estate.

In the case of *Nixon vs. Rose*, 12 Grat., 425, decided May 21, 1855. Testatrix bequeaths slaves to A., B., and C., jointly, upon the following trust: To be held by them in trust only for the benefit of her daughter, E., a married woman, or her heirs. And as it is my wish to guard in the most ample manner against the imprudent sale or other disposition of the aforesaid property during the natural life of E., it is hereby wholly and solely confided to the discretion of the aforesaid trustees, A., B., and C., in what manner the said E. shall receive and enjoy the profits arising from the liens or other disposition of the slaves aforesaid; and in the event of the death of E., without heirs of her body, then all the slaves and their increase to B. Held: E. took an absolute interest in the slaves, and the bequest over is void; that it is a bequest to the separate use of E.

In the case of *Tinsley vs. Jones*, 13 Grat., 289, decided May 8, 1856. B. died in 1807, and by his will devised a tract of land to each of his sons, J. and F. He then says: "It is my will if my said son J. die without issue, that the property heretofore given him shall go to his brother F., who in that case will lose the land heretofore given him; it being my will and desire then, and in that case, and upon the happening of the event of my son J.'s death, that the land near W., which should otherwise be F.'s share, be sold, and the money equally divided between my surviving children." J. dies without issue. Held: J. took an estate-tail in the land devised to him, which was converted by the statute into a fee-simple; and therefore the limitation over to F. is void. F. not being entitled to take the estate devised to J. under the limitation over to him, the bequest of the proceeds of land devised to him, to the surviving children of the testator upon F.'s taking the land devised to J., is void, and F. is entitled to retain it.

In the case of *Norris vs. Johnston*, 17 Grat., 8, decided May 3, 1866. Testator had twelve children; six unmarried daughters. He directed his estate to be divided into twelve parts, and gave a part to each child. He then says: "It is my will and desire that if any of my children die without heirs, for their part to be equally divided amongst all of my children then liv-

ing. Held: This is a good executory bequest in favor of the children surviving, one dying without issue.

In the case of *Hall's Executor vs. Smith et als.*, 25 Grat., 70, decided April 16, 1874, it was held: W. died in 1831. By his will he gave the residue of his estate, to be equally divided among his children, naming them, to them and their assigns forever, "except my daughter, Mary C.; and her portion, after deducting forty-nine dollars, I lend unto her during her life, and after her death I give the same to the lawful issue of her body, to them and their heirs and assigns forever." Mary C. took an absolute interest in the slaves received by her under this clause of the will.

In the case of *Stone's Executor vs. Nicholson et als.*, 27 Grat., 1, decided November, 1876. Testator, by his will made in January, 1807, lends to his daughter, Sallie, who is one of eleven, one female slave named Phoebe, to be possessed by her during her natural life or widowhood of her present or future husband, and at her death, or after marriage of her husband, then to be equally divided among her children; and if she has none, then to be equally divided among all the testator's children. Testator died in 1810, Sallie being then about fourteen years old. She lived until 1857, unmarried, and without children, the descendants of Phoebe then numbering twenty-five. Held: The executory devise over to testator's children is too remote and void. If the executory devise is not void, then it includes all the testator's children alive at his death, and Sallie is one of them.

An executory devise over to testator's children will always be held to refer to children living at his death, unless there is a clear indication in the will that some other period is intended.

In the case of *Taylor vs. Cleary et als.*, 29 Grat., 448, decided November, 1877. By a deed made on the 28th of July, 1828, certain land in said deed described was granted to D. by his grandson, R., his executors, administrators, and assigns from and after the grantor's death, for and during his life only; and after his death the said piece of land to go to such person or persons as shall at that time answer the description of the heir or heirs at law of the said R.; and such person or persons shall take the said land under that description as purchasers under and by virtue of the deed, and not by inheritance as heirs of the said R. Held: R. took but a life estate in the land; and the persons who, at the time of R.'s death, answered the description of his heirs at law took as purchasers under the deed. By the act of 1785 dispensing with the word "heirs" in the grant of an estate in fee-simple, the grant to the remainderman is a fee; but that act does not, therefore, extend the rule in

Shelley's case to the estate given to R. so as to enlarge it into a fee.

In the case of *Wine vs. Markwood et als.*, 31 Grat., 43, decided November, 1878. P., by his will, gave to his four sons, George, Joseph, James, and Sampson, each a parcel of land; to George and Joseph in fee, and to the other two each devise, except as to the land devised the same, and is as follows: *Fourth*, I will and bequeath to my son Sampson the use and benefit of the home-place which I now occupy, containing about three hundred acres, during his natural life; he then says: should my sons George, Joseph, James, and Sampson, or either of them die without issue, I direct that what has been bequeathed to them shall be equally divided between the surviving brothers, James and Sampson, for their use and benefit during their natural lives. Held: That Sampson took but a life estate in the land devised to him.

The term in the limitation over, under the Virginia statutes, means issue living at the death of the first taker, or born within ten months thereafter. If Sampson has issue living at his death, or born within ten months thereafter, his issue will take the land devised to Sampson by implication.

Sampson sells in fee-simple a part of the land devised to him. The purchaser must elect to give up the land, or take such title as Sampson can give him to it.

In the case of *Camp vs. Cleary*, 76 Va., 141.

Conditional Limitations.—By deed dated July 28, 1821, D. granted, to take effect after his death, land whereon he had erected a mausoleum to grandson R. for life, and after his death to such a person as shall at that time answer the description of his heir-at law, such person to take as purchaser under the deed, and not by inheritance as heir of R., on condition that R. shall never sell, give, lease, mortgage, or in any way alien the land, or any part thereof, or even attempt so to do to any person whomsoever, then this deed should be void, and the land, together with two other-lots conveyed to him in fee, shall revert to and vest in his sister E. and her heirs forever. This condition R. broke, and the heirs of E. brought ejectment to recover it from those claiming under alienation by R. Held:

1. This is a valid conditional limitation, which is defined to be a conditional followed by a limitation over to a third person, in case the condition be not fulfilled, or there be a breach of it.

2. There having been a breach of the condition on which R. held the land, immediately the limitation over to C. took effect, and E.'s heirs have a right to recover it from R.'s alienees.

3. There is nothing in the law that prevents one man from

limiting an estate to another until he alien it, or attempt to alien it, or until he become bankrupt or insolvent, and as soon as he alien or attempt to alien, or become a bankrupt or insolvent, that his estate shall cease and go to another.

4. Power of alienation may be restricted to a limited extent as to designated persons; but absolute restraint is inadmissible, except as to the separate estates of married woman. And so as to liability for debts (statutory exemptions aside).

5. The limitation over was not void, for that the contingency on which it was to take effect is too remote, under the rule against perpetuities, which requires that such limitations shall take effect within a life, or lives, in being, and twenty-one years and ten months thereafter. The condition of the deed is, that the life-tenant shall not alien or attempt to alien, etc., and if he does, the whole property vests at once in E. in fee-simple.

6. The restrictive provisions of the deed are within the limits of the law, and are confined to the life-tenant R.

In the case of *Hood vs. Haden*, 82 Va., 588, decided December 2, 1886, it was held: The statute essaying to abolish this rule, applies only when the grantor or testator is competent to, and does vest in the heir a remainder in fee-simple after an estate for the ancestor's life.

This is the case cited as 11 Va. Law Journal, 304.

In the case of *Smith et als. vs. Fox (Adm'r)*, 82 Va., 763, decided February 10, 1887. Testator devises land to his daughter M. without limitation. She had been married thirty years, but had no children. By a later clause he directs that all property willed to his daughters should be held in trust by A. for the separate use of them and their children, etc., and that the trustee, when notified by either of them of her desire to sell, should do so, and re-invest in the same way. Held:

1. "Children" must be construed as equivalent to "issue" in order to effectuate the manifest intention of the testator, and M. takes a fee.

2. *Jus disponendi* is incident to such an estate as M. held, and she could encumber it for her husband's debts.

In the case of *Stokes vs. Van Wyck*, 83 Va., 724, decided September 23, 1877. Where testator, dying in 1834, limited to his daughter, Mrs. W., an estate for life, with remainder to her issue in fee, and in default of issue, with limitation over to his own heirs. Held: Under the law then in force (1 Rev. Code 1879, page 329, Section 25), Mrs. W. took an estate-tail that by the statute was converted into a fee-simple, but the fee was determinable by her death without issue then living, with limitation over to the person who was testator's heir at the time of his death, the rule of law applying which favors the vesting of estates as soon as possible.

In the case of *Hawthorne vs. Beckwith*, 89 Va., 786, decided March 30, 1893, it was held: Where a court below construed a will as giving a life estate (the said rule not applying to executory limitations), and the construction, on appeal, was not drawn in question, but was approved by the appellate court, the question as to what estate passed by the will is *res judicata*, and the fact that the remaindermen were not parties to that suit is immaterial. This is on the ground of representation.

In the case of *Riddick vs. Cohoon*, 4 Rand, 547, decided November, 1826, it was held: A limitation over an indefinite failure of issue in the first taker is too remote and void. Where an estate is given by will to A. and his heirs, and if he should die without issue living at his death, then so much of the estate as may remain undisposed of by A. to B.; the limitation over is void for uncertainty, and because the power to dispose of the property gives A. an absolute estate.

In the case of *Madden vs. Madden's Executor*, 2 Leigh, 377, decided November, 1830. Testator bequeathes that "all his moveable property after the death of his wife shall be sold, and the proceeds divided among his five daughters; after all his debts paid, all his moveable property should be at the disposal of his wife; on her decease the same to be disposed as above mentioned." Held: That the wife took only a life estate in such of the moveables as were capable of being used and returned in kind; and, therefore, the wife's gift of a slave to one of her daughters passed only the wife's life estate therein to the donee.

In the case of *Burwell's Executors vs. Anderson (Administrator, etc.)*, 3 Leigh, 348, decided December, 1831. Testator after directing the sale of certain property to raise a fund to pay debts, and after giving all the residue of his estate to his wife for life, directs that at her death all his estate, real and personal, shall be turned into money, to be distributed as follows: *First*, He desires that his wife, by will or otherwise, may have the absolute disposal of five hundred pounds, then he bequeathes to his nephew, W. P., two hundred pounds, and after deducting these two sums, he bequeathes two-thirds of the balance to his niece, A. S., and the other one-third to his sister, A. C., and he directs that if the funds provided for debt prove inadequate, the sum to make up the deficiency shall be deducted in equal proportions from the sums bequeathed to his wife, his niece, nephew, and sister. Held: The wife took by will the absolute property in the five hundred pounds bequeathed to her, and not a mere power to dispose of that sum.

In the case of *Brown vs. George*, 6 Grat., 424, decided October, 1849. Testatrix bequeathes property to her married daughter for life, for her separate use; the said property, or so much thereof as may be in existence at her death, to go to her children

or their descendants if there be any. And more fully to preserve said property to the separate use of her daughter for her life, and to her children after her death, testatrix appoints a trustee, to whom the property is to be delivered by her executor. And she further directs that all receipts given to the trustee by the daughter, for payments given to her either of principal or interest of the property, shall be to him a full discharge. Held: That the daughter is entitled to use both principal and interest of the property at her discretion.

In the case of *May vs. Joynes et als.*, 20 Grat., 692, decided March, 1871. Testator says, I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, to have during her life, but with full power to make sale of any part of the said estate, and to convey absolute conveyance to the purchasers; and use the purchase-money for investment or any purpose that she pleases, with only this restriction, that whatever remains at her death shall, after paying any debts that she may owe, or any legacies that she may leave, be divided as follows: there are then limitations to his children and grandchildren. Held: The wife takes a fee-simple in the real, and an absolute property in the personal estate; and the limitation over whatever remains at her death, is inconsistent with and repugnant to such fee-simple, and absolute property in said real and personal estate, and fails for uncertainty.

In the case of *Sprinkle vs. Hayworth*, 26 Grat., 384, decided July, 8, 1875. S. and his wife P. had no children, and it was understood and agreed between them that the survivor should have all his property during the life of the survivor, and at his or her death it should be equally divided between his and her heirs and next of kin. S. made his will, by which he gave all his property, real and personal, to his wife P., absolutely. He died in her lifetime, and she was so shocked at his death that she was immediately paralyzed, and remained unconscious until she died the day after he did. She died without having made a will. Held: A court of equity will not enforce the agreement at the suit of the heirs and next of kin of S. against the heirs and next of kin of P.

In the absence of fraud on the part of a legatee, a court of equity will not enforce a parol charge upon his legacy. If it appeared from the evidence in the case that S. intended P. should have entire control of the whole property during her life, and use as much of it as she chose to use, and that only what remained of it at her death was to be divided between his and her heirs and next of kin, the trust would not be enforced even if it had been in writing.

In the case of the *Missionary Society of the M. E. Church vs. Calvert's Administrator et als.*, 32 Grat., 357, decided November, 1879. C., owning several tracts of land and personal estate, by his will says: "3. I give to my wife, Theresa, during her natural life or widowhood, all my estate, real and personal, except as hereinafter excepted. But if she should marry again, she is to have the same portion of my estate as if I died intestate." He directs his executors to sell his lands and personal property, and then says: "The home place is for my wife, to live on as long as she may remain my widow, and then it is to be sold." He then says: "I wish the proceeds of the sale of my real and personal estate, and the debts due me after paying my debts, to be put at interest by my executor, and my wife to receive the interest. But so long as she remains my widow, she is to receive from my executors, or from my estate, such part of it as she may choose, and to appropriate it as she may choose to be just and right." And he then directs that all such part of his estate as she does not thus appropriate, and all the rest of his estate, shall be given and paid over to the Missionary Society of the Methodist Episcopal Church, incorporated by an act of the legislature of the State of New York, passed April 9, 1839. All so paid to the said Missionary Society shall be paid to the Indian Mission by that society. Held: That under the provision that his wife, Theresa, is to be at liberty to receive from his executors such part of it as she may choose, and appropriate it as she may think just and right, all the estate directed to be sold and invested by his executors passed absolutely to his wife. The home place, which was to be sold after the death or marriage of his wife, did not pass absolutely to the wife, but the proceeds of the sale thereof passed to the said Missionary Society. The testator, directing the home place to be sold by his executors, the bequest to the Missionary Society, though a foreign corporation, is valid, they taking the proceeds of the sale. The direction that the Missionary Society shall expend it on the Indian Mission does not avoid the bequest for uncertainty.

In the case of *Carr vs. Effinger et als.*, 78 Va., 197, decided December 13, 1883. Testator gave annuity of one hundred dollars to his mother, "to be paid out of the money arising from the bonds due me," and then provided as follows: "What money or bonds I have in my possession, or judgments due me, I leave unto my beloved wife to be collected, should she think it best, and vested in Confederate bonds, or loaned out at interest. Out of the interest thus arising, my wife is to pay to my mother the one hundred dollars annually, so long as my mother shall live, and the remainder of the interest thus arising is to be used by my wife for her own benefit. I also leave to my wife

five shares of stock in the O. & A. R. R., which she is to sell at such time as she may think proper, and invest the proceeds in Confederate bonds, or loan it out at interest for her benefit. At the death of my wife, what bonds she may not have used, I give to my two sisters, C. T. and S. E., and the children of their bodies. Held: The wife takes an absolute estate in the property, subject to the charge of the annuity to the mother.

In the case of *Cole vs. Cole et als.*, 79 Va., 251, decided July 31, 1884, it was held: It is a well-settled rule of law, in the construction of wills, that an absolute power of disposal in the first taker renders a subsequent limitation repugnant and void.

In the case of *Blair vs. Muse*, 83 Va., 238, decided April 21, 1887, it was held: Unlimited power of alienation is an essential incident of a fee-simple estate. A deed conveys land to four grantees in fee-simple. Subsequent clause, giving one of them power to dispose of the whole at her pleasure, is invalid, the rule being, that when two clauses in a deed are repugnant, the first shall prevail. This is the case cited from 11 Virginia Law Journal, 566.

SECTIONS 2422 AND 2423.

See the references *supra*, Section 2421.

SECTION 2426.

In the case of *Ware vs. Cary*, 2 Call, 263 (2d edition, 222), decided April 21, 1800, it was held: A deed in which an estate for life is given the husband, made by husband and wife, of the wife's lands to a trustee, will pass the estate, although no consideration be expressed therein, particularly if the verdict finds that it was for the purpose of settling it on the wife's family.

In the case of *Rowletts vs. Daniel*, 4 Munf., 473, decided October 19, 1815, it was held: A legally certified copy of an ancient deed, recorded on the grantor's acknowledgment, and accompanied with possession of the land by the grantee, ought to be received as evidence, without any proof that the original is lost or destroyed.

A deed being defective as a *feoffment*, for want of proof of livery of *seisin*, may operate as a covenant to stand seised to use, and as such to pass the title to the grantee, for the use is executed into possession by the force of the statute of uses.

A voluntary deed duly recorded, operating as a covenant to stand seised to the use of the grantee, cannot be limited in its effect by a subsequent deed from the grantor to a third person.

After executing a deed operating by way of covenant to stand seised to use, the grantor cannot, by a decree to a third person,

convert his own possession into a possession adverse to that of the grantee.

In the case of *Bass and Wife et als. vs. Scott et als.*, 2 Leigh, 356, decided October, 1830. Testator devises and bequeathes real and personal estate to trustees, in trust for the equal use and benefit of testator's four sisters (naming them), and their heirs forever, to be managed as the trustees should think most conducive to the interest of each of the parties; two of the sisters being *femes covert*. Held:

1. That each of the sisters took a fee-simple as to the real, and the absolute property as to the personal, subject in her share of the trust estate.

2. That the legal title remains in the trustees, in order that they may manage the part of the subject intended for the use and benefit of each sister, in such manner as the trustees may think most conducive to the interests of each respectively.

It seems that the statute of uses of Virginia does not apply to the uses created by devise, and transfers such uses into possession of the *cestui que use*.

In the case of *Jones vs. Tatum*, 19 Grat., 720, decided May 23, 1870. T. conveyed to H. B. and J. B. ninety acres of land in trust for his wife for life, and at her death to their children, with a power of appointment by will to the wife, which she did not make. After the death of T. and his wife, four of their children, being of age, file their bill against the other two, who were infants of the age of seventeen and nineteen years, asking for a sale of the land. There was a decree directing the land to be sold, and it was sold partly on a credit, and the sale was confirmed. The purchaser having failed to make the last payment, a rule was made on him to show cause why the land should not be sold to pay the balance of the purchase-money. He appeared and filed an affidavit objecting to the title—that the trustees, H. B. and J. B., had not been parties to the suit, and that there was but eighty-nine acres of land. J. B., describing himself as surviving trustee, executed a release deed, which was filed in the suit. A sale was decreed, and the purchaser appealed.

Quære: Whether under the Virginia statute of uses, the trust having ended, the legal title was in the trustees? But if it was, and they should have been parties, the sale having been made and confirmed, and the purchaser in quiet possession, the deed of release of the surviving trustee cured the defect.

In the case of *Redd and Wife vs. Dyer et als.*, 83 Va., 331, decided May, 1887, it was held: The maxim *caveat emptor* strictly applies to judicial sales. Purchaser's objections must, ordinarily, be made before the sale is confirmed. But the pur-

chaser is entitled to relief on the ground of after-discovered mutual mistake of material facts, or of fraud, which must be clearly proved.

SECTION 2428.

In the case of *Claytor vs. Anthony*, 6 Rand., 285 (on p. 307-'8), decided March, 1828, it was held: This section embraces all descriptions of property when the *cestui qui* trust has an immediate equitable right to the possession and enjoyment of the property.

In the case of *Coutts vs. Walker*, 2 Leigh, 268, decided June, 1830, it was held: A judgment creditor has a lien in equity on the equitable estate of the debtor in like manner as he has a lien at law on his legal estate.

In the case of *Findlay vs. Toncray*, 2 Rob., 374, decided August, 1843. Under a deed of trust conveying land, with general warranty to secure debts, the land is sold for more than enough to pay the debts. The purchaser instituted a proceeding against the grantor for unlawful detainer, and obtains a judgment against him, and then the purchaser insists, *first*, that he was not bound to pay his purchase-money (and therefore cannot be charged with interest on the same) until he obtained possession; and *second*, that he may retain part of the surplus of the purchase-money to pay the costs recovered by the judgment on his complaint for unlawful detainer. The claims of the purchaser are objected to by a creditor of the grantor, who obtained a decree against him after the deed of trust, and sued out an *elegit* within a year. Held: The claims so made by the purchaser cannot be allowed.

The purchaser further claims to apply other parts of the surplus to extinguish a dower right in the property existing at the time of the warranty, and to pay taxes assessed on the property before the sale was made. Held: These claims also must be disallowed.

In the case of *Armstrong, Cator & Co. vs. Lachman*, 84 Va., 726, decided April 17, 1888, it was held: While no rule can be laid down as to the extent of evidence required to set aside a conveyance as fraudulent, it must satisfy the chancellor's conscience, and it may be, and generally must be circumstantial.

SECTION 2429.

In the case of *Rowton vs. Rowton*, 1 H. & M., 92, decided November 5, 1806, the court said: Under the act of 1785, giving a widow dower in a trust estate, it seems that she is entitled to dower in an equitable estate in fee-simple contracted by verbal agreement, to be conveyed to her late husband, provided the contract be proved to be such as would authorize a court of equity to decree the legal estate.

In the case of *Claiborne vs. Henderson*, 3 H. & M., 322, decided March, 1809, it was held: Before our act of Assembly (of 1785, which took effect the first day of January, 1787) giving a widow dower of a trust estate, she was not dowable of an equitable estate.

In the case of *Heth vs. Cocke et ux.*, 1 Rand, 344, decided March, 1823, it was held: A widow is not entitled to dower of real estate which had been mortgaged by her husband before the marriage. The only claim of the widow in such a case is to dower in the equity of redemption. The same principle applies as well to mortgages after marriage, where the wife unites in the mortgage, and has been privily examined, as to mortgages before marriage.

In the case of *Wheatley's Heirs vs. Calhoun*, 12 Leigh, 264, decided April, 1841. By articles between C. and W., they agree to make a joint purchase of land, and to divide the same between them by a designated line, W. to pay the whole purchase-money of the whole land to the vendor thereof, and C. to pay W. the purchase-money for his part at a certain appointed time; within the time C. pays to W. the greater part, but not the whole of the purchase-money for his part of the land; and then, also, within the time the contract between C. and W. is rescinded, W. agreeing to take back C.'s part of the land, upon condition that C. have credit on another account for the money he has paid; and C. dies, never having been let into possession of the land so by him agreed to be purchased and paid for. Held: That as the contract between C. and W. was wholly executory, and was rescinded before C. had completed payment of the purchase-money, and he had never had legal or equitable possession, he had no such equitable estate as that his widow was dowable thereof.

In the case of *Deering & Co. vs. Kerfoot's Executor et als.*, 89 Va., 491, decided December 15, 1892, it was held: Land bought with partnership funds, for partnership purposes, is so far considered as personality, that widow of deceased partner is not entitled to dower therein, but only to her distributive share thereof.

In the case of *Ficklin's Administrator vs. Rixey*, 89 Va., 832, decided April 6, 1893, it was held: Wife's right of dower, whether inchoate or consummate, is an existing lien, and a covenant against encumbrances is broken by its existence. This lien is inferior to all which attached prior to the marriage, but superior to those acquired after marriage without her consent.

Such settlements on a wife for value are valid in equity, though void at common law, and relinquished of her right of dower is a good consideration to the extent of its value as against the husband's creditors.

In the case here, as the value of the dower relinquished exceeded that of the land settled on the wife, she and her heirs at law, after her death, were entitled to the land free from all liability for her husband's debts.

SECTION 2430.

In the case of *Deloney vs. Hutcheson*, 2 Rand., 183, decided December, 1823, it was held: Where parties purchase an estate jointly for the purposes of their trade, it is considered in equity as an estate in common in England; and in Virginia, where the *jus accrescendi* is abolished, it is so considered in law as well as equity. Therefore, a surviving partner can have no other claim against real estate held in partnership than any other creditor has.

In the case of *Pierce's Administrator vs. Trigg's Heirs*, 10 Leigh, 406 (2d edition, 423), decided July, 1839, it was held: Where land is purchased by two partners for partnership purposes with partnership funds, and is used as part of the stock in trade, a court of equity deems such lands partnership's property; and though, if the conveyance has been made to both partners, their will, upon the death of one, passes to his heirs a legal title, yet the whole beneficial interest devolves upon the survivor, and he may sue the heirs, compel a sale, and dispose of the proceeds as he would dispose of the personal estate of the firm.

In the case of *Wheatley's Heirs vs. Calhoun*, 12 Leigh, 264, decided April, 1841. By articles between C. and W., they agree to join in the purchase of mills and two hundred acres of land adjoining, and that in case the purchase shall be effected, C. shall keep the mills at a salary to be paid out of the joint concern, and that "the improvements, privileges, expenses, and profits shall in all respects be equal to both parties and their legal representatives." They make the purchase accordingly; the mills, etc., are conveyed to them jointly; they give their joint bonds for the purchase-money, payable in four annual instalments, and a joint mortgage of the property to secure payment of the same, and then commence and carry on the business of millers in partnership for several years. The first instalment is paid out of the social funds, and the residue of the purchase-money out of money borrowed on the credit of the partnership, but repaid to the lenders by W. alone after C.'s death. Held: Though C. and W. were partners in the milling business carried on by them at the mills so purchased, yet the mills, etc., were not social property or stock, but real estate, purchased by C. and W. individually, of which one was a tenant in common with the other of an undivided moiety, and therefore C.'s widow is dowable of his moiety.

In the case of *Thornton vs. Thornton*, 3 Rand., 179, decided February, 1825, it was held : An estate given to husband and wife is not joint tenancy, and therefore not affected by our act of Assembly concerning joint rights and obligations. In such an estate each party takes the entirety, and the survivor takes the whole, not by survivorship, but by virtue of the original conveyance.

In the case of *Norman's Executrix vs. Cunningham and Wife et als.*, 5 Grat., 63, decided April, 1848. Mrs. W. and Miss T., as tenants in common, hold the equitable title to a tract of land by warrant, survey and possession. N. marries Miss T., and then buys Mrs. W.'s moiety of the land, and a patent issues for the whole tract to N. and his wife, T. T. dies in 1805, leaving several children. After her death N. sells the land to *bona fide* purchasers without notice, and conveys to them with general warranty. He marries a second time, and dies in 1838, leaving a widow and children by both of his wives, and devises and bequeathes to them a large estate. After the death of N., the children of his first wife, T., file their bill against his executrix, claiming compensation from the estate of N. for the moiety of the tract which had belonged to their mother, T.; and they charge that the sales and conveyances were to *bona fide* purchasers without notice. The executrix answers, not admitting the facts, and calling for proof. Held : Under the patent, N. and his wife, T., each took the entirety of the tract of land, with the chance of excluding, by survivorship, the heirs of the other. Though the patent vested the legal estate of the entire tract in N. and his wife, which, upon her death, survived to him alone, yet her equitable estate in an undivided moiety was not thereby defeated, but descended to her heirs at her death, subject to N.'s life estate as tenant by the curtesy.

SECTION 2432.

In the case of *Troth vs. Robertson*, 78 Va., 46, decided November 22, 1883, it was held : This section should be construed as remedial and liberal, and therein the word "estate" is held to be used in its most extended sense, and as meaning the property or thing given by the deed or will, and not merely the interest therein, so as to promote the policy of the legislature, which was to remove those fetters upon alienation which contingent limitation, more or less, tend to fasten. Under that, statute circuit courts have jurisdiction to sell and make good title to real estate devised to one for life, and remainder to his children or descendants, if any, at his death, and if none, then remainder to the children or descendants of another, if any such be living at the former's death.

SECTION 2434.

In the case of *Pierce's Administrator, vs Trigg*, 10 Leigh, 423, it was held: The decree against an infant, though it gives him a day in court to answer, is of the nature of a final decree, and is carried into execution as such; nor is it reversible but for error, or fraud, or collusion.

CHAPTER CVIII.

SECTION 2440.

In the case of *Mickie vs. Lawrence, Executor of Wood*, 5 Randolph, 571, decided August, 1827, it was held: No set form of words is necessary to constitute a lease; and a contract between two persons, that one should have, during the life of the other, land, negroes, etc., he paying therefor a stipulated annual sum, is not a sale, but a rent. Such a contract does not lose its character of a rent by slaves and other personal property being included in the contract.

Interest cannot be recovered as of course in an action for the recovery of rent, but may be given under circumstances to be judged by the jury.

SECTION 2441.

In the case of *Clark vs. Moore (Trustee, etc.)*, 76 Va., 262 and 265. 2. Case here: Father conveyed property in trust to secure two debts to son and to trustee of his wife, by deed in statutory form, giving no priority. One of the debts secured to son arose out of a judgment against father, prior to deed, in favor of a third person, which son had paid, but no assignment thereof had been made. It was only referred to in the deed as an execution against father, which son had paid. Upon questioning whether this was entitled to priority, held:

1. It is not. All three of the debts must be paid *pari passu*.

2. But even if this judgment had been the property of son by *bona fide* purchase for value, and a lien on the land when it was conveyed, son lost his priority by unequivocally accepting the deed; recognized no priority, as attested by his execution thereof.

SECTION 2442.

In the case of *Lane vs. Tidball*, 1 Va. (Gilmer), 130, decided November 2, 1820, it was held: A court of equity should enjoin a sale by trustees, where the title to the property is disputed, and full value could not probably be had for it, even if that fact was known to all the parties to the deed when executed.

In the case of *Chowning vs. Cox et al.*, 1 Rand., 306, decided February, 1823, it was held: When a conveyance of real estate is made to a creditor, in trust to satisfy his own demand, such

conveyance is not to be considered as a deed of trust, but as a mortgage, to which the right of redemption is incident. But if a sale is made by the creditor under these circumstances, and the grantor comes into a court of equity for relief, the court will not decree in his favor, unless he makes the purchaser under the sale a party.

In the case of *Taylor's Administrators and Devisees vs. Chowning*, 3 Leigh, 654, decided March, 1832, it was held: Though a mortgage be made to secure a debt, and power being therefore given to the mortgagee to sell the subject to pay the debt, the mortgagee cannot execute the power, the character of creditor and trustee in such case being incompatible; yet if the mortgagee, in fact, execute the power fairly, and make sale of the subject for cash, and if the mortgagor be apprised of the sale, and be present at it, and make no objection to the mortgagee's proceedings, but, on the contrary, acquiesce in them, he shall be regarded as waiving his objection to the defect of the mortgagee's power to sell, so far as the purchaser is concerned, and shall not be allowed in equity to redeem as against the purchaser.

In the case of *Hutchison et als. vs. Kelly*, 1 Rob., 148-154 (2d edition, 131). The policy of the statute of 13 Eliz., chapter 5 (substantially adopted in the act of Virginia to prevent frauds and perjuries), investigated by Baldwin, J., and the true principle declared by him to be, that a fraudulent intent of the grantor against one or more creditors is fraudulent against all, and that no distinction exists between prior and subsequent creditors other than that which arises from the necessity of showing a fraudulent intent against some creditor, which cannot be done in behalf of creditors not in existence at the time of the conveyance, but by proving either a prior indebtedness or a prospective fraud against them only.

A father made a deed, whereby, in consideration of natural love and affection, he conveyed to his four children, who were infants, living with him, all of his property, both real and personal. He had another child afterwards. The real property was transferred to the grantees on the commissioner's books, and the taxes charged to them. But the taxes were paid by the father, who continued to reside on the lands and cultivate them, and to use the personal property as his own. A small part of the land was sold by him after the deed. One of the tracts of land conveyed by the deed was afterwards levied upon and sold under an execution at the suit of the Commonwealth against the father for money for which he was liable as sheriff. The father was still residing on the land at the time of the sale; and on the day of the sale the father and one of the sons offered to sell the

land and make a good title ; but the son forbade the sale by the sheriff. The purchaser from the sheriff obtained possession by virtue of a judgment against the father upon a complaint for unlawful detainer ; and then ejectment was brought against the purchaser by the grantees, all of whom were infants at the time of the sheriff's sale. In the action of ejectment a special verdict was returned, finding the foregoing facts, and also the additional fact that the deed made by the father to his children was executed for the purpose of avoiding a liability to which he might be subjected in consequence of being the surety of a deputy sheriff. Held : The deed made by the father is void as to his creditors, and the purchaser at the sheriff's sale is entitled to hold the tract of land so purchased by him. But it appearing that the Commonwealth was satisfied by the proceeds of that tract of land, and the conveyance by the sheriff being not only of that tract, but of another, which was neither levied upon nor sold, held, further : The conveyance by the sheriff presents no obstacle to a recovery by the lessors of the plaintiff of the last mentioned tract.

In the case of *Floyd vs. Harrison et als.*, 2 Rob., 161, decided July, 1843, it was held : A deed is made, whereby, after reciting that F., the grantor, hath sold to H., the grantee, for the sum of two hundred dollars, certain real and personal estate, it is witnessed that the grantor, in consideration of that sum, conveys the same to grantee, and then the deed concludes as follows : " It is agreed and fairly understood by and between the said F. and H. that in case the said H., or his heirs or assigns, shall not be able to make the aforesaid two hundred dollars out of the estate hereinbefore conveyed, that then the said F. shall refund the same to the said H., or his heirs or assigns, with lawful interest thereon from this date till paid, or such part of the said two hundred dollars as the said H. shall not be able to realize as aforesaid." Under the authority of this deed, the grantee sells and conveys the estate, and his grantee again sells and conveys the same ; after which, to-wit, about ten years after the date of the first mentioned deed, the grantor in that deed files a bill in equity to redeem the estate conveyed. Held : The bill cannot be sustained.

In the case of *Rossett vs. Fisher et als.*, 11 Grat., 492, decided July, 1854, it was held : Real estate is conveyed in trust to secure debts. The grantor in the deed has at the time but an equitable title, and the principal creditor secured by the deed having become the purchaser, and the grantor being absent at the time, and the money to pay the debts having been forwarded to his agent at the place of sale, and being at the time in the post-office at the place and not delivered to the agent,

though in the expectation of receiving it, he having several times applied at the office for a letter, a court of equity will not set aside the sale.

The references to 28 Grat., 815 and 822, are errors.

In the case of *Shultz et als. vs. Hansbrough*, 33 Grat., 567, decided October 2, 1880, it was held, pp. 576-'77: If a trustee *in pais*, with power to make sale of real estate for the payment of debts, attempts to make sale while there is a cloud resting on the title to the property, or there is any doubt or uncertainty as to the debts secured, or the amounts thereof, or a dispute or conflict among the creditors as to their respective claims, a court of equity, on a bill filed by any person having an interest, will restrain the trustee until these impediments to a fair sale have by its aid been removed, so far as it is practicable to do so. And so, if the aid of the court is invoked in the first instance to enforce the incumbrances on land, a decree for a sale without first ascertaining, settling and determining what incumbrances are chargeable on the property, the amounts thereof respectively, and the order in which they are so chargeable, would be premature and erroneous.

In the case of *Clarke vs. Wells (Administrator)*, 6 Grat., 475, decided January, 1850. The sale by an administrator of his intestate's effects, though upon a credit, must be treated at law as a conversion thereof. There is an exception to this rule in equity, when upon a settlement between proper parties of the administration of the administrator it appears that the collection of such sale bonds by his personal representative is unnecessary for the reimbursement or indemnity of his decedent's estate, and may therefore be confided as unadministered assets to the administrator *de bonis non*.

W., administrator of C., sells assets on a credit, and dies indebted to his intestate's estate. A purchaser at the sale qualifies as administrator *de bonis non* of C. Held: The proceeds of sale not being necessary for the reimbursement or indemnity of C.'s estate, his administrator shall be enjoined from proceeding to collect the debt from the administrator *de bonis non* of C., but he shall hold it as unadministered assets of his intestate.

In the case of *Hogan vs. Duke et als.*, 20 Grat., 244, decided January, 1871, it was held: It is improper in a trustee, in a deed to secure a debt, to make a sale so long as it remains uncertain what amount is due on account of the debt, and if the amount due is uncertain, or if credits properly applicable thereto be not so applied, it is his duty before making a sale to ascertain the amount to be raised by the sale, and to bring a suit in chancery to procure a settlement by a commissioner for that purpose, if

necessary, or if it fails to do this the debtor may do it and in the meantime enjoin the sale.

On a bill to enjoin a sale of land by the trustee, the answer denies all the grounds of equity stated in the bill, and there is no proof to sustain them. The court may dissolve the injunction, and have the sale made and the proceeds distributed under its direction. In such case, the trustee having been declared a bankrupt, it was especially proper for the court to retain the cause, and have the trust administered under its direction, and to require the trustee to give security for the faithful performance of his duties. The decree for the sale of the property should be according to the terms of the deed.

It was proper to allow compensation for the services of an auctioneer in making the sale ordered by the court, and also the expense of a former advertisement of the sale of the property by the trustee, which had been enjoined by the debtor and the injunction dissolved.

Though the court decreed an account involving a few items to a small amount, it was not error to direct the payment of so much of the debt secured by the deed as might be safely paid, leaving enough to meet any possible amount which could be reported as due on that account to the debtor.

The reference to 76 Va., 715, is an error.

In the case of *Griffin's Executors vs. Macauley's Administrators*, 7 Grat., 476, decided May 11, 1851. A person named trustee in a deed to secure debts, unites in sales necessary to the execution of the trust, and other formal acts, but he receives none of the trust funds, they being received by his co-trustee; and he is guilty of no fraud in relation thereto. Held: He is not responsible for the misapplication or waste of the funds by his co-trustee. Trustee not responsible for estimated rents when he has received none, when his delay in selling the property arose out of the difficulty of finding a purchaser.

The reference to 9 Grat., 341, is an error.

In the case of *Womack vs. Paxton's Executors*, 84 Va., 9, decided September, 1887, it was held: Where but part of the price is ever collected, commissions should be allowed only on the part collected, and no extra compensation is allowable for extraordinary efforts to sell the lands.

In the case of *Muller's Administrators vs. Stone*, 84 Va., 834, decided May 3, 1888, it was held: Where there is a cloud on the title, uncertainty as to the debts secured, or the amounts thereof, or a dispute as to priorities, the aid of equity may be invoked by any person interested to enjoin a sale under trust deed until such impediments to a fair sale are removed. But unless some such impediments exist, it is not the duty of the

trustee, in every case where there are liens on the trust subject, to invoke the aid of equity before making sale *in pais*.

In the case of *Alexander vs. Howe*, 85 Va., 198, decided August 9, 1888. Trustee advertised land for sale under trust deed. Owner enjoins sale on the ground of usury and the pendency of suit to partition the tract whereof this was an undivided part. The circuit court perpetuated the injunction as to the usury and dissolved it as to the residue of the debt, and decreed that the trustee proceed to sell the land and report to court. The trustee, ascertaining that there were several liens on the land, sold it free of liens, and reported that fact to the court, and asked that an account of liens be taken before the proceeds were disbursed. Held: The sale was a judicial sale, and was premature and erroneous, in that it was ordered before the liens were ascertained by the court, it appearing that liens existed.

In the case of *Orr vs. Chandler*, 86 Va., 938, decided June 19, 1890, it was held: Where land conveyed in trust to secure a bond is required by the trust deed to be sold for cash, and by consent of the owner of the land it is sold on credit at the instance of the surety on the bond, who is one of the purchasers at the sale. Held: The latter cannot complain of the change of the terms of sale.

In the case of *Miller vs. Mann*, 88 Va., 212, decided July 2, 1891, it was held: Where the trustee in a deed which prescribes no terms other than those prescribed by this section, sells the trust property in accordance with the provisions of said section, such sale is valid, though he sells only half thereof, it being sufficient to satisfy the debts secured thereon, and the debtor not requiring the sale of more.

In the case of *Morriss vs. Virginia State Insurance Company*, 18 Southeastern Reporter, 843, decided December 7, 1893, it was held: While it is a compliance with a deed of trust requiring a notice of ten days at the least to insert the advertisement on Sunday, the 4th, for a sale on the 15th, when the circumstances warrant equity in taking charge of the sale, the court should prescribe a notice of at least thirty days, not only in the newspaper, as directed by the deed, but by handbills.

Where a deed of trust contains no provision as to the place of the sale, this matter is in the discretion of the trustee, and if neither party is satisfied with his decision he may apply to equity for instructions prior to sale.

Where a deed of trust covering property on the outskirts of Richmond contained no provision as to the place of sale, and the trustee selected the City Hall in Richmond, on the debtor's objection that, if the sale were made on the property it would command a higher price, the debtor's wishes should be respected.

A deed of trust directing a sale, but not requiring in terms a

subdivision, should be construed in reference to Code 1873, Chapter 113, Section 6, requiring the trustee, in case of default, "to sell the property conveyed by the deed, or so much thereof as may be necessary," and if the land will bring a better price by sale in lots, and the owner so requests it, and the trustee refuses, the owner may control the trustee, in the exercise of his discretion in equity. Trustees in deeds of trust must act in person and not by agent.

SECTION 2446.

In the case of *Ralston vs. Miller*, 3 Rand., 44, decided November, 1824, it was held: A court of equity will not interfere to prevent the payment of the purchase-money of land, unless the title to the land is questioned by a suit either prosecuted or threatened, or unless the purchaser can show clearly that the title is defective.

In the case of *Randolph's Administratrix vs. Kinney et als.*, 3 Rand., 394, decided March, 1825, it was held: A real covenant cannot operate so as to pass to an assignee of land, unless the vendor has a capacity to convey the land itself, to which the covenant is incident.

In the case of *Threlkeld's Administrator vs. Fitzhugh's Executor*, 2 Leigh, 451, decided December, 1830. Upon a sale of land by T. to B., the vendor covenants for himself, his heirs, executors, and administrators, to warrant the land to B., his heirs and assigns; B. is evicted and brings covenant for breach of this warranty. Held: The proper measure of damages is the purchase-money, with interest from the date of the actual eviction, the cost incurred in defending the title, and such damages as the vendee may have paid, or may be shown to be clearly liable to pay, to the person who evicted him. But, though the purchase-money, with interest, etc., was held to give the proper measure of damages in the particular case, the opinions of the judges leave it still questionable whether the actual value of the land at the time of sale, if proved to be greater than the purchase-money, with the interest, &c., may not be justly demanded.

In the case of *Tabb's Administrator vs. Binford*, 4 Leigh, 132, decided January, 1833. In a deed of bargain and sale of lands the bargainer covenants as follows: "And the said T. doth hereby covenant, for himself and his heirs, to and with the said B., that he, said T., will warrant and forever defend to the said B., his heirs and assigns, the title to the said parcels of land against all persons whatever." Held: This covenant was not a mere warranty real, but was a personal covenant, upon which an action of covenant lay for the bargainee, on being evicted, against the administrator of the bargainer.

In the case of *Feazle vs. Dillard*, 5 Leigh, 30, the case of *Ralston vs. Miller*, 3 Rand., 44, quoted *supra*, is cited and approved, *obiter dictum*.

In the case of *Miller vs. Argyle's Executor et als.*, 5 Leigh, 460, decided November, 1834, it was held: A vendee of land executes a deed of trust of the same land to secure the payment of the purchase-money. If there is any doubt as to the title of the land, or any part thereof, equity will enjoin the trustees from selling the land, or at least such part thereof as to which the title is doubtful, to satisfy the debt.

In the case of *Koger et als. vs. Kane's Administrator*, 5 Leigh, 606, decided July, 1833, it was held: In Virginia equity will enjoin the collection of the purchase-money of land on the ground of defect of title after vendee has taken possession under conveyance from vendor with general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the purchaser can show clearly that the title is defective. But when A. sells and conveys land to B. with general warranty, and then B. sells and conveys to C. such title as A. has conveyed to him, equity will not give C. relief against B. on the ground of defect of title, because C. purchased of him only A.'s title; nor give him relief against A., for A. has no claim against C. which he can be enjoined from enforcing.

In the case of *Beale vs. Seiveley et als.*, 8 Leigh, 658, decided August, 1837, it was held: Where a vendee is in possession of land under conveyance with general warranty, and the title has not been questioned by any suit, prosecuted or threatened, such vendee has no claim to relief in equity against the payment of the purchase-money unless he can show a defect of title, respecting which the vendor was guilty of fraudulent misrepresentation or concealment, and which the vendee had at the time no means of discovering.

In the case of *Long's Executor vs. Israel*, 9 Leigh, 556, decided December, 1838. A., in consideration of a certain price per acre to be paid him by B., undertakes to procure C., who is in possession of a tract of land as the owner thereof, to make a good deed for the same to B., with general warranty. A. purchases the land from C., pays him the purchase-money, and directs him to make the conveyance to B., which is made accordingly, with general warranty. B. executes to A. his notes for the price agreed upon between them, and takes possession of the land, which he holds without eviction or disturbance. Held: Equity will not enjoin A. from collecting the money due him by B., whatever be the defects of C.'s title to the land. No eviction or disturbance of B.'s possession having taken place, defect of title is no ground for his coming into equity against C.

In the case of *Sutton vs. Sutton*, 7 Grat., 234, decided Feb-

ruary 17, 1851, it was held : A mistake in respect to the title to land is no ground for relief to a purchaser where he purchases the land without an agreement, express or implied, for a conveyance with warranty of the title. A trustee to sell, selling such property, and such title only as is vested in him, according to the terms prescribed, and without warranty or fraud, incurs no responsibility to the purchaser. The object of the trust being to sell for what the property will bring, and there being no warranty by the grantor of either title or quantity, the purchaser is not entitled to relief for a mistake in the estimated quantity of land.

In the case of *Clarke vs. Hardgrove*, 7 Grat., 399, decided May 11, 1851. H. sells land to C., and conveys to him with general warranty, and C. assigns to H. the bonds of S. in payment of the purchase-money. The title to a part of the land is afterwards discovered to be fatally defective. Held : C. may enjoin H. from collecting so much of the bond of S. as will compensate him for the land to which the title is defective. C. is entitled to compensation according to the relative value of the land to which good title cannot be made. H. should be directed to perfect the title by a day specified by the court, and if he failed to do so, a commissioner should be directed to ascertain the relative value of the part of the tract to which the title is defective.

In the case of *Dickinson vs. Hoomes's Administrator et als.*, 8 Grat., 353, decided January, 1852. There is a devise to J. with a limitation over, upon his dying without issue, at his death to his brother R., if he should survive him, or his representatives, and R. dies in the lifetime of J. J. sells and conveys the land to A., and R., though he does not convey the land, is a party to the deed, and J. and R. covenant as follows : That the said J., for himself and his heirs, and the said R., as contingent devisee under the will of Col. J., by whom said land was devised to J., do hereby covenant and agree with the said A. that they will warrant and defend the fee-simple estate, etc., to said land, to him and his heirs forever, against the claim of themselves and their heirs, and the claim of any person claiming under them by virtue of the will aforesaid, and do relinquish and fully confirm to said A. all the right they or theirs now have or may hereafter have to said land, or any part thereof, to him and his heirs, free from the claims of the said J. and R. and their heirs, and of all other persons in the whole world. Held : That this covenant of R. extends to the claim of his children to the land, though they claim not as his heirs, but as devisees under the will of Col. J. ; that the covenant of R. is a covenant running with the land, and a purchaser claiming under A. a portion thereof

by a regular chain of conveyances is entitled to the benefit of said covenant for his indemnity against said claim; that the children of R., having inherited from him lands in Kentucky, and as by the laws of that State lands descended may be subjected to the payment of the debts of the ancestor, and the heir is bound by such a covenant of warranty by the ancestor, a court of equity in the State of Virginia may compel the children of R. residing within the jurisdiction to account for any lands in Kentucky descended to them as his heirs as a trust subject for the payments of his debts; and under the circumstances of this case the power should be exerted.

Under the circumstances of the case, the heirs are held bound to account for only so much of the Kentucky lands as they have actually gotten or may get possession of, with the rents and profits derived therefrom, deducting the cost and expense of recovering the lands.

In the case of *Peers vs. Barnett et als.*, 12 Grat., 410 and 416, decided May 21, 1855, it was held: Land is purchased by the acre, but after the survey is commenced the vendee agrees to take it at the quantity for which the vendors hold it, and the survey is stopped. He is concluded by his agreement, and is not entitled to an abatement from the purchase-money on account of a deficiency in the quantity.

In the case of *Faulkner vs. Davis*, 18 Grat., 651, decided May 3, 1868, it was held, p. 661: If the purchaser be informed of a defect in a title, yet still accept it, with a covenant of general warranty, and be evicted, he is still bound to pay the purchase-money. His remedy for the recovery is at law.

In the case of *Click et als. vs. Green & Sadler*, 77 Va., 827, decided October 18, 1883. The fixed rule as to the measure of damages to which vendee is entitled upon a breach of warranty of title is the amount of purchase-money paid by him, with interest from the date of his eviction from the land. C. and S., being jointly in possession as joint owners of land, jointly sell the same to G. and S., and convey it to them. In their deed they say: "And the said C. and S. covenant that they will warrant generally," etc. Held: This is a joint and several warranty, and both warrantors are responsible to the vendees, upon their eviction, for the payment of the full measure of the damages.

In the case of *Sheffey's Executor vs. Gardiner*, 79 Va., 313, decided August 14, 1884, it was held: When premises are in actual possession of third party, under paramount title at date of conveyance, it is unnecessary either to aver or to prove actual entry or eviction in action for breach of warranty of title to land. Because deed recites that "immediate possession is delivered," and declaration avers no eviction, covenantee is not thereby estopped to deny that he got possession.

The rule as to the measure of damages to which vendee is entitled upon a breach of warranty of title is the amount of purchase-money paid by him, with interest from date of eviction.

In the case of *Marbury et als. vs. Thornton*, 82 Va., 702, decided December 16, 1886, it was held: Covenants of warranty of title run with the land for the protection of the owner in whose time the breach occurs. But to constitute such breach plaintiff must be evicted, or prevented from taking possession by another in possession under a paramount title. Declaration not averring that the plaintiff was evicted, or kept out of possession by one in possession under paramount title, is bad on demurrer.

This is the case cited as 11 Virginia Law Journal, 226.

In the case of *Abernathy vs. Phillips*, 82 Va., 769, decided January 13, 1887, it was held: Remedy of vendee for loss of land paid for by him, and conveyed to him by vendor with warranty of title, is by action at law, and the measure of recovery is the purchase price, with interest from date of eviction.

This case is cited as 11 Virginia Law Journal, 313.

SECTION 2449.

In the case of *Brook vs. Barton*, 6 Munf., 306, decided February 25, 1819, it was held: Upon a covenant to make a good title to certain lots of land (according to a plat for extending the streets of a town), including the use of the streets, and appurtenances therein mentioned, and that the covenantee, his heirs and assigns, may at all times thereafter enter into, possess, and enjoy the said lots, with the streets, etc., without the let, hindrance or molestation of the covenantor, his heirs and assigns, a court of equity, by injunction, will compel the covenantor, his heirs and assigns, to remove all obstructions by them put in the said streets, and open the same to the free and full use of the covenantee, his heirs and assigns, and permit him and them thereafter to use the same without let, hindrance or molestation.

SECTION 2455.

In the case of *Ross vs. Overton*, 3 Call, 309 (2d edition, 268), decided November 8, 1802. O. leased a mill and premises to R., who covenanted to leave it in repair. The mill during the term was carried off by ice. Held: R. is bound to pay the rents and perform the covenants.

In the case of *Newton vs. Wilson*, 3 H. & M., 470, decided April, 1809, it was held: Interest is not recoverable by way of damages, in an action of debt for rent arrears. In an action of debt for rent, the defendant, on a plea of *nil debet*, may give in evidence any special circumstance showing the rent ought to be apportioned.

A lease was made of a mill, together with a tract of land adjoining, and a black man as miller, for a term of years, rendering an annual rent; the miller had, previously to the lease, been emancipated by the lessor, by a deed entered of record, and before the expiration of the first year, left the services of the lessee. It was held that the lessee was entitled to an apportionment of the rent.

In the case of *Maggort vs. Hansbarger*, 8 Leigh, 532, decided July, 1837. A lease is made of a lot of land, with all the appurtenances thereto belonging, for four years, and the defendant agrees to pay the plaintiff twenty-two dollars a year; at the expiration of the four years to return the property to the plaintiff with all of its appurtenances. On the premises there were, at the time of the lease, a grist-mill and a carding-machine, which during the time were consumed by fire, either accidentally or by some incendiary. Held: The contract, according to its fair meaning, could not be considered as binding the tenant to rebuild.

In the case of *Thompson vs. Pendall*, 12 Leigh, 591, decided August, 1841, it was held, page 601: In the lease of a mill, lessee covenants to keep up repairs of the mill, except heavy repairs, such as if the dam or fore-bay should be injured by high water, or if the main shaft or wheel should give away so as to require a new one; in this case it is to be repaired by the lessor in a reasonable time, and the lessor is not to lose the rent if he should go to do the work according to the contract. The mill is wholly destroyed by fire during the term, and the lessor fails and refuses to rebuild the same. Held: The rent is suspended from the time of such destruction of the demise premises.

In the case of *McCandlish vs. Keene et als.*, 13 Grat., 615, decided February 3, 1857, it was held: Deed conveys grantor's life estate in land, all live stock upon the place, farming implements, carriage and horses, household and kitchen furniture as it stands, and in a number of slaves; also the grantor's interest in the reversion in the property derived from three of her children, who had died since the death of their father, and a number of slaves absolutely, in consideration of a sum of money, and that grantee shall support the grantor for life; and in the event of the grantee's death in the lifetime of the grantor, his estate shall pay her three hundred dollars a year during her life for her board, etc., and let her have a maid-servant, if she lived out of his family; but if she lived in his family, then she should have her choice of the maid-servants of his estate to wait on her, one room in the house and its furniture for life, and should receive one hundred and fifty dollars a year during her life to purchase clothing, etc. The grantor has no lien upon the property conveyed for the annuity.

In the case of *Scott's Executrix vs. Scott*, 18 Grat., 150, 164, and 175, decided January, 1868. E. owns an estate for her life in property, both real and personal, including slaves, and S. owns the remainder in fee therein; and E. and her trustee enter into a contract, called by the parties a lease, by which they convey to S. the life estate of E. in the whole of the property, and S., in consideration thereof, undertakes to pay E. annually for her life seven hundred dollars as rent, and to pay all taxes and legal charges on the estate; and the usual remedies for the recovery of these annual sums were reserved. S. was put into possession of the property, and held and treated it as his own. Held: Though the instrument was called a lease, and the sums reserved were called a rent, the contract was a surrender, and the life estate of E. was merged in the estate of S. The instrument not being under seal, it was not, as to the land, an express surrender, but it was a contract for a surrender, which was carried out by the parties by the delivery of possession and the payment of money under it, and it therefore has all the legal effect of an express surrender by deed. As to the personal property, no deed was necessary. The slaves having been emancipated by the proclamation of the President of the United States, this does not entitle S. to any abatement from the amount of the annual payments which he contracted to make.

In the case of *N. White et als. vs. Stuart, Buchanan & Co.*, 76 Va., 546, 563 and 564.

Idem—Abatement.—In the absence of an express covenant to pay rent, a tenant is not liable for the same where the premises are destroyed, whatever the rule may be in the case of such express covenant.

The Code refers to the report of the revisors of the Code of 1849. That report cites the case of *Overton vs. Ross*, 3 Call, 309, above cited, and other previous foreign cases, as a reason for passing an act substantially the same as this one.

In the case of the *Postal Telegraph-Cable Company vs. Norfolk and Western Railroad Company*, 87 Va., 349, decided January 22, 1891, it was held: Judgment obtained by telegraph company appointing commissioners to fix a just compensation for the land of a railroad company, proposed to be taken for the purpose of the former in condemnation proceedings, is not final, and is appealable.

SECTION 2456.

In the case of *M. Clenahan vs. Gwynn*, 3 Munf., 556, decided November 16, 1811, it was held: A person assigning a lease for value received, but without any special agreement to be responsible for the title, is not bound to restore the purchase-money, upon the eviction of the assignee, in consequence of a defect in the lessor's title, especially when the lessor has not

been previously resorted to, or shown to be insolvent, and when the possibility of the eviction was in contemplation of both the parties at the time of the assignment. When a lease is assigned, and the assignee is evicted through a defect in the lessor's title, he may sue the lessor for compensation.

In the case of *Black vs. Gilmore*, 9 Leigh, 446, decided July, 1838, it was held: When a conveyance is of a freehold estate, words of lease do not amount to a covenant for quiet enjoyment.

A declaration in covenant sets forth that the defendant, by an indenture, did rent and lease to the plaintiff a tract of land, to have and to hold the same so long as the plaintiff should live; and it avers as a breach of the covenant that the defendant entered upon the possession of the plaintiff, and expelled and removed him. Held: On general demurrer, that no covenant for quiet enjoyment is to be implied from the words set forth, and that the action cannot be maintained.

CHAPTER CIX.

SECTION 2458.

In the case of *Starke's Executors vs. Littlepage*, 4 Rand., 368, decided June, 1826, it was held: Parol evidence is admissible to impeach evidence under seal on the ground of fraud. The rule *in pari delicto potior est conditio defendentis* does not apply where the policy of the law requires that a fraudulent or vicious conveyance should be enforced; and therefore, where a debtor makes a fraudulent conveyance of his property for the purpose of protecting it from his creditors, the fraudulent grantee may enforce such conveyance in a court of law, and the debtor will not be allowed to defeat the claim by proving the fraud. Decided by two judges out of three.

In the case of *James vs. Bird's Administrator*, 8 Leigh, 510, decided July, 1837, it was held: A party who, to hinder and delay his creditors, fraudulently conveys his land to another, cannot, except under peculiar circumstances, maintain a bill to rescind the contract; the grantor and grantee being generally *in pari delicto*, neither is entitled to come into equity.

In the case of *Terrell vs. Imboden et als.*, 10 Leigh, 321 (2d edition, 332), decided July, 1839, it was held: The obligee in a bond secured by a deed of trust makes a deed transferring the bond and deed of trust for the benefit of his creditors. Afterwards, at the request of the obligor, the obligee signs a receipt, stating that on the day of the date thereof he received the amount of the bond. The bond was, in fact, executed without consideration, and the receipt was, in fact, given without any payment. The creditors for whose benefit the bond was assigned had no notice of its being without consideration until after the

assignment; but the obligor knew of the assignment when he took the receipt. In a suit between the obligor and those claiming under the assignment, an injunction, awarded to restrain the sale of the property conveyed to secure the bond, was dissolved, and the court of appeals affirmed the order of dissolution.

In the case of *Owen vs. Sharp and Wife et als.*, 12 Leigh, 427, decided November, 1841. One makes a fraudulent bill of sale of a female slave, absolute on its face, in order to protect the property from his creditors, but there is a secret trust that the grantee shall hold the property for the benefit of the grantor's daughters. Held: The daughters cannot establish the secret trust in equity and have a decree for the slave, her increase and profits.

A fraudulent bill of sale is made of a female slave, absolute on its face, with a secret trust for the grantor's daughters, of whom the grantee becomes guardian in 1827, and in 1829 he settles his guardianship accounts, both wards having then attained to full age. They then set up a claim to the property, which the grantee denies to be just, and in 1837 they file a bill to establish the secret trust. Held: The statute of limitations would alone be a bar to the bill.

In the case of *Harris vs. Harris's Executor*, 23 Grat., 737, decided September, 1873. In a debt on bonds by the executor of H. against G., G. tenders a special plea that at the time of the execution of said bonds he owed nothing to G., and the consideration of said bonds was as follows: In 1866 four suits at law were pending against him in the county, naming plaintiffs, to recover damages for trespass during the civil war in impressing horses, etc., by him under orders of the Confederate government, he being an officer of the army under that government. He did not regard these claims as debts or just liabilities on his part, but owing to the unfavorable and unjust constitution of courts and juries at that time, he feared they might be enforced against his property. He was informed by his counsel that the result was uncertain; that judgment had been given in similar cases in Berkeley county; then he conferred with his father, who warmly advised him to secure his property against these claims. The plan adopted was for him to execute to his father the bonds sued out on, antedated with the distinct understanding that they were only to be used and treated as obligations to claim priority over the plaintiffs in case of necessity, and, if unnecessary, were to be handed back to the defendant. Said bonds were executed under this understanding, and upon no other consideration. Wherefore said G. and his executor were bound to deliver said bonds to defendant, because said suits had been dismissed in 1867, before the death of G.; and the bonds were

therefore null and void, and to be surrendered. Therefore he has sustained damages, etc. On the motion of the plaintiff, the plea was rejected. Held: The plea was properly rejected, because no issue, either by general or special replication, could be made upon it. It was not good as a plea under the statute for failure of consideration. The statute only applies to cases where the consideration was originally valuable, and not where there was no consideration. Such a defence cannot be made to a specialty, either at common law or under the statute. The seal imports a consideration, and a party cannot avoid it upon the ground of a want of consideration. The plea is not good, on the ground that the facts stated would entitle him to relief in equity, because his ground of relief is his own fraud. The averment of his fears that the courts and juries would not do him justice could not avail him, as the court must presume that no injustice could be perpetrated in regular legal proceedings had in the forum where such proceedings were pending. It is not a good plea at common law, because it is emphatically of the class in which the maxim, "*nemo allegans suam turpitudinem audiendus est*," applies with full force. This case does not come within the maxim "*in pari delicto potior est conditio defendentis*."

There is a marked distinction between contracts which are void *ab initio* and contracts which are void as to third persons, but are valid between the parties.

Where the contract is void *ab initio*, when it appears either by the allegation of the plaintiff or by a proper plea of the defendant, that the contract is so void, the court will not lend its aid either to enforce it on the one hand or give relief on the other. Though the bonds are void as to creditors, they are valid between the parties, and therefore they will be enforced by the courts.

In order to apply correctly the rule *potior est conditio defendentis*, it is necessary to consider not who is plaintiff or who is defendant, but by whom the fraud is alleged or sought to be made a ground of defence or recovery.

Upon the question whether a fraudulent contract shall or shall not be enforced, there is no distinction between an executed or an executory contract.

A party claiming damages for the acts of another must be regarded in law as much the creditor of that other as one holding his bonds or other promises to pay.

A special plea of *non est factum*, which admits the execution and delivery of the bonds sued on, but avers that they were to be delivered to the defendant when he should request it, is not a good plea.

In the case of *Montgomery vs. Rose*, 1 Patton & Heath, 5,

decided January, 1855. A. defrauds B. of certain slaves, and afterwards makes a deed conveying them to a trustee to secure a debt. The trustee sells to C., for valuable consideration, and without notice of the fraud; C. then conveys to D. Held: D. is entitled to hold against B., whether he had notice of the fraud or not. In the former case he holds valid title under C.; in the latter, he is himself a *bona fide* purchaser, without notice of fraud.

In the case of *Coutts et als. vs. Greenhow*, 2 Munf., 363, decided June 7, 1811, it was held: A marriage settlement on a wife and her children, by the husband, though born in fornication, is a conveyance to purchasers for valuable consideration, as to the children as well as the wife; and not void as to creditors, no fraudulent intention being proved.

In the case of *Herring et als. vs. Wickham and Wife et als.*, 29 Grat., 628, decided January, 1878, it was held: If the grantee in a deed be a *bona fide* purchaser for valuable consideration, his or her title is unassailable, whatever may have been the motives or intentions of the grantor in executing the deed. It is absolutely essential that both parties shall concur in the fraud to invalidate the deed. Fraud cannot be presumed; it must be proved by clear and satisfactory evidence.

Marriage is a valuable consideration, sufficient to support a conveyance of property, even against creditors, and in such a case the wife is deemed a purchaser of the property settled on her, in consideration of the marriage, and is entitled to hold it against all the world.

However much a man may be indebted, an ante-nuptial settlement, made by him in consideration of marriage, is good against his creditors, unless it appears that the intended wife was cognizant of the fraud; and even though it conveys his whole estate, it is not simply on that account void; and when a settlement is made in contemplation of a marriage, the law presumes it was an inducement to it, and the courts cannot assume the contrary to be the fact.

The fact of the cohabitation of the parties, and the birth of children before the marriage, will not avoid the conveyance.

Coutts vs. Greenhow, 2 Munf., 363, examined and followed.

In the case of *Triplett et als. vs. Romine's Administrator et als.*, 33 Grat., 651 and 659, decided September, 1880. M., a widow, having property settled by her upon her former husband, purchases land, and borrows from R. money to pay for it in part. Being about to marry again, she enters into a marriage contract with her intended husband, T., by which she conveys all her property, real and personal, to a trustee, in trust for the separate use of herself and T., and the children of T. by a former marriage; the money she borrowed to pay for the

land still being due and unpaid. Held: The land is liable to pay the debt due to R. as against the children. R. files his bill against T. and his wife M., to subject the land to the payment of his debt. They answer; an account is ordered and taken, fixing the amount of R.'s debt to some items, to which T. excepts. After the death of M., and eight years after the suit was brought, the children of T. file their petition in the cause. R.'s administrator answers the petition, and the court decrees against them. Held: They should have been made parties, but as their case was fully stated and investigated upon their petition and the answer of R.'s administrator, and after the delay they would not allow to be disturbed the report of the commissioner, the appellate court will not reverse the decree; they may be made parties, if they desire it, when the cause goes back.

In the case of *Clay vs. Walter & Co.*, 79 Va., 92, decided May 1, 1884, it was held: Whatever the design of the grantor, a settlement on a woman in contemplation and in consideration of marriage is valid, unless her knowledge of his intended fraud is clearly and satisfactorily proved. Service by the creditors of the grantor of written notice in accordance with the statute on the grantee before the marriage of his fraudulent design in making the settlement, cannot affect her constructively with notice of such design; but her actual knowledge of, and actual participation in that fraudulent design, must be clearly established by proof.

In the case of *Garland vs. Rives*, 4 Rand, 282, decided June, 1826, it was held: A creditor who takes a conveyance from his debtor to secure his debt, but at the same time inserts provisions in the deed to delay, hinder, or defraud other creditors, comes within the statute of frauds, and the conveyance is void. So, likewise, if the grantee be privy to a fraudulent intent on the part of the grantor, and takes a deed to secure his own debt, with provisions to delay, hinder, or defraud other creditors, the deed will be void, although his only motive was to secure his own debt, and the other provisions were forced upon him by the grantor as the only means of having his own debt secured. Such a grantee will not be considered as a *bona fide* purchaser. Under our statute of frauds, as well as the English statute of 13 Eliz., a *bona fide* purchaser for value, having no notice of covin, fraud, collusion, etc., will be protected. To vitiate a conveyance there must be a fraudulent design in the grantor, and notice of that design in the grantee.

In cases of actual fraud a court of equity has concurrent jurisdiction with a court of law in remedying the fraud. In these cases equity follows the law, and gives relief to the same extent as a court of law. And therefore where a creditor comes into equity to set aside a conveyance tainted with actual fraud, and

the grantee had notice of the fraud, the conveyance shall be set aside *in toto*.

In the case of *Tate vs. Liggat & Matthews* and *Liggat & Matthews vs. Morgan et als.*, 2 Leigh, 84, decided March, 1830. A creditor at large, not having obtained judgment or decree against his debtor, cannot resort to equity to set aside a fraudulent conveyance of his debtor, though interference of the court be also prayed to prevent a sale or removal of the subject, and though the subject be equitable estate not liable to execution.

Deison mortgages property to secure a fair debt due the Farmers Bank and a pretended debt to Tate. L. & M. bring a suit in chancery impeaching the security provided by the mortgage for the pretended debt to T. as fraudulent. Pending this suit D. mortgages not the property, but his equity of redemption in it, to S. & Co., fair creditors, to secure a just debt due them; and then L. & M. obtain a decree for their claim against D. Held: That S. & Co. purchased only what D. could rightfully convey, that is, his equity of redemption, and took subject, not only to the fair debt due the Farmers Bank, but the pretended debt secured to T.; and L. & M. being creditors by decree, and thus having the right to satisfaction in preference to the pretended creditor, T. acquired a preference also over the second mortgagees, S. & Co., who were postponed by contract to the pretended creditor, T. A., creditor at large, procuring a mortgage of his debtor's property, cannot claim as a creditor or in the double character as creditor and purchaser, but only as purchaser.

And per Green, J., if A. make a fraudulent conveyance for valuable consideration to C., who has full notice of the previous fraudulent conveyance, the statute of frauds and perjuries does not apply to protect such a subsequent purchaser against the previous fraudulent conveyance; nor upon the principles of common law can he claim against the previous fraudulent conveyance whereof he had notice when he purchased.

In the case of *Brockenbrough's Executrix et als. vs. Brockenbrough's Administrator et als.*, 31 Grat., 580, decided March, 1879. A deed of trust is given in 1870 to secure a *bona fide* debt of ten thousand dollars, evidenced by four notes, payable in one, two, three and four years, and conveys a tract of land, with the crops then upon or thereafter grown upon the land, until said notes are fully paid; all the stock of horses, mules, cattle, sheep, and hogs, with the increase of the same then on the said land and thereafter placed on the same, and all farming implements of the said land. Held: The deed is not *per se* fraudulent on its face. *Quære*: If the crops thereafter grown upon the land, or the increase of the stock, or other stock or

implements afterwards put upon the land, pass by the deed, and will be protected against subsequent execution creditors?

Pending a suit by judgment creditors to set aside a deed as fraudulent, the grantor makes a deed of quit-claim to his creditor of all the property conveyed in the deed, but the notes are not given up, nor is the deed of trust released. Held: That whether the trust released depends upon the intention of the creditor; and in this case it was held, upon the evidence, that there was no such intention.

A deed of trust, to secure certain debts, conveys certain real estate, and the grantor reserves in it to himself and his family, all exemptions and property allowed by the Constitution of Virginia and all laws passed in pursuance thereof, and in addition thereto, all exemptions allowed under the bankrupt laws. Held: The reservation is legal and valid.

L. brings an action on a bond against B., which is on the office judgment of the court at its March term, which commences on the third of the month, and the office judgment is confirmed on the fifth, which is the last day of the term of the court. On the first day of the same term of the court, B. goes into court and confesses a judgment in favor of S., no suit having been instituted against B. by S. Held: The judgment in favor of S. is valid, though no suit had been instituted by him against B.; that the judgment of L. relates back to the first day of the term, and the law not regarding the fraction of a day, both judgments stand as of the same date.

In the case of *Williams et als. vs. Lord & Robinson et als.*, 75, Va. Reports, 390, decided March 24, 1881, it was held: W., a merchant, conveys his stock of goods in trust for the benefit of such of his creditors as shall accept the deed in a prescribed time. A few of the creditors accept the deed, but other creditors refuse. The creditors who accept the deed sell their claims to the wife of W., and she buys some goods and opens a store. Whether or not she may claim to hold the money she receives under her contract as a separate trader from the claims of her husband's creditors, under the first section of the said act, she is entitled, under the second section of said act, to all the benefits of her said contract, and to hold the same free from the claims of her husband's creditors.

In the case of *Davis vs. Turner*, 4 Grat., 422, decided January, 1848, it was held: The retaining possession of personal property by the vendor, after an absolute sale, is *prima facie* fraudulent; but the presumption may be rebutted by proof.

In the case of *Forkner vs. Stuart*, 6 Grat., 197, decided July, 1849. On a sale of slaves, if the possession does not accompany the sale, but remains with the vendor, such retention of the vendor is *prima facie* evidence of fraud, but is not con-

clusive; and it is liable to be repelled by satisfactory legal evidence of the fairness and good faith of the transaction.

C. makes an absolute bill of sale of slaves to F., and F. executes to him an obligation that, upon C.'s producing evidence of the payment of a certain debt for which F. is bound as surety for W., that he will cancel the bill of sale. This is not a mortgage; but the bond is conditional defeasance.

In an action on an indemnifying bond, the relator claims title to the property sold under a sale made by one partner without the knowledge or consent of the other of partnership property. The relator may recover for the undivided interest of the partner who made the sale, under a general allegation in the declaration of his ownership of the property. One partner, in the absence and without authority from his co-partner, sells partnership property, and executes a bill of sale under seal, in the name of both to the purchaser. The sale is made to pay a pressing debt of the absent partner, and is *bona fide* and for whole value, and the money is applied to pay the debt. Held: That the partner, having the authority by law as partner to sell partnership effects, his sale thereof is obligatory upon and passed the title of the firm.

In the case of *Curd vs. Miller (Executor)*, 7 Grat., 185, decided December 7, 1850, it was held: The grantor, in an absolute conveyance of personal property, continuing in possession thereof such continued possession, raises the legal presumption that the sale was fraudulent as regards the creditors of the grantor, which presumption throws imperatively upon the grantee the whole burden of proving the fairness and good faith of the transaction; and that cannot be done without sufficient evidence that the pretended sale was for a fair and valuable consideration; and in the absence of such evidence, the *prima facie* presumption becomes absolutely and irresistibly conclusive. A judgment having been obtained against the grantor and his surety, the surety may direct the execution to be levied on the property so conveyed, and set up the fraud in the conveyance.

In the case of *Lang vs. Lee et als.*, 3 Rand., 410, decided June, 1825, it was held: Where a deed reserves to the grantor a power inconsistent with the avowed object for which the deed is made, it will be null and void as against creditors and purchasers.

In the case of *Sheppards vs. Turpin*, 3 Grat., 373, decided January, 1847. A property taken under a deed of trust is taken under execution and sold, at the instance of parties not claiming under the trust deed. Held: A court of equity will not entertain a suit by the trustee or *cestui que* trust against the purchasers at the sale under the execution to recover the property; there being no obstacle in the way of their proceeding at law.

Property conveyed in a deed of trust is taken under execu-

tion and sold, and the purchasers remain in peaceable possession thereof for five years before the suit is instituted by the trustee for *cestui que* trust to recover it. Held: The statute of limitations is a bar to the recovery.

A reservation in a deed of trust inconsistent with the avowed object of the trust, and adequate to the defeat thereof, renders the deed fraudulent and void as to the creditors thereby postponed.

In the case of *Spence vs. Bagwell*, 6 Grat., 444, decided October, 1849. A deed of trust was held fraudulent because it reserved powers to the grantor which were sufficient to defeat the purposes for which the deed purported to be given.

In the case of *Addington vs. Ethelbridge (Coroner)*, 12 Grat., 436, decided May 22, 1855, it was held: H., a merchant, conveys to S. all his stock of goods and the store-house for the current year in trust to pay certain debts described in the deed; and the deed provides that H. shall keep possession of and sell the stock of goods in the usual line of his trade, and occupy the store until default is made in the payment of any of the debts secured, and until the trustee shall be requested by any of the said creditors to close the deed by a sale. The deed is fraudulent *per se*, and void as to the creditors of H.

In the case of *Perry & Co. vs. Shenandoah National Bank et als.*, 27 Grat., 755, decided September, 1876. In November, 1873, N. conveyed to G. certain real and personal estate, and all his stock in trade, with all accretions to and replenishments of said stock, in trust to secure and indemnify certain endorsers upon negotiable notes due by said N. And if the said notes were not paid on demand, C., upon the written request of either of the parties secured, should sell the said property according to law; but C. was not to be responsible for any of said property until he was ordered to sell the same as aforesaid. N. continued in possession and carried on his store for two years, and until all the goods in the store at the time of the deed were sold, and other goods were bought with the proceeds. In November, 1875, under an execution of P. against N., the goods then in store were levied on. Held: The deed is fraudulent *per se*, and P. is entitled to the proceeds of the sale of said goods under his execution.

In the case of *McCormick (Trustee) vs. Atkinson (Trustee)*, 78 Va., 8, decided November 15, 1883, it was held: It is well settled that a conveyance professedly to indemnify creditors, but expressly or impliedly reserving to the grantor powers inconsistent with and adequate to defeat such purpose, is void as to creditors and purchasers. When conveyance is made of stock and fixtures of a store in trust to secure debts payable *in futuro*, without right to trustee to possess or control the pro-

perty except in event of default of payment, then, on request of C., G., and trustee to sell the same, such conveyance impliedly reserves to grantor the power to possess and sell the property; and if he sells, then, as to the purchaser and creditors of that purchaser, that conveyance is void, although it may have been recorded, its recordation being only notice of a void thing.

As between an unrecorded deed of trust and a subsequent but recorded conveyance of the equity of redemption, without notice of the former deed, the latter hath priority.

In the case of *Wray vs. Davenport*, 79 Va., 19, decided April 3, 1884, it was held: It is well settled that conveyances, professedly to indemnify creditors, but expressly or impliedly reserving to grantors powers inconsistent and adequate to defeat such purpose, is void to creditors and purchasers.

It is too late for a grantor in a fraudulent deed to urge in the appellate court that a judgment is excessive in a suit to annul that deed, and subject the property to that judgment.

In the case of *Peay vs. Morrison's Executors*, 10 Grat., 149, decided July, 1853, it was held: A creditor at large may maintain a suit in equity to set aside as fraudulent a deed conveying real estate made by his debtor, both the debtor and his grantee living and being out of the Commonwealth.

In the case of *William and Mary College vs. Powell et als.*, 12 Grat., 372, decided April, 1855, it was held: A post-nuptial settlement is made by a husband upon his wife. The wife afterwards dies, and then a bill is filed by a creditor of the husband against the children to set aside the deed as fraudulent as to the creditor. The husband is not a competent witness to prove the consideration upon which the settlement was made.

In the case of *Penn et als. vs. Whitehead*, 17 Grat., 503, decided June 26, 1867, it was held, pages 527-530: A married woman may engage in trade on her separate account, and enter into partnership for that purpose, by the consent of her husband, and she will be entitled to the profits of the trade against her husband, even though his agreement be merely voluntary; and against his creditors, at least to some extent, if the agreement be founded on valuable consideration paid by or for the wife.

A married woman, having a separate estate, may engage in trade, with the consent of her husband, and may, to the extent of her power over it, subject her estate to the payment of the debts, and she will be entitled to the profits of the trade as against her husband and his creditors, to the extent, at least, to which such profits may not be due to the labor, skill, capital or credit furnished by her husband.

Where the husband furnishes all, or a portion of the labor and skill, or a portion of the capital and credit used in carrying

on the business, the wife will be entitled, even as against his creditors, to such portion of the profits as will compensate her for what she has contributed to the business, either in the shape of capital or credit. To the extent to which a just apportionment can, it will, be made.

If the power to dispose of or charge the wife's separate estate is not denied, either expressly or by implication, she has the power as incident to the separate estate.

Property is conveyed to a trustee, on a consideration flowing from the wife, for her separate use for life, to remain in her possession for the support of herself and her issue and family, and for no other purpose, and with power to dispose of it by will among her family. She has the power to charge her life estate with payment of the debts of the business in which she was engaged. In such a case the wife is entitled to have the debts of the business paid out of the assets, in exoneration of her separate life estate.

A wife, being without any adequate means of support for herself and family, and her husband being insolvent, she, with his consent, and for the purpose of obtaining a support, engaged in a mercantile business for her separate use, by the aid of her friends in loaning her money or selling her goods on the credit of the business. Her stock in trade will be liable for the debts thus contracted, and so liable, preferably, to the proper debts of her husband, even though the necessary labor and skill employed in conducting the business was furnished by him and his minor sons. In such a case any claim which the husband may have for the services of himself and his minor sons will be subordinate to the claims of the creditors of the concern to priority of payment out of the assets.

An infant may be a partner, and his father, though indebted and insolvent, may release to his son all claim to his services; and the consent of the father to the son's becoming a partner is a release of his services.

A business in which the wife is engaged, with the consent of the husband, is carried on by the labor and skill of her husband and his minor sons, and he is indebted and insolvent. The profits of the business, after paying off its debts and expenses, are liable to the creditors of the husband. The expenses of the support of the husband and his wife and family are a part of the necessary expenses of the business, without which there could be no profits.

In the case of *Burton vs. Mill et als.*, 78 Va., 468, decided March 13, 1884. This statute protects against fraudulent transfer all claims, debts, and demands, including claims to damages for breach of contract to marry, for which judgment may, after the execution of the conveyance, be obtained.

In the case of *Saunders (Trustee) vs. Waggoner*, 82 Va., 316, decided July 15, 1886, it was held: It is well settled that conveyances, professedly to indemnify creditors, but expressly or impliedly reserving to grantors powers inconsistent with and adequate to defeat such purpose, are void as to creditors and purchasers.

In the case of *Hickman's Executor et als. vs. Trout et als.*, 83 Va., 478, decided June, 1887, it was held: Fraud must be clearly proved. The burden of proof rests on the allegor. It may be proved by circumstances. When the evidence shows a *prima facie* fraud, the burden shifts to the upholder of the transaction to establish its fairness. The grantee must be proved to have had notice of grantor's fraudulent intent. The usual badges of fraud are: Gross inadequacy of price; no security taken for the purchase-money; unusual length of credit; bonds taken at long periods; conveyance in payment of alleged antecedent indebtedness of father to son residing together; threats and pendency of suits; concealment of the transaction; keeping the deed unacknowledged and unrecorded for some time; grantor remaining in possession, as before the conveyance. Any of these facts may make a case of *prima facie* fraud, calling on the parties for explanation. Where to these *indicia* are added the absence of itemized accounts, vouchers, etc.; contradictions in the testimony of grantor and grantee; the want of means in grantee to create the alleged indebtedness of grantor to grantee, and the failure to examine as witnesses persons having opportunities to know the facts—these things combine to establish the fraudulency of the conveyance as to both grantor and grantee.

In the case of *Rucker's Administrators vs. Moss et als.*, 84 Va., 634, decided March 15, 1888. M., for R.'s benefit, put a lien on his real estate for the amount of a fictitious note that could cover its value, and then referred his creditors to R. as a probable purchaser of their debts, and sold some at fifty cents on the dollar, it being agreed secretly between M. and R. that the discounts should be shared equally between them. Held: The deed creating the lien was fraudulent in fact and void as to M.'s creditors.

In the case of *Hawkins vs. Gresham*, 85 Va., 34, decided May 10, 1888, it was held: In suits to set aside fraudulent deeds and subject the property therein to satisfy a debt, it is the amount of the debt, and not the value of the property which determines the appellate jurisdiction.

In the case of *Paul vs. Baugh et als.*, 85 Va., 955, decided April 4, 1889, it was held: Debtor, in failing circumstances, may make valid assignment of all his property, giving preferences as between his creditors, in the absence of fraud, which must always be proved with clearness and certainty.

SECTION 2459.

For the references to 17 Grat., 503, 527, 530; 2 Munf., 363; 29 Grat., 628, and 33 Grat., 651-659, see *supra*, Section 2458.

In the case of *Chamberlayne et als. vs. Temple*, 2 Rand., 384, decided February, 1824, it was held: A voluntary conveyance of property to children at a time when the donor is largely indebted, is void as against creditors.

A creditor cannot subject the property thus conveyed by a suit against the donees until he has established his demand at law by obtaining judgment, and in the case of personal property, by suing out an execution against the donor or his representatives, or by showing, by a settlement of the administration account, that there are no assets in the hands of the executor or administrator to satisfy the debt.

A voluntary conveyance is good between the parties, and only void as to creditors, who are thereby delayed, hindered, or defrauded.

When a decree is rendered on behalf of a creditor against several voluntary donees of the debtor, a court of equity should decree contribution among them, so that each man should pay his just proportion of the debt. But all the donees should be liable for the failure of any one to pay his proportion until the debt is completely discharged, as far as he has received the funds of the donor.

In the case of *Davis vs. Payne's Administrator*, 4 Rand., 332, decided June, 1826, it was held: A voluntary conveyance of personal property, by a party not indebted at the time, is good against creditors, if the deed be duly recorded, or the possession remain solely and *bona fide* with the donee; otherwise it is void by the statute of frauds.

In the case of *Huston's Administrators vs. Cantril*, 11 Leigh, 136, decided April, 1840. A father, owing a debt at the time, makes a deed of gift of personal chattels to his infant daughter, which is duly recorded. The daughter marries, and after the father's death the creditor files a bill against the daughter and her husband, impeaching the deed as fraudulent, and seeking to subject the property to the payment of his demand. Held: Whatever might have been the character of the conveyance in its origin, it was rendered good and available against creditors upon the marriage of the daughter, who thereupon was to be considered a purchaser by relation for valuable consideration.

The reference to 1 Rob., 123, is an error.

In the case of *The Bank of Alexandria vs. Patton et als.*, 1 Rob., 499 (2d edition, 528). In March, 1807, a voluntary conveyance was made, settling real and personal estate for the benefit of a wife and children. It was attested by highly respectable

and intelligent witnesses, and immediately placed upon record. Eighteen years afterwards a bill was filed to impeach this conveyance, by a creditor whose debt originated some years after the conveyance was made, and who, it appeared, had notice of the conveyance when not more than a fourth of the debt had been contracted. The bill alleged that at the time of the conveyance the grantor was very much involved, and largely indebted to many persons. But in the opinion of the court it was proved that he was then, and for several years afterwards, able to meet all his engagements; the owner of property to a considerable amount; in good credit and extensive business; having the command of large sums of money, and not indebted, except to a single individual, the debt to whom was not large, considering the grantor's estate. Held (in accordance with the principles laid down by Baldwin, J., in *Hutchinson et als. vs. Kelly*, 1 Rob., 132): That the bill of the creditor in this case cannot be sustained.

In the case of *Hunters vs. Waite*, 3 Grat., 26, decided April, 1846. The principles applicable to a voluntary conveyance, in a controversy between creditors of the grantors and claimants under the deed, were so thoroughly discussed as to make the case rather a text than a decision, and while good authority is to be found therein, it is so mixed with *obiter dicta* as to be very uncertain.

In the case of *Johnston et als. vs. Gill et als.*, 27 Grat., 587, it was held, p. 592: The stay law of March 3, 1866, suspended the statute of limitations as to suits to set aside fraudulent conveyances.

In the case of *Clay et als. vs. Walter & Co.*, 79 Va., 92, decided May 1, 1884, it was held: Whatever the design of the grantor, a settlement on a woman in contemplation and in consideration of marriage, is valid, unless her knowledge of his intended fraud is clearly and satisfactorily proved, service by creditors of grantor of written notice on the grantee before the marriage, of his fraudulent design in making the settlement, cannot affect her constructively with notice of such design, but her actual knowledge of and participation in that fraudulent design, must be clearly established by proof.

In the case of *Young vs. Willis*, 82 Va., 291, decided July 15, 1886. A deed conveys land and horses and utensils on it to trustee in trust to secure *bona fide* creditors, some of whom are preferred, and reserving to grantor for three years the use and profits by paying interest annually on certain of the debts; sale to be made at the end of that period at the instance of a majority of the unpaid creditors. Held: Such deed is *per se* fraudulent on its face. In suit to impeach such deed as fraudulent, an order made by the court to take the horses and utensils

from the possession of the grantor and sell them, held to be erroneous.

In the case of *Witz, Biedler & Co. et als. vs. Osburn and Wife*, 83 Va., 227, decided April, 1887, it was held: In suit to annul such settlements as voluntary, husband and wife are incompetent to testify, no matter by which party introduced.

Voluntary deeds are void as to existing, but not as to subsequent creditors, unless actually fraudulent.

In the case of *Lewis vs. Mason's Administrators*, 84 Va., 731, decided February 19, 1885, it was held: Post-nuptial settlements are presumably voluntary. The burden of proving a valuable consideration rests on those claiming under them. Where the bill alleges them to be voluntary, the answer denying the allegation does not shift the burden. The defence must be proved.

In the case of *Robbins vs. Armstrong, Cator & Co.*, 84 Va., 810, decided April 26, 1888, it was held: Post-nuptial settlements are presumed to be voluntary. The burden of repelling this presumption rests on those claiming under them. If the bill charges them to be voluntary, and the answer denies the charge, such denial is not evidence for the respondent, and does not shift the burden of proof, but a valuable consideration moving from the wife must be proved.

In the case of *Rixey's Administrators vs. Deitrick*, 85 Va., 42, decided May 17, 1888. Personal property was bequeathed to a married woman and her children. The husband sold the property and used the proceeds. Afterwards he conveyed his lands in trust for his wife and children. Held: The property was bequeathed to the wife and children jointly. He became invested with her interest *jure mariti*, so that as to her his conveyance was voluntary; but as to the children, the conveyance was based on a valuable consideration, and must stand as a security to them.

It is well settled that a post-nuptial settlement is presumed to be voluntary and void; and to be upheld when assailed by creditors, must be supported by proof, independent of the answers of those claiming under the settlement.

In the case of *Saunders vs. Parrish*, 86 Va., 592, decided January 23, 1890, it was held: Fraud must be both charged and proved. It may be proved by circumstantial evidence, but the evidence must be such as to satisfy the chancellor that the conveyance was not made in good faith, before he can so declare.

In the case of *McCue's Trustees vs. Harris et als.*, 86 Va., 687, decided March 20, 1890, it was held: A marriage settlement cannot be avoided on the ground that it is voluntary only after five years from the date of its admission to record, no actual fraud being charged.

In the case of *DeFarges et als. vs. Ryland & Brooks*, 87 Va., 404, decided January 29, 1891, it was held: Every voluntary post-nuptial settlement is fraudulent and void as against creditors when settler is indebted; and every settlement will be taken as voluntary, unless those claiming under it can show that it was made for a valuable consideration, which cannot be shown, either by the answer or by the recitals in the deed, but must be established by legal evidence.

In the case of *Penn (Executor) vs. Penn*, 88 Va., 361, decided September 17, 1891, it was held: Though a trust deed originated in a fraudulent intent on the grantor's part, yet if the trustee and the *bona fide* creditors secured thereby had no notice of such intent, their claims so secured are valid against all other creditors of grantor.

In the case of *Oberdorfer vs. Meyer*, 88 Va., 384, decided November 5, 1891, it was held: The doctrine is now established that though owner is fraudulently induced to sell his goods, yet the sale passes the title, and that vendor, on discovering the fraud, may disavow the sale and reclaim the goods, provided they have not passed into the hands of a *bona fide* purchaser. Where goods fraudulently purchased are conveyed by vendee to secure his creditors, who, as well as the trustee, are unaware of the fraud, the trust deed will not be annulled at the suit of the vendors.

SECTION 2460.

In the case of *Wallace's Administrator et als. vs. Treacle et als.*, 27 Grat., 479, decided March, 1876, it was held: Creditors at large who file a bill to set aside the deed of their debtor conveying land as fraudulent, and succeed, have a lien on the land for their debts from the filing of their bill.

The deed of H. for land is set aside as fraudulent at the suit of some of his creditors, and there is a decree after the death of H. and their priorities. The report shows that there was one judgment against H. before the deed was made. Some of the plaintiffs in the bill were creditors by judgment, one a creditor at large, a number came in by petition before the decree, and a number came in before the commissioner, and by petition after the decree. In distributing the fund, it is to be applied first, to pay the judgment recovered before the deed was made. Second, to the judgments recovered before the deed was made. Third, to the creditors at large who joined in the bill. Fourth, to the creditors by petition before the death of Henderson, in the order in which their petitions were filed. Fifth, to all the other creditors *pro rata*.

Though in this case there was a decree for the sale before an account of the debts was taken, the sale of the land will not be set aside upon objection of some of the creditors who came in

after the decree made years after the sale, when it is obvious that the land would not sell for as much as it had sold for before, and which was more than some of these creditors had expressed their willingness to take for it.

SECTION 2461.

In the case of *Beasley vs. Owen*, 3 H. & M., 449, decided April 17, 1809, it was held: If the clerk of the court of appeals be directed by the court to set aside a judgment, and by misapprehension, the entry of the order be omitted, it may be done at a subsequent term, and the cause re-docketed.

Construction of the Statute of Frauds and Perjuries, as to Loans of Slaves.—W. H., by his will, dated in 1789, gave a slave, then in possession of his son-in-law, W. B., to his two grandsons, F. B. and E. B., sons of the said W. B., and at that time infants, as soon as they should come of lawful age; in 1792 he verbally lent the slave to his son-in-law, "for the purpose of assisting in the maintenance of his children," reserving the right to take him back whenever he should think proper; and in 1796, four years afterwards, died; in the same year his will was admitted to record, the surviving grandchild being still under age; in 1801, when the grandchild attained his full age, the slave was taken in execution, and publicly sold as the property of W. B. It was held that the recording of the will, in 1796, was a sufficient declaration, within the meaning of the statute of frauds, to protect the right of the grandchild, in opposition to the claims of the creditors of the father.

In the case of *Lacy et als. vs. Wilson*, 4 Munf., 313, decided March 29, 1814, it was held: A deed declaring a loan of a slave from a father to his daughter during her life, and a gift to her children after her death (being admitted to record on proof by one witness only), is not good against her husband's creditors or purchasers from him, without notice of such deed, possession of such slave having remained with the husband for five years without interruption.

A purchaser with notice, who bought of a purchaser without notice, will not be affected by the deed. *Quære*: Whether a purchaser from the husband, with notice of the deed, would not have been protected by the five years' possession in this case?

In the case of *Garth's Executor vs. Barksdale*, 5 Munf., 101, decided March 7, 1816, it was held: Five years' peaceable and uninterrupted possession of slaves under a loan not evidenced by deed duly recorded, vests a title in the loanee, which enures in favor of his creditors, and cannot be divested as to them by his returning the same to the lender after the said five years have expired.

In the case of *Boyd & Swepson vs. Steinback*, 5 Munf., 305,

decided January 17, 1817, it was held: A loan of slaves, though not declared by deed in writing, duly recorded, and therefore void as to creditors, the loanee having continued in possession five years without such demand as would bar their right, is nevertheless effectual between the parties and their representatives. If, therefore, the loanee die in possession of such slaves, they are not to be considered assets belonging to his estate, nor can they be recovered as such, being liable to his creditors, so far as their claims remain unsatisfied by the assets in the hands of his executors or administrators, but no farther. In such a case, if the assets be insufficient, a court of equity will give the creditors relief on a bill in their behalf against the lender and executor or administrator of the loanee, making the assets liable in the first place, so far as they extend, after which it will allow the lender a limited time to make good the deficiency, and in default thereof, direct a sale of the slaves.

In the case of *Pate vs. Baker, etc.*, 8 Leigh, 80, decided February, 1837. Case between the lender of a slave, and the creditors of the loanee, under the statute declaring, that where possession shall have remained with the loanee or those claiming under him for five years, without demand made and pursued by due process of law on the part of the lender, the loan shall be taken to be fraudulent as to the creditors of the loanee, unless it were declared by will or deed in writing proved and recorded.

After a loan to a person with whom, or with those claiming under him, possession has remained five years, a deed is made by the lender, declaring the original loan and continuing it, but this deed is never admitted to record. Held: The deed cannot affect the creditor of the person in possession, and ought not to be received as evidence against such creditor.

In the case of *Lightfoot vs. Strother*, 9 Leigh, 451, decided July, 1838, it was held: A loan of goods and chattels made by parol to a person with whom, or those claiming under him possession remains five years, without demand made and pursued by due process of law on the part of the tender, is taken to be fraudulent as to the creditors and purchasers of the person so remaining in possession. If the property shall have been sold before the possession shall have remained five years with the loanee, or those claiming under him, the loan is not, under the statute, taken to be fraudulent as to the purchaser; when possession has not at the time of the sale remained five years with the loanee and those claiming under him, the purchaser can have no benefit of the statute of frauds by reason of his own possession after the purchase. The circumstance that the possession by the loanee before the sale, and the possession of the purchaser after the sale, will together make five years cannot avail to give a title to the purchaser.

In the case of *Collins vs. Lofftus*, 10 Leigh, 5 (2d edition, 6), decided January, 1839, it was held: The evidence to sustain an illegal parol gift by a father to his daughter on her marriage should be clear and cogent.

According to the settled construction of the clause in the statute of frauds concerning loans, a resumption of possession by the lender, or recording a deed or will granting away the property to another within the five years, avoids the operation of the statute, and puts an end to the loan.

In the case of *Rose's Administrator vs. Burgess*, 10 Leigh, 186 (2d edition, 193), decided April, 1839. Certain persons having become the sureties of an executor in his executorial bond, a deed is made by him mortgaging slaves to them, upon condition that if he shall faithfully perform in all things his office of executor, then the deed shall be void; but the deed contains no clause providing that possession shall remain with him until default in the performance. The mortgagor, after the date of the mortgage, is in possession of the slaves for more than five years. Whereupon a creditor of his procures the slaves, to be taken under execution and sold; and then, in less than five years after they are so taken, an action of detinue is brought by the mortgagees against a purchaser at the sale under the execution. Held: First, the action is commenced in due time; and second, the fact of possession remaining with the mortgagor five years without demand made and pursued by process of law on the part of the mortgagees, does not make a case in which, under the statute of frauds, the property is taken to be with possession, and liable to the creditors of the person in possession.

An opinion being given by the circuit court that the action is barred by the act of limitation, the opinion is excepted to, and the bill of exceptions setting forth the evidence contains, among other things, a deed which, it is alleged in the court of appeals, shows the action to have been brought by improper parties. Held: This point, not having been made in the court below, cannot be passed upon by the appellate court.

In the case of *London vs. Turner*, 11 Leigh, 403, decided November, 1840, it was held; Although when personal property is given to one upon a trust by parol for another, the declaration of trust by parol may be valid as between the donee and the *cestui que* trust, yet as between the *cestui que* trust and the creditors of the donee the case is essentially different.

When any reservation or limitation is pretended to have been made of a use or property by way of condition, reversion, remainder or otherwise, in goods and chattels, the possession whereof shall have remained with another for five years, the same as to the creditors and purchasers of the person so re-

maining in possession, is, under the act to prevent frauds and perjuries, taken to be fraudulent, and the absolute property to be with the possession, unless such reservation or limitation were declared by will or by deed in writing, proved and recorded.

A father, upon the marriage of his daughter, makes her a gift of slaves, and the possession thereof remains in the daughter's husband five years. While the husband is in possession, the father makes his will confirming the gift, and declaring that the same is "to her in trust for the sale and only purpose of her immediate use and comfort in life, and after her decease the title and fee-simple interest to be vested forever in the children or issue lawfully begotten of her body, free from the claim, control or direction of any other person whatsoever." Although this will is made and recorded within five years from the time of the gift, yet held: That the slaves are liable to be taken in execution by the creditors of the husband.

In the case of *Dickinson vs. Dickinson's Administrator et als.*, 2 Grat., 493, decided January, 1846, it was held: A father sends a slave to a son upon a loan; but the agent who takes the slave to the son neglects to inform him that the slave is a loan. The neglect of the agent does not affect the right of the father to have the slave considered as a loan. The father having died within five years of the time when the slave so went into the possession of the son, and having by his will disposed of the slave, of which the administrator of the son had notice, the slave may be recovered for the father's estate after five years from the loan.

In the case of *Taylor vs. Beale et als.*, 4 Grat., 93, decided July, 1847. T. makes a parol loan of a slave to C., and the slave remains in the possession of C. and of C.'s executors for more than five years, and then T. takes possession of him. Held: The slave may be subjected by the creditors of C. to satisfy their claims. The executors of C. having brought an action of detinue for the slave against T., who dies pending the suit, which is revived against his executor, and a verdict and judgment having been given in favor of the defendant, the creditors of C., who have recovered judgment against his executors, cannot levy their executions upon the slave.

In the case of *McKenzie et als. vs. Macon*, 5 Grat., 379, decided January, 1849, it was held: Slaves remaining in the possession of one person on hire for more than five years, are not subject to be taken into execution for his debts.

The act 1 Rev. Code, Chapter 101, Section 2, page 372, does not apply to the case of property remaining in possession of a debtor for more than five years on hire.

In the case of *Beale vs. Diggs et als.*, 6 Grat., 582, decided January, 1850, it was held: A debtor remaining in possession

of slaves for five years under a parol loan, they are liable to satisfy his creditors, though the possession is resumed by the lender before executions are levied upon them.

In the case of *Scott (Trustee) vs. Jones, etc.*, 76 Va., 233—

1. Loan of Chattels.—If not in writing, duly recorded, loans of chattels, under Code of 1873, Chapter 114, Section 3, void as to creditors of loanee, but valid as between the parties, however long loanee may keep possession.

2. Idem.—The operation of the statute will be avoided by the lender's resuming possession or granting the chattels to another by writing, duly recorded, within five years.

3. Idem.—If no writing declaring such loan be recorded, or no demand be made by the lender and pursued by course of law for more than five years after possession commenced, the loan is void as to the loanee's creditors, whose rights cannot be affected by lender's subsequent resumption of possession; but the creditors meant are those whose debts were contracted before the resumption of possession or the conveyance of the chattels by the lender, they having given credit to loanee on the apparent ownership of the property.

SECTION 2462.

In the case of *McComb vs. Donald's Administrators*, 82 Va., 903, decided September 23, 1886, it was held: Where vendor agrees to sell to vendee personal property for a price agreed to be paid at a future time, and delivers possession, but expressly reserves the title until payment, it is a conditional sale, and though by parol, or by an unrecorded instrument, it is valid as against vendee's creditors or subsequent purchasers with or without notice. Hence the statute.

In the case of *Hash vs. Lore, Devault & McKarney*, 88 Va., 716, decided January 28, 1892, it was held: Where vendor of goods, by unrecorded bill of sale, delivers possession, but retains the title until price is paid, such sale is void as to creditors and purchasers without notice from such vendee.

Where vendor of goods, by unrecorded bill of sale, delivers possession, but retains title to and control over them, and requires proceeds of sales paid to him daily on the price, and fails to keep up the stock according to contract, whilst the vendees faithfully perform their part, and at length he sues out an attachment and seizes upon the goods for an alleged balance, he has no claim to priority over other creditors of the vendees, and no claim against them, as he has violated and they have kept their contract.

SECTION 2463.

In the case of *McClure vs. Thistle's Executors*, 2 Grat., 182, decided July, 1845, it was held: A deed executed before judg-

ments have been obtained against the grantor, under which the purchaser has been put in possession and paid the purchase-money, but which was not recorded until after the judgments were obtained, is void as against such creditors, and the land conveyed thereby is subject to satisfy the judgments. The land is equally subject in such case to satisfy a creditor who has issued a *ca. sa.* upon his judgment, upon the service of which the grantor in the deed has been discharged as an insolvent debtor.

In the case of *Withers vs. Carter et als.*, 4 Grat., 407, decided January, 1848, it was held: Although the statute avoids an unrecorded deed as against creditors of the grantor, it does not affect a pre-existing equitable estate of the grantee acquired by purchase from the grantor.

In the case of *Floyd (Trustee) vs. Harding et als.*, 28 Grat., 401, decided March, 1877. In 1856 L. sells land to T. by parol contract, receives all the purchase-money, and puts T. into possession. In January, 1867, L. executes a deed to T., by which he releases all the land to T., and warrants the title. T. then sells the land to W., and W. conveys to F. In March, 1866, B. recovers a judgment against L., which is docketed within the year. In a suit against F. to subject the land to satisfy the judgment against L., held: That the registry acts do not apply to a parol contract for land, and T., having paid all the purchase-money, and having been put into possession so that he had a valuable equitable title to the land, it is not subject to the lien of the judgment against L. The valid equitable title of T. is not so merged in the legal title acquired by the deed of L. to him, as to subject the land to the lien of the judgment against L.

In the case of *Young et als. vs. Devries et als.*, 31 Grat., 304, decided January, 1879, it was held: Land sold and purchased under a written contract, which has not been recorded, though the purchasers have paid all the purchase-money, and have been for years in possession under their contract before a judgment has been recorded against their vendor, is liable to satisfy the judgment.

Land sold and purchased under a parol contract, the purchaser having paid the purchase-money, and having been put into possession, and holding possession under the contract before a judgment has been recovered against their vendor, is not liable to satisfy the judgment.

In the case of *Powells et als. vs. Bell's Administrator et als.*, 81 Va., 222, decided December 10, 1885. In 1885 H. bought of K. a lot of land for \$433.33, and paid one-third cash, but took neither deed nor other writing nor possession. Some time prior to July 14, 1856, T., as trustee of B., verbally purchased

the lot of H. for the same price, and paid him what he had paid, and assumed the remaining two-thirds due to K., and by writing, under seal of that date, B. directed her trustee to obtain a conveyance of said lot from K., reserving vendor's lien for the two-thirds still due on the purchase-money, and to employ her trust fund in building a house upon it. This T. did, after having first gotten a written order from H. directing K. to convey the lot as aforesaid. The deed is dated August 1, 1856, but it was not recorded until 1859. Afterwards, in May, 1857, S. got a judgment against H., and sued to subject the lot to the judgment. Held :

1. T.'s purchase of the lot from H. having been by parol, came not within the registry acts.

2. T. having paid H. for his entire interest in the lot, and gotten possession of it before S.'s judgment was obtained, had a valid, equitable title to the lot, and the lot is not subject to the lien of the judgment of S. and H.

3. The valid, equitable title of T. in the lot was not so merged in the legal title acquired by the subsequent deed of K. to him as to subject the lot to the lien of said judgment.

4. H. had bought the lot verbally, and had sold it verbally, and been paid back his money, and his vendor had acquired possession of the lot before the rendition of the judgment against H., so H. had, when the judgment was obtained, no interest in the lot whereof the judgment lien creditor could avail.

SECTION 2465.

In the case of *Edison vs. Huff et als.*, 29 Grat., 338, decided November, 1877. At the February term, 1857, of the court, a judgment was recovered against S., and H., as his surety, on a forthcoming bond, and it was docketed on the 1st of April, 1857. An execution was issued on this judgment, and it was paid by H. On the 8th of October, 1856, S., by written agreement, under seal, sold to E. a house and lot, and delivered possession, and on the 18th of the same month S. conveyed the same to E. This deed was acknowledged on the same day, H. being one of the justices who took the acknowledgment, but it was not presented in the clerk's office for record until March 9, 1857. Upon a bill by H. against E. and S. to be substituted to the lien of the judgment against S., held : H. is entitled to be substituted to the lien of the judgment. The judgment having been docketed within twelve months from the date of its being rendered, and the deed not having been docketed within sixty days from its acknowledgment, the judgment is a lien upon the house and lot as against the deed. The agreement not having been docketed, it is void as to the creditor, and as to H., claiming under him, though H. had notice of the deed, and E. had possession

of the house and lot. Notice of a deed or written agreement for the sale of land does not affect a creditor of the grantor.

In the case of *March, Price & Co. vs. Chambers et als.*, 30 Grat., 299, decided March, 1878. In January, 1866, C., by an agreement in writing, sold to W. a lot in Danville, and in the same month conveyed it to him. The agreement was never recorded, and the deed was not recorded until September 18, 1873. W., having paid all the purchase-money to C., conveyed the lot to R. to secure to him a debt of four thousand dollars. This deed was recorded on the 24th of August, 1866. In April, 1868, W. was declared a bankrupt, giving in the lot as a part of his estate. In May, 1868, the register in bankruptcy conveyed to the assignee in bankruptcy, and in September, 1868, on the joint application of the assignee and R., as a lien creditor of the bankrupt, the court in bankruptcy ordered a sale of the lot, and the sale was made to R. On the 18th of November the sale was confirmed, and the assignee directed to convey the lot to R., which was done on the same day, and R. took possession. In July, 1872, M. recovered a judgment against C. in the Corporation Court of Danville, which was docketed on the 11th of March, 1873. Held: Though M. had notice of the sale by C. to W., the lot is liable to satisfy this judgment, notwithstanding all the subsequent conveyances and proceedings in relation to said lot.

In the case of *Young et als. vs. Devries et als.*, 31 Grat., 304, decided January 23, 1879, it was held: Land sold and purchased under a written contract which has not been recorded, though the purchasers have paid all the purchase-money, and have been for years in possession under their contract before a judgment is rendered against their vendor, is not liable to satisfy the judgment.

Land sold and purchased under a parol contract, the purchasers having paid the purchase-money, and having been put in possession, and holding the possession under the contract before a judgment has been recorded against their vendor, is not liable to satisfy the judgment.

In the case of *Bird vs. Wilkinson*, 4 Leigh, 266, decided February, 1833. L. executes a bill of sale of a slave to B., which bill of sale, though absolute on its face, was, in fact, intended as a mortgage; the bill of sale, though intended as a mortgage, was never recorded, and possession of the slave was never delivered to or acquired by the vendee, and could not be at the time the deed was executed, the slave being then a runaway; but the vendor afterwards got possession of him, without the knowledge or consent of the vendee, and then sold him to C., a fair purchaser, for valuable consideration, without notice of the previous bill of sale to B. Held: That the bill of sale from L. to B. must be taken for what it was intended to be,

a mortgage, which was void as against the subsequent fair purchaser, because it was not recorded according to the statute of conveyances.

In the case of *Lane vs. Mason*, 5 Leigh, 520, decided December, 1834. A mortgage of slaves is recorded in the county of A., the slaves being at the time of the execution and recording of the deed in the county of B.; and after the recording of the deed in A., the slaves are removed to A., but the deed is not recorded anew there after such removal; and then the mortgagor mortgages the same slaves to another person, and this mortgage is recorded in A., where the slaves are at the time of the execution and recording thereof. Held: The first mortgage was not duly recorded, and so is void as against the second mortgage.

In the case of *Clark vs. Ward et als.*, 12 Grat., 440, decided May 22, 1855, it was held: A deed is made conveying personal property to trustees for the purpose of paying debts specified therein, and the trustees take possession of the property, and proceed to sell it for the purposes of the trust. Though the deed was not duly recorded, yet the property having been delivered to the trustees, this was a valid transfer thereof, and protects the property against the demands of creditors who had not acquired liens upon it before said transfer was consummated.

In the case of *Kirkland, Chase & Co. vs. Brune et als.*, 31 Grat., 126, decided November 28, 1878, it was held: The words "goods and chattels" in the registry acts, do not include a mere chose in action as a debt or claim on another for money due; and the assignment of such debt or claim for value, though not recorded, will be good against a subsequent attachment upon such debt or claim. The words "goods or chattels" refer to and only include personal property which is visible, tangible, or movable.

In the case of *Gregg vs. Sloan et als.*, 76 Va., 497 and 500:

Trust Deeds, Attachments, Priorities.—Debtors in North Carolina grant all their property, including choses in action, due from their debtors in Virginia, and secured on land here. After recordation of deed in North Carolina, but before its recordation in Virginia, a creditor of grantors living in Virginia attached the choses and the land securing them. In contest for priority, held: The deed, though unrecorded in Virginia, being prior to the attachment, prevails over it.

In the case of *Gordon (Assignee) vs. Rixey (Assignee) et als.*, 76 Va., 694, decided October 4, 1882, it was held, page 703: Reserving lien for purchase-money creates no property in the land. It passes as personalty. Assigning the debt carries the lien. It binds the land for the purchase-money, excluding other claims.

In the case of *Dailey's Executors vs. Warren et als.*, 80 Va., 512, decided June 11, 1885, it was held: Assignments of choses in action need not in Virginia be recorded. The case here is one of competitive assignments.

Where subsequent assignee claims that he took his assignment for value, without notice of the previous assignment, and that the previous assignment was fraudulent, the burden is, of course, on him to prove the case.

In the case of *Cammack vs. Soran et als.*, 30 Grat., 292, decided April 25, 1878, it was held: The consideration for the sale and conveyance of land is a debt due at the time by the vendor to the purchaser. The purchaser is a purchaser for valuable consideration, within the meaning of the recording acts. And such a purchaser having purchased and received a conveyance of lands, without notice of an attachment which had been previously levied upon it, but which had not been docketed, is entitled to hold the land free from the lien of attachment.

In the case of *Preston's Administrators vs. Nash*, 75 Va., 949, decided 1881. In April, 1850, W. N. executed a deed of trust, conveying real estate to secure a debt to J. M. P., but the deed was not recorded until 1858. In the meantime—viz., in March, 1851—W. N. sold the same property to S. H. N., who took and held possession continuously and notoriously under his contract from the date of his purchase, and paid the purchase-money in full at the date of his contract, but received no conveyance, and had no notice of the existence of the trust deed until March, 1861, when the property was advertised for sale by the trustee. Held: The claim of the purchaser was entitled to priority over that of the creditor.

Under Chapter 114, Section 5, of the Code of 1873, it is not necessary that a purchaser for value, claiming against an unrecorded deed of trust, should have taken a conveyance of the legal title. It is sufficient if he has the best right to call for it. A complete purchaser is one who has paid the purchase-money, and who, though he has not received a conveyance of the legal title, is entitled to call for it.

In the case of *Preston's Administrators vs. Nash*, 76 Va., 1. In April, 1850, W. N. conveyed real estate to secure a debt to P., but the deed was not recorded until 1858. In March, 1851, W. N. sold the same estate to S. H. N., who took and held possession continuously and notoriously under his contract from the date of his purchase, and paid the price, but received no conveyance, and had no notice of the trust deed until March, 1861, when the trustee advertised the sale thereof. S. H. N. enjoined the sale. The court below decreed that the contract of purchase had priority over the deed of trust, and perpetuated the injunction. On appeal, held (by the whole court): The

purchaser hath priority over the creditor, under the circumstances of this case, and the decree should be affirmed.

Under the Code of 1873, Chapter 114, Section 5, it is not necessary that a purchaser for value, claiming against an unrecorded deed of trust, should have taken a conveyance of the legal title. It is sufficient if he has the best right to call for it. *Doswell vs. Buchanan's Executors*, 3 Leigh, 366, criticised.

The reference to 75 Va., 404, is an error, as the case is not in point.

In the case of *Beverley vs. Ellis & Allan et als.*, 1 Rand., 102, decided March, 1822, it was held: Where a deed is duly proved or acknowledged and ordered to be recorded, and left with the clerk for that purpose, it shall be considered as recorded from that time, although it may never, in fact, be recorded, but is lost by the negligence of the clerk or other accident. Therefore a deed, under such circumstances, will be preferred to a subsequent deed which has been duly recorded, even though the party to such subsequent deed may not have had notice of the prior deed.

In the case of *McCandlish vs. Keen et als.*, 13 Grat., 615, decided February 3, 1857. C., in 1849, gives a deed of trust upon land to secure a *bona fide* debt, which is duly acknowledged and certified for record, but it is not recorded until after his death. He makes his will in December, 1849, by which he charges his whole estate with the payment of his debts; and he dies in 1851, indebted more than his whole estate will pay, but there were no judgment-creditors at his death. Held: The deed of trust, though not recorded, is valid against the creditors of C.

In the case of *Davis et als. vs. Beazley et als.*, 75 Va., 491, decided April 28, 1881, it was held: A trustee and the creditor secured by a deed are purchasers for valuable consideration within the meaning of the statute, and their title is not affected by a prior deed of the grantor, unless they had notice at the date of their purchase; and a prior deed not legally admitted to record cannot give them constructive notice.

In the case of *Dobyn's Administrators vs. Waring*, 82 Va., 159, decided June 30, 1886, it was held: Unrecorded contracts for the sale of real estate are void as to creditors with or without notice.

In the case of *Slater et als. vs. Moore et als.*, 86 Va., 26, decided April 11, 1889, it was held: A deed is void as against creditors "until and except from the time it is duly admitted to record." And it is only deeds recorded within sixty days from their date of acknowledgment that, upon recordation, relate back and are valid as of the date of acknowledgment.

SECTION 2466.

In the case of *Pollard's Heirs vs. Lively*, 2 Grat., 216, decided July, 1845, it was held: The clerk of a county or corporation court has no authority to admit to record a deed which does not convey land lying in his county or corporation. And a copy of such a deed, authenticated by the clerk, is not competent evidence in place of the original.

In the case of *Horsley vs. Garth & Colquit*, 2 Grat., 471, decided January, 1846, it was held: Where a deed conveys several tracts of land lying separately in different counties, the recordation thereof in only one of the counties is not effectual in regard to the tract or tracts lying in the other counties, within the true intent and meaning of the statute regulating conveyances.

Where a navigable stream is the dividing line between two counties, and so separates lands conveyed by deed as to throw part thereof into the county on one side of said stream and part thereof into the county on the opposite side of the same, the parts so separated must be as distinct tracts lying in different counties, within the true intent and meaning of the statute of conveyances.

A variance between the date as it appears in the deed certified by the justices, and in their certificate, does not avoid the registry of the deed, if the identity of the deed certified and the deed recorded is satisfactorily ascertained by other parts of the certificate, and the annexation thereof to the deed.

The endorsement of the clerk on the deed of the day when it was left with him to be recorded, and his return to the court of deeds left with him to be recorded, is not conclusive as to the day when the deed was so left; but the true day may be shown by parol testimony.

The carrying a deed to the clerk's office to be recorded is not enough to make it good as a recorded deed from that day. It must be left with the clerk to be recorded.

SECTION 2467.

In the case of *Wayles's Executors vs. Randolph*, 2 Call, 125 (2d edition, 103), decided November 9, 1799, it was held: A deed re-acknowledged within eight months from its date, and recorded within four months from the re-acknowledgment, is good from the date of the re-acknowledgment, although there are more than eight months between the time when the deed was first executed and the day of recording it.

Although the deed does not mention that it was made in consideration of a marriage contract, the party may aver and prove it.

In the case of *Colquhoun vs. Atkinson*, 6 Munf., 550, decided

March 23, 1820, it was held: In general, a deed is to be taken as having been executed on the day of its date, unless it appears to have been on some other day. The testimony of the person who executed the deed was received as fixing the time when it was executed, notwithstanding the testimony of two witnesses to his acknowledgment to the contrary when not on oath, he being entirely disinterested between the parties, and the falsehood of his evidence being not probable under the circumstances of the case.

In the case of *Harvey (Surviving Partner, etc.)*, vs. *Alexander, etc.*, 1 Rand., 219, decided December, 1822, it was held, p. 241: A wife parting with her dower right in real property forms a sufficient consideration for a subsequent deed conveying other property for her benefit. Although personal property acquired by marriage cannot be considered a valuable consideration to support a subsequent deed for the benefit of the wife, yet it is a meritorious consideration, and the deed will be supported or set aside, according to circumstances.

A deed not lodged to be recorded until eight months after its date, and not proved by the witnesses on whose testimony it was recorded to have been sealed and delivered within eight months before it was recorded, is not good as a recorded deed.

In the case of *Roanes vs. Archer*, 4 Leigh, 550, decided May, 1833. A deed, dated in April, 1804, and the execution thereof attested by witnesses, is not recorded within eight months from its date; but in April, 1805, the grantor acknowledges the deed in open court, and upon such acknowledgment it is ordered to be recorded. Held: Upon the construction of the statute of conveyances of 1792, 1 old Rev. Code, Chapter 90, Sections 1-4, such acknowledgment of the deed in court is to be taken as a re-delivery and re-execution of the deed, so as to make it a deed as of the date of such acknowledgment, and so the deed is well recorded within eight months from the time of the execution, and is valid as against the grantor's creditors.

In the case of *Hannan et als. vs. Obendorfer et als.*, 33 Grat., 497, decided September 23, 1880, it was held, page 502: Affirms the case of *Harvey et als. vs. Alexander et als.*, 1 Rand., 219, cited *supra*.

SECTION 2468.

In the case of *Hughes vs. Pledge et als.*, 1 Leigh, 443, decided October, 1829, it was held: Deed of marriage settlement of slaves then in Hanover, where the deed was made and duly recorded; husband, entitled to and holding possession under settlement, removes with the slaves to Richmond, and there mortgages them for a debt of his own, contrary to the terms of the settlement, within twelve months after his removal of them. The trustees of the subject under the settlement fails to have it

recorded in Richmond within twelve months after the removal of the slaves, but within the twelve months he files a bill in chancery against the husband and the mortgagee, asserting his legal title to the slaves and the trusts of the settlement. Held : The mortgagee is a purchaser, with notice of settlement within twelve months after the removal of the slaves to Richmond, and, as to him, the failure of the trustee in the deed of marriage settlement to have it recorded in Richmond, does not make the settlement void.

See *Lane vs. Mason*, 5 Leigh, 520, cited *supra*, Section 2465.

In the case of *Bryan vs. Cole, etc.*, 10 Leigh, 497 (2d edition, 519), decided November, 1839. A deed of trust conveying personal chattels is recorded in the court of the county in which the property is at the time of making the deed. Afterwards the grantor, who has the property in possession, is permitted to remove with the same out of that county, and there is a failure, for more than twelve months after such removal, to cause the deed to be delivered to the clerk of the court of the county into which the grantor has so removed, whereupon an action is brought upon the grantor by one of his creditors. The deed is then delivered to the clerk of the court of the county into which the grantor has removed, and is there recorded before an execution against the grantor's chattels is delivered to the sheriff, and, indeed, before the grantor's creditors obtain judgment. Held : The deed is valid as against the creditor.

In the case of *Crouch et als. vs. Dabney*, 2 Grat., 415, decided January, 1846, it was held : A deed of trust conveying slaves is duly recorded in the county in which the slaves are at the time. Afterwards a third person takes one of the slaves to another county and sells him, and he remains with the purchaser for more than twelve months without the deed being recorded in the county where he is. In an action by the trustee in the deed against the purchaser to recover the slave, it is not to be presumed that the slave was removed with the assent of the trustee, but that fact must be proved by the purchaser. In such a case, the slave being removed without the assent of the trustee, the deed is not void as to purchasers, though not recorded within twelve months in the county to which the slave is removed.

In the case of *Lucado et als. vs. Tutwiler's Administratrix et als.*, 28 Grat., 39, decided January, 1877. A canal boat, which plied between Richmond and a point in Fluvanna county, was owned by one Tutwiler, who resided in said county. He sold the boat to Cox, who lived in Richmond, and took a mortgage thereon to secure the purchase-money, which mortgage he forthwith recorded in Fluvanna county, and within twelve months thereafter in the city of Richmond. Between the dates of the recordation of the mortgage in the two places, judgment-cre-

ditors of Cox issued *feri facias*, under which the boat was seized at Richmond. Upon a bill filed by Tutwiler's administratrix to assert (alleged) prior lien, held: That the mortgage in favor of her intestate was properly recorded, and she therefore had priority.

In the case of *Kirkland, Chase & Co. vs. Brune et als.*, 31 Grat., 126, decided November 28, 1878, it was held: The words "goods and chattels" in the registry acts, do not include a mere chose in action as a debt or claim on another for money due, and the assignment of such debt or claim for value, though not recorded, will be good against a subsequent attachment upon such debt or claim. The words "goods or chattels" refer to and include only personal property which is visible, tangible or movable.

SECTION 2469.

In the case of *Naylor vs. Throckmorton et als.*, 7 Leigh, 98, decided January, 1836. Three several mortgages of the same subject, to secure several debts due to the several mortgagees, are executed on the same day, one after the other in quick succession; they are all proved and delivered to the clerk to be recorded, also on the same day, but in the same order in which they were executed; there being no design, and no express agreement either that any one of the mortgagees should have priority over the others, or that they should all stand on equal footing. Held: Upon the construction of the statute, 1 Rev. Code, Chapter 99, Section 12, that the mortgagee, whose mortgage was first executed, is entitled to priority of satisfaction over the other mortgagees.

SECTION 2470.

In the case of *Blackford vs. Hurst*, 26 Grat., 203, decided April 22, 1875, it was held: By the statute, deeds of trust, etc., are to be recorded in the clerk's office of the county or corporation court within the jurisdiction of which the real estate conveyed is situated.

(By the charter of the city of Lynchburg, jurisdiction is given to the Court of Hustings for said city, not only within the limits of the corporation, but also for the space of one mile without and around said city. A deed of trust conveying real estate lying outside the corporation limits, but within one mile without and around said city, is to be recorded in the clerk's office of the corporation court of the city; and being so recorded, it is valid, and has priority over subsequent judgments against the grantor, in the deed docketed in the clerk's office of the county court.)

In the case of *Burgess vs. Belvin*, 32 Grat., 633, decided January 15, 1880, it was held: The clerk's office of the Chancery

Court of the city of Richmond is the proper place for the recordation of deeds conveying land lying within one mile of the city of Richmond on the north side of James River, though outside the city limits.

In the case of *Campbell & Co. vs. Nonpareil F., B. & K. Co. et als.*, 75 Va., 291, decided February 7, 1881. On the 29th of July, 1869, the Nonpareil F., B. & K. Company executed a deed of trust for the benefit of its creditors, conveying real estate located in Henrico county, within a mile of the corporate limits of the city of Richmond. The deed was admitted to record in the clerk's office of the county of Henrico on the 7th of August, 1869, and in the clerk's office of the Chancery Court of Richmond on the 30th of November, 1876. On the 3d of April, 1876, C. & O. recovered judgment against the grantor, which was duly docketed. On the 30th of June, 1875, the trustee sold and conveyed a portion of the trust property to a purchaser, whose deed was recorded in Henrico county on the 6th of November, 1875, and in the Chancery Court of Richmond on the 30th November, 1876. In a suit brought to enforce the judgment lien, held: 1. The deed of trust not having been legally recorded prior to the rendition of the judgment, is absolutely void as to the judgment creditors, notwithstanding the trust had been executed by a sale and conveyance of the property; for in this respect the statutes of registration make no distinction between executed and unexecuted trusts, but are designed to give notice of the state of the title as affected by successive alienations, as well as by encumbrances.

The act of January 26, 1877, is wholly prospective in its operation, and does not validate a recordation invalid under previous laws, where rights have accrued under those laws; although the words of a statute are broad enough in their literal intent to comprehend existing cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein.

SECTION 2472.

In the case of *Anderson vs. Anderson*, 2 Call, 198 (2d edition, 163), decided November 11, 1799, it was held: Marriage settlement must be recorded within eight months, or it will be void against prior creditors.

In the case of *Land, etc., vs. Jeffries, etc.*, 5 Rand., 211, decided June, 1827, it was held: Where the grantor of personal property remains in possession after an absolute conveyance, such conveyance will be deemed *prima facie* fraudulent. But such possession is not conclusive evidence of fraud, but open to explanation. Therefore, where a woman about to be married makes a conveyance of her personal property to a third person, with the privity and approbation of her intended husband, the

marriage takes place a few minutes after the conveyance, and the husband takes possession of the property after the marriage, the property thus conveyed will not be subject to the husband's creditors, as his possession after the marriage was not that of the wife (she not being *sui juris*), and her short possession between the time of conveyance and that of the marriage not being sufficient, or of a nature to render the deed fraudulent. Such a conveyance, although not recorded, is not void under the statute of frauds (even supposing it to be a deed of trust) against the creditors of the husband as the statute applies to the creditors of the grantor.

In the case of *Thomas vs. Gaines*, 1 Grat., 347, decided February, 1845, it was held: A deed of marriage settlement made before the marriage, conveying the property of the wife, and in which the intended husband joined, is fraudulent and void as to subsequent purchasers from the husband, without notice, unless duly recorded.

In the case of *McCundlish vs. Keen*, 13 Grat., 615, decided February 3, 1857, it was held: The act in relation to the creditors and purchasers who shall be protected against unrecorded deeds, does not include creditors claiming under a devise for the payment of debt, or under the statute subjecting real estate to their payment. But the creditor who may avoid such a deed must have some lien, by judgment or otherwise, which entitles him to charge the subject conveyed specifically.

The reference to report of the revisors of the Code of 1849 throws no light on this section, as all the cases there cited are given here, and only serve to show the prevailing confusion which made this legislative enactment necessary.

In the case of *Doswell vs. Buchanan's Executors*, 3 Leigh, 365, decided December, 1831. H. having only an equitable sale in land, conveys the land by deed of bargain and sale, without any warranty, to M. & F., in trust to secure a debt to B., and this deed of trust is duly recorded; afterwards, H. acquires the legal title, and then he sells the land to D., and conveys it to him with warranty. Held: That as the deed of trust by H. to M. & F. to secure the debt to B. was executed when H. had not the legal title, and as that deed contained no clause of warranty, the legal estate subsequently acquired by H. did not enure to the trustees, M. & F., to secure the debt to B., so that B. had only a lien on the equitable estate. That the recording of the deed, mortgaging H.'s equitable estate to secure the debt to B., was not constructive notice of that deed to D., the subsequent purchaser from H.; for the statute requiring deeds to be recorded makes them void as to subsequent purchasers without notice, if not recorded, but gives them no additional validity if recorded.

To sustain a plea of purchaser without notice, the party must be a complete purchaser before notice; that is, must have obtained a conveyance and paid the whole purchase-money.

In the case of *Preston's Administrator vs. Nash*, 76 Va., 1 (absent, Moncure, P.). A complete purchaser is one who has paid the purchase-money, and who, though he has not received a conveyance of the legal title, is entitled to call for it. Held (by Staples and Burks, J.'s): The trust creditor, P., is equitably estopped by his conduct from setting up the lien of the trust deed against S. H. N.; and whilst they reached the same results as were reached by Christian and Anderson, J.'s, they did so by a different process of reasoning.

In the case of *Lamar (Executor) vs. Hale et als.*, 79 Va., 147, decided July 17, 1884, it was held: To maintain the defence of purchasers without notice, alienees must aver and prove (1), that they are purchasers for valuable consideration; (2), that the consideration has been actually paid; (3), that they have received, or are best entitled to receive, conveyance of the property; and (4), that those essentials all occurred prior to their having notice of the adverse claim. The burden of establishing the first three essentials rests on the alienees, and to affect them with notice of his adverse claim rests on claimant.

SECTION 2473.

For 3 Leigh, 365, see *supra*, Section 2472.

CHAPTER CX.

SECTION 2474.

In the case of *McCandlish vs. Keen*, 13 Grat., 615, decided February 3, 1857. A. conveys real and personal property on a consideration of a sum of money and of an annuity for the life of the grantor, if she survives the grantee, from the death of the grantee; and in the deed the grantee covenants that his estate shall pay to the grantor, if she survives him, the annuity. Held: This does not create a charge upon the property conveyed, so as to entitle the grantor to subject the same to the payment of the annuity after the death of the grantee in preference to the other creditors of the grantee. The conveyance is in consideration of the covenant of the grantee that his estate shall pay the annuity, and the vendor's lien does not attach upon the property.

In the case of *Patton vs. Hoge*, 22 Grat., 443, decided July 15, 1872, it was held: W., Z. and Y. are partners and joint tenants of real estate. W. and Z. sell their two-thirds interest in the real estate to Y., W. receiving four hundred dollars in cash for his interest, and Y. executing to Z. three notes, payable at

different dates, amounting to seven hundred dollars, for his interest. The deed from W. and Z. to Y., which conveys the two undivided thirds of the property, reserves a lien, as follows: "And the said Z. hereby retains a lien on the property hereby conveyed as security for the payment of the above recited notes received in payment of his interest." The said W. has been paid in full for his interest. The lien is reserved on the two-thirds of the real estate conveyed in the deed.

In the case of *Coles vs. Withers*, 33 Grat., 186, decided April, 1880. In 1852 C. sold to M. a tract of land for \$3,564, for which she took his bond, and reserved a lien on the face of the deed given to M., which was duly recorded. Between the sale, in 1852, and December, 1855, there were other transactions between C. and M., by which the latter became indebted to the former (inclusive of the purchase-money for the land) \$10,630.50, and for which he executed his bond, with two personal sureties, and the bond for \$3,564 was surrendered. M. died in 1856, leaving his whole property to his wife, L., who was a sister of C. L., the widow, soon married W., and in 1863, W. and his wife conveyed the land purchased of C., with other lands, to H., made him a deed, and put him into possession. On the 19th of October, 1866, the balance due on the \$10,630.50 bond was \$4,123, for which W., who was then the representative, and had married the widow of M., gave his bond, got possession of the \$10,630.50 bond, and confessed a judgment for the \$4,123 in favor of C., which he, W., alleges was in lieu of the bond which he got possession of. W. soon went into bankruptcy, and but a small portion of the judgment was paid. C. denies the statement of W. about his possession of the bond, and there is nothing in the record to certainly show affirmatively that she never intended to release the lien reserved in the deed to M. H. denies all knowledge of the reserved lien at the time of the purchase, and until a long time thereafter. There was nothing done by C. to induce H. to believe that she had waived her lien or to influence his conduct in any way. On a bill filed by C. against W. and H. and wife in 1871 to enforce the lien for the purchase-money then due on the land sold by C. to M., and afterwards by W. and wife to H., held: The question of whether a lien reserved is surrendered is one of intention, on the part of the vendor, under the circumstances of each case; and there being nothing in this case to show such intention, the lien is not surrendered, and must be recognized as still existing. The lien was a security, not for the bond, but for the debt, and therefore the cancellation or surrender of the bond cannot extinguish the debt and the lien given for its payment without a manifest intention to do so by the vendor, and the burden is on the purchaser to show such intention.

In the case of *Gordon (Assignee) vs. Rixey (Assignee) et als.*, 76 Va., 694:

1. Liens—Judgment-Vendors—Priorities—Case at Bar.—In 1867, on the bond of M. & B. to P., assigned by P. to R., the latter obtained judgment, which was docketed in 1869. In 1866 M. granted his land to B., reserving lien for purchase-money, and in 1870 assigned the purchase-money bonds to G. for value without notice of the judgment. In a contest for priority between R., as judgment-creditor, and G., as assignee of the vendor's lien and of the bonds thereby secured, held: The lien of judgment hath priority.

2. *Idem*—Vendors.—Reserving lien for purchase-money creates no property in the land; it passes as personality. Assigning the debt carries the lien. It binds the land for the purchase-money, excluding other claims.

3. *Idem*—*Idem*—Assignee of purchase-money bonds, secured by vendor's lien, is assignee of a chose in action only, and not such purchaser of the land for value as will be protected by the Code of 1873, Chapter 182, Section 8. He is entitled to the rights of his assignor, and to no more.

In the case of *Stoner et als. vs. Harris et als.*, 81 Va., 451, decided February 18, 1886, it was held: Purchaser or incumbrancer of mere equitable title must take the place of the person from whom he purchases, and vendor may resort to the estate, whether the purchaser of mere equitable estate from his vendee purchased with notice or without notice.

In the case of *Neff vs. Wooding et ux.*, 83 Va., 432, decided June 16, 1887, it was held: In a suit to enforce liens reserved in favor of grantor in his conveyance of land, as provided by this section, the court may decree a sale of the land to satisfy the lien, without any previous account of rents and profits, the provisions of Section 3571 applying only to suits for the enforcement of judgment liens.

SECTION 2475.

In the case of *Iaeger, etc., vs. Bossieux*, 15 Grat., 83, decided January, 1859, it was held: Under the statute, Code, Chapter 119, Section 2, page 510, creating the mechanics' lien upon the building, the suit may be brought within six months from the time the building is finished, to enforce the lien as to the instalments of the contract price due, and though some of them are not due and payable at the time the suit is commenced, the court may, in its decree, provide for them. The contract and lien under the statute may be assigned, and the assignee may enforce the lien in the same mode that the mechanic may do it.

By the contract for building a house, the builder is to furnish the materials and to build the house in a workmanlike manner,

and the price is to be fixed by referees chosen by the parties. Soon after the work is finished it is valued and the price fixed, but afterwards defects become apparent by the shrinking of the timber, showing that the work was executed in a very defective and unworkmanlike manner. The valuation does not conclude the owner of the house; but he is entitled to compensation for the defects; and in a suit by the assignee of the builder to enforce the lien for the price for building the house, the owner will only be required to pay what the building was really worth.

A building fund company agrees to advance to one of its members money to build a house on a lot owned by him, and advances a part of the money and takes a lien upon the lot and the buildings which may be erected upon it, to secure advances made and to be made. The member then makes a contract for the building of a house on the lot, with a mechanic, who, to raise money faster than it can be gotten from the company, assigns the contract to a person who undertakes to advance the money, and the contract is recorded so as to create a mechanics' lien. After the contract is recorded, the company advances money from time to time as it had agreed to do, which is paid to the assignee in part satisfaction of his advances to the mechanic, with a knowledge on his part that it comes from the company, and that company claims priority of lien upon the property. The company is entitled to priority over the mechanics' lien for its advances made after the contract was recorded, as well as for its advances made before.

In the case of *Merchants and Mechanics Savings Bank of Norfolk vs. Dashiell et als.*, 25 Grat., 616, decided December, 1874, it was held: The term "general contractor," as used in the act of July 11, 1870, entitled "an act in relation to mechanics' lien," includes all persons furnishing materials for or doing work upon a building under a contract made by such persons directly with the owner of the building. If, after contracts are made by the owner with the parties who are to furnish materials for or do the work upon the building, and they commence to perform their contract, the erection of the building is stopped by the owner, so that it is not completed, the lien in favor of the workman, and the parties furnishing the material for compensation for work done and material furnished, is existing and valid, without their filing their claims in the clerk's office within thirty days from the time the work is stopped, or though they do not file them; and these liens will have priority over any liens upon the building created after work was commenced under said contracts. The lien exists where work is done under a verbal contract with the owner.

In the case of *Pairo vs. Bethell (Assignee)*, 75 Va., 825, de-

cided November, 1881. The act of 1870, in respect to mechanics', liens is more comprehensive than the previous law, which was left as it was; it extends the lien to a larger class of persons, and prescribes a different mode of acquiring the lien; it applies to contracts written as well as not written, and the remedy by motion as well as by bill is provided. Hence, if the contract be in writing, the lien may be acquired either under the previous statute, by the recordation of the contract as therein provided, in which case the remedy would be by bill in equity; or it may be acquired or secured under the act of 1870, by filing in the proper clerk's office and having recorded "a true account of the work done or materials furnished," etc., as provided by Section 4 of said chapter.

The proceeding by motion under this statute is a summary remedy in equity, assimilated in some of its features to a proceeding at law; the motion may be heard without formal pleadings; the testimony is given *viva voce* before the court, and if objections are made to the rulings of the court, they may, it seems, be put into the record by bills of exceptions. All this is anomalous in a court of equity, but it results necessarily from the proceeding authorized. A party has no absolute right to a trial by jury of an issue joined in such a motion, it being in the nature of an equitable remedy, and the statute not applying to motions which partake of the nature of an equitable proceeding to enforce a charge on real estate. On such a motion the court might, perhaps, in the exercise of a sound discretion, direct an issue or issues under circumstances which would warrant such direction in a regular chancery suit; and so, if the case required it, there seems to be no good reason why there might not be a reference to a commissioner to make inquiries and to take and state accounts. On such a motion proof of the recordation of the account and statement under the statute is proper, if such evidence is offered not to contradict or vary the written contract, but merely to prove the signing of the contract by the parties and the performance of it on the part of the builders. As the statute requires all parties in interest to be before the court, the assignors of the contract are proper, if not necessary, parties, and may be made such on their motion. The statute gives the lien, not only on a building, but also "so much land therewith as shall be necessary for the convenient use and enjoyment of the premises." In the absence of proof to the contrary, a lot in a town, such as is described in this case, is necessary to the convenient and reasonable enjoyment of the buildings put upon it.

Real property of value should be sold on a reasonable credit, unless under peculiar circumstances, which should appear by the record. But this rule has no application to sales' under

mortgages, deeds of trust or other instruments of writing, in which the terms of sale are agreed upon. In such cases the contract of the parties governs, and the court is left without discretion as to the terms.

In the case of *Boston & Co. vs. C. & O. R. R. Co. et als.*, 76 Va., 180 :

1. Mechanics' Lien—General Contractor—Railroad Company.—General contractors, in May, 1874, filed a bill to assert the mechanics' lien against the railroad company, predicated on notice of lien recorded in the Chancery Court of Richmond city, December 27, 1873, and nowhere else. The lien claimed was for five thousand dollars worth of lumber furnished the railroad company at different times and places; part for constructing wharves in Henrico county, within one mile of the corporate limits of said city; another part for constructing a tunnel in said city; a third part for constructing coal-bins and trestles at S., in A. county, and the residue for constructing a round-house at H., in West Virginia. The lien claimed on the whole property of the railroad company in this State, and particularly on the wharves, etc., and the tunnel, etc. The items extend from July 1 to December 8, 1873, but the last lumber furnished for the tunnel was on September 8, 1873. Held :

(1.) They have no statutory lien against the railroad company.

(2.) They have no equitable right to priority over the mortgages on the principles affirmed in *Williamson's Administrator vs. R. R. Co.*, 33 Grat., 624, and *Gibert vs. R. R. Co.*, because such claim was asserted first here in argument, but not in the record, and because the materials were purchased for the construction, not for the maintenance, of the road.

(3.) The wharves are within the jurisdiction of said city, which extends one mile beyond its corporate limits; but, in the sense of the statute, they are not within the city.

(4.) The tunnel is within the city, but the last item of the account for lumber furnished for the tunnel is dated September 8, 1873, and the lien-claim was not filed within the prescribed time.

2. *Idem*—*Idem*.—Furnishing materials creates an incipient lien, but to perfect it the general contractor must, in conformity with the Code of 1873, Chapter 115, Sections 3 to 11, inclusive, within the prescribed time, file, in the county or corporation court of the county or corporation in which is situated the property on which the lien is sought to be secured, and in the clerk's office of the Chancery Court of Richmond city, where the property is in said city, a true account of the work done or materials furnished, sworn to by the claimant, or his agent, with a statement attached, signifying his intention to claim the benefit

of the lien, and setting forth a description of the property on which he claims a lien, which is to be recorded by the clerk.

3. *Idem*—*Idem*—Railroad Company.—If such a lien is given on the property of a railroad company in its entirety, it can only be secured by filing the account in the proper clerk's office of every county or corporation through which the road passes.

4. *Quære*: Are railroad companies embraced within the provisions of the Code of 1873, Chapter 115, Sections 3 to 11, inclusive?

In the case of *Shackleford vs. Beck*, 80 Va., 573, decided June 25, 1885, it was held: The remedy by lien under the Code of 1873, Chapter 115, Sections 2, 3, and 4, is a creature of statute unknown to the common law; and in order to entitle a contractor to its benefits, he must strictly pursue the statute. The statute requires that a contractor, seeking to secure the benefit of its provisions, shall file in the clerk's office an account (which is an itemized or detailed statement of the transaction to which it relates) of work done and materials furnished, and therefore a paper in the following words, viz., "To balance of account rendered for labor and work done and material furnished for your house," is not sufficient to create the lien provided by the statute. The contractor having failed to secure a lien on the house by his omission to fulfil the requirements of the statute, a purchaser of the house from the owner is not affected with liability for the contractor's claim by reason even of actual notice of the account thereof.

In the case of the *Roanoke Land and Improvement Company vs. Karn & Hickson*; *Same vs. Snead & Winston*, 80 Va., 589, decided June 25, 1885, it was held: In the suit of a sub-contractor against the owner for materials furnished the general contractor, it is unnecessary to allege that any part of the price agreed to be paid remained due to the latter from the owner when notice was given.

The mechanics' lien law, as amended by the act of 1874-'75, page 437, section 5, does not require the sub-contractor to notify the owner at the time the labor is done or the materials furnished. It is sufficient if the notice be given at any time thereafter, and within twenty days after the building has been completed or the work otherwise terminated; but he is not obliged to wait until other work on the building, with which he has no concern, is performed, before he gives his notice.

In the case of the *S. V. R. R. Co. vs. Miller*, 80 Va., 821, decided October 1, 1885, it was held: As soon as a sub-contractor has furnished labor or materials, he may give notice to the owner, and may furnish the affidavit at any time within twenty days after the completion of the building or termination of the work; and without regard as to state of accounts between

the owner and the general contractor, the owner, upon proper notice and affidavit, is liable absolutely to the sub-contractor for the amount named in the affidavit. Section 8 secures to sub-contractor by Section 4, provided notice is given by the former before the lien is discharged. This remedy is additional to that conferred by Section 5, which gives to the sub-contractor, upon compliance with his request, the right to discharge the owner personally. Under Section 8 regard is had as to the state of accounts between the owner and the general contractor. Under Section 5 none is had.

In the case of *N. & W. R. R. Co. vs. Howison*, 81 Va., 125, decided December 3, 1885, it was held: In declarations by sub-contractor against owner under mechanics' lien law, it is unnecessary to aver that the account alleged to have been furnished defendant was approved by general contractor; or that latter, after ten days' notice thereof, had failed to object to it, or that same had been ascertained to be due from latter to sub-contractor, according to Section 6. These are matters of defence. Nor is it necessary to aver when alleged notice was given defendant; nor that, when notice was given, he owed anything to general contractor. Notice and affidavit having been furnished, as required by law by sub-contractor to owner, the latter is liable to former to amount named in the affidavit, regardless of state of accounts between owner and general contractor. Notice may be furnished owner by sub-contractor at any time between doing the labor or furnishing the material, and twenty days after building is completed or work otherwise terminated; but affidavit must be furnished within said period of twenty days.

In the case of *Kirn vs. Champion Iron Fence Company*, 86 Va., 608, decided February 6, 1890, it was held: Under Code 1873, Chapter 115, as amended by Acts 1883-'84, pages 636, 637, in action against owner by sub-contractor whose account is disputed by general contractor, it is not sufficient for sub-contractor to show that he has served his notice and filed his account as provided by Section 5, but he must also aver and prove that he has complied with his contract with the general contractor, under which the materials were furnished.

In the case of *Sergeant et ux. vs. Denby et als.*, 87 Va., 206, decided December 11, 1890, it was held: Mrs. S. bargained with general contractors, D. & W., to build two houses on two distinct lots, for an entire price, and the latter bargained with sub-contractor, D., to furnish entire materials for the entire work, and the work is done and the materials furnished accordingly. Held: The lien of the general contractors and of the sub-contractor is joint on both houses, under this section.

SECTION 2476.

In the case of *Shackleford vs. Beck*, 80 Va., 573, decided June

25, 1885, it was held: The remedy by lien under Code 1873, Chapter 115, Sections 2, 3, and 4, is a creature of statute unknown to the common law; and in order to entitle a contractor to its benefits, he must strictly pursue the statute. The statute requires that a contractor seeking to secure the benefit of its provisions shall file in the clerk's office an account (which is an itemized or detailed statement of the transaction to which it relates) of work done and materials furnished; and therefore a paper in the following words, viz., "To balance of account rendered for labor and work done and material furnished for your house," is not sufficient to create the lien provided by the statute. The contractor having failed to secure a lien on the house by his omission to fulfil the requirements of the statute, a purchaser of the house from the owner is not affected with liability for the contractor's claim, by reason even of actual notice of the account thereof.

In the case of *Lester v. Pedigo*, 84 Va., 309, decided January 12, 1888, it was held: Where a verified account of the number and price of materials furnished is filed with the claim for a lien on a certain building, with so much land therewith as shall be necessary for the convenient use of the premises, and notice is served of claim for the lien and of a motion to enforce the same at the first day of the next term, and the motion was on that day docketed and continued until the sixth day of the term, when it was heard, the proceedings conform to the statute, and are regular.

In the case of the *Trustees Franklin Street Church vs. Davis*, 85 Va., 193, decided August 9, 1888, it was held: The provisions of the mechanics' lien act are, each and all, indispensable to the creation of the lien, and hence, if any one of them be omitted, no lien is acquired.

The contract for erecting the building provides that it shall be considered completed before the "finishing touches" are put on it. Held: The ninety days within which the statute allows a mechanics' lien to be filed commences from that time, and not from the actual completion.

In the case of *Moore vs. Rolin*, 89 Va., 107, decided June 16, 1892. A sub-contractor files a mechanic's lien before the completion of the work, contrary to the Code, Section 2476. Held: He is liable to an action for damages for injury thereby done the contractor. In such action the declaration should charge some special damage to the plaintiff, as the language of the alleged lien does not necessarily import injurious defamation; but it is not necessary to give the name of any one whose custom has been lost to the plaintiff, nor to state that the alleged lien has been ended by limitation or decree.

SECTION 2479.

In the case of the *Roanoke Land and Improvement Company vs. Karn & Hickson*; *Sume vs. Snead & Winston*, 80 Va., 589, decided June 25, 1885, it was held: In the suit of a sub-contractor against the owner for materials furnished the general contractor, it is unnecessary to allege that any part of the price agreed to be paid remained due to the latter from the owner when notice was given.

The mechanics' lien law, as amended by the act of 1874-'75, page 437, Section 5, does not require a sub-contractor to notify the owner at the time the labor is done or the materials furnished. It is sufficient if the notice be given at any time thereafter, and within twenty days after the building has been completed, or the work otherwise terminated. But he is not obliged to wait until other work on the building, with which he has no concern, is performed, before he gives his notice.

In the case of the *S. V. R. R. Co. vs. Miller*, 80 Va., 821, decided October 1, 1885, it was held: As soon as a sub-contractor has furnished labor or materials he may give notice to the owner, and may furnish the affidavit at any time within twenty days after the completion of the building or termination of the work; and without regard as to the state of accounts between the owner and the general contractor, the owner, upon proper notice and affidavit, is liable absolutely to the sub-contractor for the amount named in the affidavit.

Section 8 secures to sub-contractor by Section 4, provided notice is given by the former before the lien is discharged. This remedy is additional to that conferred by Section 5, which gives to a sub-contractor, upon compliance with his requirements, the right to discharge the owner personally. Under Section 8 regard is had as to the state of accounts between the owner and the general contractor. Under Section 5 none is had.

In the case of the *N. & W. R. R. Co. vs. Howison*, 81 Va., 125, decided December 3, 1885, it was held: Notice may be furnished the owner by the sub-contractor at any time between doing the labor or furnishing the materials, and twenty days after the building is completed or the work otherwise terminated; but affidavit must be furnished within said period of twenty days.

SECTION 2484.

In the case of the *Bailey Construction Company vs. Purcell*, 88 Va., 300, decided July 23, 1891, it was held: Where the object of the suit is to enforce an alleged mechanics' lien, the suit is one of equitable jurisdiction.

Where the chancery court takes cognizance of a suit, the object whereof is to enforce an alleged mechanics' lien, and a cross

bill is filed, and all the evidence appears in the record, this court will review the action of the court below, and decree according to the very right of the case.

SECTION 2498.

In the case of *Stimson vs. Bishop et als.*, 82 Va., 190, decided July 1, 1886, it was held: Mortgage secures the debt; no change in the form of the evidence or mode or time of payment; nothing short of actual payment or express release of the debt will discharge the mortgage. Transfer of the debt carries with it the security, without assignment or delivery thereof.

CHAPTER CXI.

SECTION 2500.

In the case of *Turner vs. Stip*, 1 Washington, 319, decided at the fall term, 1794, it was held: Where a deed is improperly attested, and only one witness offered to prove its execution, the deed cannot be admitted to record.

In the case of *Pollard vs. Lively*, 2 Grat., 216, decided July, 1845, it was held: The clerk of a county or corporation court has no authority to admit to record a deed which does not convey land lying in his county or corporation; and a copy of such a deed, authenticated by the clerk, is not competent evidence in place of the original.

In the case of *Horsley et als. vs. McGarth & Colquit*, 2 Grat., 471, decided January, 1846, it was held: Where a deed conveys several tracts of land lying separately in different counties, the recordation thereof in only one of the counties is not effectual in regard to the tract or tracts lying in the other counties, within the true intent and meaning of the statutes regulating conveyances.

Where a navigable stream is the dividing line between two counties, and so separates lands conveyed by deed as to throw part thereof into the county on one side of said stream and part thereof into the county on the opposite side of the same, the parts so separated must be regarded as distinct tracts lying in different counties, within the true intent and meaning of the statute of conveyances.

A variance in the date as it appears in the deed certified by the justices, and in their certificate, does not avoid the registry of the deed, if the identity of the deed certified and the deed recorded is satisfactorily ascertained by other parts of the certificate, and the annexation thereof to the deed.

The endorsement of the clerk on the deed of the day when it was left with him to be recorded, and his return to the court of deeds left with him to be recorded, is not conclusive as to the

day when the deed was so left; but the true day may be shown by parol testimony. The carrying the deed to the clerk's office to be recorded is not enough to made it good as a recorded deed from that day. It must be left with the clerk to be recorded.

In the case of *Johnson and Wife vs. Slater et als.*, 11 Grat., 321, decided July, 1854, it was held: A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to the wife, either for the purpose of proving the due execution of the deed when called in question, or for the purpose of having it admitted to record.

A deed admitted to record upon proof by the subscribing witnesses, one of whom was the husband of the grantee, is null and void as to the creditors, not having been duly recorded.

In the case of *Peyton et als. vs. Carr's Executor*, 85 Va., 456, decided November 8, 1888. Where record of county court shows that "at a court held for a county on 4th of February, 1867, this deed was produced into court, and being duly acknowledged according to law, was thereupon ordered to be recorded," held: Sufficient proof of valid recordation.

In the case of *Bowden vs. Parrish*, 86 Va., 67, decided April 25, 1889, it was held: Acknowledgment of deed by grantor before the trustee as officer is invalid, and its recordation upon such acknowledgment does not give constructive notice.

In the case of *Corey vs. Moore*, 86 Va., 721, decided March 27, 1890, it was held: Grantee or beneficiary in deed cannot, as an officer, take the acknowledgment of grantor, and deed admitted to record on certificate thereof cannot affect a notice under the registry laws; but when trust deed describes trustee as "L. Triplett, Jr.," and the certificate begins "I, L. Triplett, Jr., a notary public," etc., but is signed "L. Triplett, N. P.," the inference is that the trustee and the notary are different persons.

In the case of *Hockman vs. McClanahan*, 87 Va., 33, decided November 6, 1890, it was held: The certificate of *feme covert's* acknowledgment of deed must comply substantially with every requisite of the statute. Her examination must be privy, and the deed must be explained to her, and then she must (1), acknowledge the deed to be her act; (2), declare that she willingly executed it; and (3), does not now wish to retract it.

In the case of *Barton vs. Brent*, 87 Va., 385, decided January 29, 1891, it was held: Deed of trust by husband and wife to a trustee, who, as a notary, took their acknowledgment, the recordation is invalid as to both, and the deed wholly void as to the wife; and as to the husband, valid only between the parties and to third persons having notice thereof.

SECTION 2501.

In the case of *Davis et als. vs. Beazley et als.*, 75 Va., 491, decided April 28, 1881, it was held: A grantee in a deed, or a beneficiary under it, is not allowed, as an officer, to take an acknowledgment of the deed by the grantor with a view to its registration. The certificate to such acknowledgment is invalid as authority to admit the deed to record, and hence a recordation based upon it is without effect as notice by construction under the registry laws. The clerk of the county court cannot take his own acknowledgment of a deed executed by him, so as to render it valid as against a subsequent purchaser for value from him as a deed admitted to record.

In the case of the *Virginia Coal and Iron Company vs. Roberson*, 88 Va., 116, decided June 25, 1891, it was held: Whilst literal compliance with the statute is not necessary, yet the certificate of acknowledgment must show substantial conformity with every requisite of the statute.

SECTION 2502.

In the case of *Bowden vs. Parrish*, 86 Va., 67, decided April 25, 1889, it was held: Acknowledgment of the deed by the grantor before the trustee, as an officer, is invalid, and does not give constructive notice.

In the case of *Barton vs. Brent*, 87 Va., 385, decided January 29, 1891, it was held: Deed of trust by husband and wife to a trustee, who, as notary, took their acknowledgment, the recordation in invalid as to both, and the deed wholly void as to the wife; and as to the husband, valid only between the parties and to third persons having notice thereof.

SECTION 2510.

In the case of *Bolling vs. Teel et als.*, 76 Va., 487:

Chancery Practice—Partition.—Commissioners to make partition allot land to husband, instead of to his wife, whose inheritance it was, and their report is confirmed by the court. No conveyances are directed or made. Held:

1. The husband acquired no title by the proceedings.
2. The decree of partition does not of itself operate as a conveyance by the parties, if *sui juris*, and by a commissioner for those *non-sui juris*.
3. Registration of partition or assignment of dower does not alter this rule of chancery, but only gives notice of the decree.

CHAPTER CXII.

SECTION 2512.

In the case of *Browne vs. Bockover*, 84 Va., 424, decided Jan-

uary 26, 1888, it was held: Estate by the curtesy consummate exists in husband in wife's lands unaliened by her during her lifetime, though devised by her will. Such estate is subject to the liens of the husband's creditors acquired during the coverture in preference to the general liens of her creditors upon her real estate.

SECTION 2513.

In the case of *Chapman vs. Price*, 83 Va., 392, decided June 14, 1886, it was held: The power of alienation by deed *inter vivos*, or by will, is an incident to the separate estate, and if not expressly or impliedly restricted, always exists in the married woman just as if she were *sole*, and if exercised effectually, excludes the husband's rights by curtesy or otherwise.

In a grant by parents of estate of inheritance to a married daughter occurs the following *habendum*: "To have and to hold in her own right, free from the claims or demands of her husband, or any person claiming under, or through or against him in any way, now or at any time hereafter." Afterwards the wife, by her will, devised the land to her children, and died, leaving her husband her surviving. His creditors brought their bill to subject his supposed curtesy in the land to his debts. Held: The terms of the devise created a separate estate in the wife, with power of alienation, which she exercised, and thereby precluded her husband and all claiming under him from all claim on the land.

SECTION 2514.

In the case of *Lewis Neil et als. vs. Abram Neil et als.*, 1 Leigh, 6, decided February, 1829, it was held: An attestation of a will of lands, made in the same room with the testator, is *prima facie* an attestation in his presence, according to the statute of wills. An attestation not made in the room, is *prima facie*, not an attestation in his presence; but as in the one case the attestation is good, if shown to have been made within the scope of the testator's view from his actual position, so in the other, it is not good if it appear that in the actual relative position of the testator and the witness, he could not possibly have seen the act of attestation, nor have so changed his situation as to have enabled him to see it without aid from others, which was at hand, but was neither asked nor given.

In the case of *Boyd et als. vs. Cook, Executor of Vass*, 3 Leigh, 32, decided May, 1831, it was held: The will of a blind man shall be admitted to probate and record as a will of real as well as personal estate, if attested at his request in the same room with him, though it be not proved that the will was read in the presence of the attesting witnesses, or that it was ever read to him, provided it appears satisfactorily to the court that

he was acquainted with its contents, and intended to make the testamentary dispositions therein contained.

A court of probate occupies the place of a jury as to questions of fact, and its province is, like that of a jury, to draw all just inferences from the evidence.

In the case of *Waller et als. vs. Waller*, 1 Grat., 454, decided March, 1845. A will, wholly in the handwriting of the testator, commenced, "I, J. W., of the county of H. and State of Virginia, calling to mind the uncertainty of human life, and being desirous to dispose of all such estate as it hath pleased God to bless me with, I give and bequeath the same in manner following." He then proceeded to dispose of the whole of his estate, real and personal, and concluded thus: "In witness whereof, I have hereunto set my hand this — day of —, 1841; signed and acknowledged in the presence of —." The blank for the date was not filled up, and the testator's name not subscribed to the paper, nor were there any attesting witnesses. Held: The will was not well executed. The finality of the testamentary intent must be ascertained from the face of the paper, and extrinsic evidence is not admissible either to prove or disprove it.

The signing a will, to be a sufficient signing under the statute, must be such as, upon the face and from the frame of the instruments, appears to have been intended to give it authenticity. It must appear that the name written was regarded as a signature, and that the instrument was complete without further signature; and the paper itself must show this.

In the case of *Pollock et ux. vs. Glassell*, 2 Grat., 439, decided January, 1846. A marriage settlement gives a power to the wife to dispose of the settled estate by gift or devise, under her hand and seal, attested by two or more witnesses. Held: That a testamentary paper signed by the wife, with a scroll annexed to her name, and attested by the requisite number of witnesses, though the scroll is not recognized in the body of the instrument, is a valid will under the power. That such a paper, duly executed, referring to and recognizing another testamentary paper, previously executed according to the statute concerning wills, but not according to the power, will constitute the paper recognized a valid testamentary paper. To give validity to the paper recognized, it is not necessary that it should be incorporated into the paper recognizing it. It is not necessary that the attestation clause shall state that the paper was duly signed and sealed by the testatrix; that parol evidence is admissible to show that the scroll was put upon the paper by the direction of the testatrix, as a seal. Though the name of the witness was put to the paper, not as a witness, but for some

other reason, yet if the testatrix afterwards requests the witness to attest the paper, and she adopts the signature already there, it is a valid attestation. *Quære*: Whether an assignment under hand and seal, absolute on its face, but not delivered, and intended to operate only at the death of the assignor, may be valid as a testamentary paper?

In the case of *Rosser vs. Franklin*, 6 Grat., 1, decided April, 1849. It is not necessary that the subscribing witnesses to a will should see the testator sign, or that he should acknowledge to them the subscription of his name to be his signature, or even that the instrument is his will. It is enough that he should acknowledge in their presence that the act is his, with a knowledge of the contents of the instrument, and with the design that it should be testamentary disposition of his property.

If the paper has been signed by the testator, such an acknowledgment is a recognition and ratification of his signature as having been made for him in his presence and by his directions.

A testamentary paper appears on its face to be signed with the name and mark of the testatrix, and subscribed with two names of the attesting witnesses, and with the name and mark of a third. The two first witnesses are dead, and their handwriting is proved, and it is proved that the body of the will and the testatrix, and of the last witness, are all in the handwriting of the first witness; the name of the last witness having been so written at his request; that the witnesses attest the will at the request of the testatrix, and in her presence, at the same time. It was a question whether the testatrix made her mark before the attestation of the paper by the witnesses, or immediately after the last had made his mark, and in their presence. Held: If the testatrix made her mark after the attestation of the witnesses, and her so doing was an after-thought, and not in pursuance of any design conceived prior to the attestation; but at the time she acknowledged the paper, there was no design on her part to affix her mark to it; then the making her mark was a work of supererogation, and did not affect the validity of the previous acknowledgment.

The fact, whether in the order of time the testatrix made her mark before or after the subscribing witnesses made their subscription, is not material where the whole transaction may be regarded as one continuous, uninterrupted act, conducted and completed within a few minutes, whilst all concerned in it continued present, and during the unbroken supervising, attesting attention of the subscribing witnesses.

In the case of *Jesse et als. vs. Parker's Administrators et als.*, 6 Grat., 57, decided April, 1849, it was held: Upon an issue

devisavit vel non, the verdict of the jury in favor of the will, approved by the court before which the issue is tried, concludes all mere questions of fact depending upon the credit to be given to the witnesses. And therefore, in such case in an appellate court, it must be taken that all the requirements of the statute, in order to establish a will, were satisfactorily proved, and the identity of the paper is one of the facts settled by the verdict.

It is settled law that a subscribing witness may attest a will by making his mark, his name being written by another in his presence and at his request.

The validity of such an attestation depends upon the signing the name of the witness by his authority and in his presence, and not upon the fact of his making a mark, or doing some manual act in connection with the signature.

Although there must be satisfactory proof that every statutory provision has been complied with, in order to establish a will, the law does not prescribe the mode of proof, nor that the will shall be proved as well as attested by a specified number of witnesses.

In the case of *Johnson vs. Dunn*, 6 Grat., 625, decided January, 1850, it was held: A testamentary paper appears to be attested by two witnesses, but one of them is not a creditable witness, and his attestation is not proved by the other attesting witness, or any other person. Held: The paper is not so proved as to be admitted to probate.

In the case of *Moore vs. Moore's Executor et als.*, 8 Grat., 307, decided October, 1851, it was held: *Quære*: Whether an attestation of a will out of the room in which the testator is lying, and out of his sight, but in a case in which the testator is able, and might have placed himself in a position to see the witnesses when they signed the paper, is valid attestation? A court of four judges equally divided upon the question.

In the case of *Sturdivant et al. vs. Birchett*, 10 Grat., 67 decided April, 1853. A will is executed by the testator, and certain persons are requested by him to attest it. For convenience they take it into another room, out of the vision of the testator, and there subscribe their names to the paper as witnesses, and they immediately, within one or two minutes, returned to the testator with the paper, and one of them in the presence of the other, with the paper open in his hand, addresses the testator and says, "here is your will witnessed," at the same time pointing to the names of the witnesses, which are on the same page and close to the name of the testator. The testator then takes the paper and looks at it as if examining it, and then folds it up, and speaks of it as his will. Held: That under these circum-

stances the recognition of their attestation by the witnesses to the testator is a substantial subscribing of their names as witnesses in his presence,

In the case of *Nock vs. Nock's Executors*, 10 Grat., 106, decided April, 1853. From what circumstances it may be inferred that the name of a testator was written in his presence, and before the acknowledgment of the paper as his will.

The witnesses to a will subscribe their names in another room from the testator, who though lying on a bed, is able to walk about; but the witnesses are directly within the range of his vision, so that he can see all the persons except the forearm and writing hand, those being hid from him by the body of the witness whilst he is subscribing his name; it may be inferred, too, that he may see the paper as it lies on the bureau or desk where the witnesses subscribe their names. Held: The witnesses subscribe their names in the presence of the testator, within the meaning of the statute.

In the case of *Purramore vs. Taylor*, 11 Grat., 220, decided April, 1854, it was held: The Code of 1849, Chapter 122, Section 4, p. 516, in relation to attestation of wills, does not require that the witnesses shall subscribe their names in the presence of each other. T. subscribes his name to his will in the presence of C., and requests C. to attest it, who does so. B. is then called into the room, and T. again acknowledges the paper as his will, and requests B. to attest it, who does so, C. being present when T. acknowledges the paper to B., but not subscribing it or recognizing his subscription at that time, the whole, however, being done within a few minutes. This will was duly attested.

In the case of *Beane et ux. vs. Yerby*, 12 Grat., 239, decided March 6, 1855. C. subscribed his name to his will in the presence of R. who wrote it, and requests R. to witness it, who does so. H. is then called into the room, and requested by C. to witness the instrument, and C. acknowledges his signature to him in the presence and hearing of R., and H. subscribes his name as a witness in the presence of the testator and of R. Held: The acknowledgment of his signature by C. was a sufficient acknowledgment of the will.

Though the testator spoke of the paper as an instrument, and did not speak of its contents to H., yet knowing that it was his will, and knowing its contents, it was a sufficient publication of it as his will. The will was duly executed.

The act of 1849, Code, Chapter 122, Section 4, does not change the former law, either as to what shall constitute an acknowledgment, or a publication of the will.

In the case of *Green et als. vs. Crain et als.*, 12 Grat., 252, decided March 6, 1855. A paper prepared as the will of C. is

read to him by the scrivener, and approved, and then the scrivener, at the request of C., subscribes C.'s name to the paper, and by like request he attests it, and no other witness attests it in the presence of this one.

About three days after, C. acknowledges the paper as his will in the presence of H., who at his requests attests it in his presence. No other witness attests the paper on that day; but about four days after, H. is again at the house of C. with W., when C. requests W. to attest the paper, which W. does in the presence of H. and C., and C. then acknowledges the paper as his will in the presence of H. and W. Held: The will is duly executed.

In the case of *Ramsey vs. Ramsey's Executors*, 13 Grat., 664, decided February 10, 1857, it was held: The name of a testator at the commencement of a holograph will is an equivocal act, and unless it appears affirmatively from something on the face of the paper that it was intended as his signature, it is not a sufficient signing under the statute.

In the case of *Roy et als. vs. Roy's Executor*, 16 Grat., 418, decided November 23, 1863, it was held: In a holograph will the writing of the name of the testator at the commencement of the paper is an equivocal act, and therefore is not, of itself, a sufficient signing of the paper to constitute it his will. The paper being folded up and endorsed by the testator with his name, "R.'s will," is not a sufficient signing. Such a paper being offered for probate by the nominated executor, and its probate opposed by some of the testator's next of kin, the costs should be paid out of the estate.

The reference to 25 Grat., 363, is an error. That case is upon the question of the competency of witnesses as to wills. See Section 3346.

In the case of *Riddel vs. Johnson*, 26 Grat., 152, decided April 15, 1875, it was held: A bequest in favor of an attorney, who writes the will, is not necessarily invalid. The *onus probandi* lies, in every case, upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

If a party writes or prepares a will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

J. was an unmarried man with a large property, having a large amount in bonds. B. had been his counsel for years, in

whom J. had great confidence, and for whom he had a great regard. In February, 1867, B. wrote J.'s will, in which he gave most of his real estate to a number of his illegitimate children, who were colored persons. He then did not dispose of his bonds, which were in B.'s hands for collection. In June following, J. sent for B. to write a codicil to his will, and after some previous provisions as to real estate among the same parties, and providing for the payment of his debts and expenses of administration, and any orders he might draw upon B. in his lifetime out of the collection from the bonds, he gave whatever remained of these bonds in the hands of B. at J.'s death, to B. absolutely. J. had a number of next of kin, and among them, two sisters, to none of whom did he leave anything. It being clearly proved that J. was entirely competent to make a will; that he dictated the bequest in favor of B. without any suggestion from B. or any other person, and repeated it; that it was read to him, and he clearly understood it, and intended it to be as it was written; and it further appearing that he had been on bad terms with his family for years, and had expressed more than once his determination that none of them should have any of his estate, the bequest to B. was held to be a valid bequest.

In the case of *Cheatham vs. Hatcher et als.*, 30 Grat., 56, decided March, 1878. A will must be subscribed, but need not be proven by two attesting witnesses. The testimony of a subscribing witness invalidating the will which he attested ought to be viewed with suspicion.

The opinion of a physician on a question of sanity is entitled to peculiar weight, particularly where he had special opportunities of observation.

The fact that a draftsman of a will will take a benefit under it, while it imposes upon the court the duty of careful scrutiny, does not invalidate the will.

A request to a witness to subscribe the will, made by a third person in the hearing of the testator, is, in law, the request of the testator, if he is conscious and does not dissent therefrom.

In this case the due execution of the will and the sanity of the testatrix was proven by one of the attesting witnesses, whose testimony was confirmed by other witnesses and the circumstances surrounding the transaction. The other subscribing witness, on the other hand, denied the due execution and the consciousness of the testatrix, but his testimony was impaired by the circumstance that it was in conflict with statements made by him soon after the execution of the will, and was inconsistent with his act in attesting the will. Held: That the will was duly executed and should be admitted to probate.

In the case of *Peake vs. Jenkins*, 80 Va., 293, decided March 12, 1885. Code 1873, Chapter 118, Section 4, requires the attes-

tation of two subscribing witnesses, but no particular form or place on the paper, yet the witnesses, unless the will be holograph, must subscribe as witnesses, though the word witness need not appear.

Instrument propounded as the will of J. is wholly written by H. and signed "J. by H.," and is attested "Witness L." L. being dead, the instrument is probated on the testimony of H. as a subscribing witness. Held: The instrument was not attested pursuant to the statute. H. did not subscribe as a witness and could not attest the will.

Instrument dated April 13, 1870, speaks of the testatrix in the third person, and merely recites that she had spoken to the amanuensis of her wish to make a will to secure to her son, J., two hundred dollars a year for every year he had been staying at home with her since his father's death, and that on the third of January, 1870, she had asked the amanuensis to write her will for her to copy, etc. Held: The instrument is not testamentary in its character.

Pollock vs. Glassell, 2 Grat., 440, is distinguished from the case at bar in that, though there the name of the witness was put to the paper not as a witness but for some other purpose, yet the testatrix requested the witness to alter the paper, and the witness adopted her signature already there; whilst here, the witness signed as amanuensis, and was not requested to attest the paper.

In the case of *Baldwin vs. Baldwin (Executor, etc.)*, 81 Va., 405, decided February 4, 1886. Entering room of testatrix, her friend S. said to her: "These gentlemen, F. and R., have come to witness the will." She bowed her head in assent. The will was read to her by F. in an audible voice; and on being asked if she understood it, she signified her assent as before. She then signed the will in a legible manner, her arm being held to steady it, but the pen not being touched. She was then laid back in a recumbent posture as before, and the witnesses, F. and R., subscribed the will at a table in a little room near the foot of the bed, in her presence, both being present together. She was so lying that she was compelled to see them, unless she shut her eyes or turned her head away. Held: Such will was duly executed as required by statute. *Idem*. What is such presence? In company with, in the same room with, within the view of the testator, coupled with consciousness on his part of such proximity.

In the case of *Perkins vs. Jones*, 84 Va., 358, decided January 19, 1888, it was held: A will wholly written and signed and sealed by the testator who is of sound mind, containing an attesting clause unsigned by witnesses is valid, and another paper of testamentary character, bearing the same date, and

found folded up with said will and written and signed by the said testator, is a valid codicil, though it does not refer to said will.

In the case of *Warwick vs. Warwick*, 86 Va., 596, decided January 30, 1890, it was held: This section provides that "no will shall be valid unless it be in writing and signed by the testator or by some other person in his presence, and by his direction, in such manner as to make it manifest that the name is intended to be a signature."

SECTION 2515.

In the case of *Knight vs. Yarbrough*, 1 Va. (Gilmer), 27, decided June 13, 1820, it was held: W. devised property to his wife, with power to sell, etc., or to dispose of among children and grandchildren, as she pleased; the wife gave part to a son-in-law, and made no provision for some of the children and some of the grandchildren. This is an imperfect execution of the power, and void.

When an object of the bounty has received anything by appointment, he can claim a share of the residue only on bringing what he has received into the *collatio bonorum*; where the appointment is improperly executed, and a court of equity is called on to correct it, equality is the rule.

In the case of *Knight vs. Yarbrough*, 4 Rand., 566, decided December, 1826, it was held: Where an appointment is made in pursuance of a general power not prescribing the mode of appointment, it must be made in such a way as would pass the title if the property belonged to the person making the appointment. Therefore, where an appointment is made of slaves, under such a general power, by an oral declaration that the trustee gives them to the appointee, without a delivery of possession, the appointment is void.

In the case of *Williamson vs. Beckham*, 8 Leigh, 20, decided February, 1837. A deed of settlement made before marriage, and conveying real and personal property to a trustee for the separate use of the intended wife, provides that after the marriage she shall have power, by written instrument under her hand and seal, attested by three or more witnesses, in the nature of an appointment of a will and testament, to dispose of the property as freely as if she were a *feme sole*. Held: This is a power to dispose by will only, and not by deed.

In the case of *Lee vs. Bank of United States*, 9 Leigh, 200, decided February, 1838. By post-nuptial deed of settlement (reciting that husband had sold his wife's estate, and she had joined him in conveyances thereof, under promise from him to settle an equivalent on her therefor), husband conveys real estate to a trustee. First, to the separate use for life of the

wife, unless she should in writing, under her hand, direct trustee to sell and convey the whole or any part of trust subject, in which case he should hold the proceeds of sale, subject to the separate use and order of the wife; second, after wife's death, to use of husband for life; and third, after husband's death, to and for the use of the devisees or heirs of wife, to be divided and conveyed to them in such portions as she shall by will direct, or the law of the land in that case made and provided shall determine. By mortgage, afterwards executed by husband and wife (the wife duly joining, but the trustee in the settlement no-wise joining in the same), the real estate is mortgaged to creditors of husband to secure a just debt due from him. Held: That under the deed of settlement the wife has full power to dispose of the whole estate in the trust subject, by deed in her lifetime, duly executed by her husband and her according to the statutes of conveyances as well as by will; and therefore, that the mortgagees are entitled to have the whole estate in the trust subject sold for the satisfaction of their debt.

The case of *Pollock et ux. vs. Glassell*, 2 Grat., 439, here cited, will be found *supra*, Section 2514.

In the case of *Thorndike et als. vs. Reynolds et als.*, 22 Grat., 21, decided March 27, 1872, it was held: A husband, who, by his will, gives property, real and personal, to his wife absolutely, if she survives him, may, by his will, authorize her to make a will in his lifetime disposing of the property; and the wife, having made a will in the lifetime of the husband disposing of the property, and afterwards surviving her husband, and dying without re-executing or revoking her will, the same is valid to pass the property to her devisees and legatees.

Though the will of the wife does not say, in terms, that it is made in pursuance of the power vested in her by her husband's will, yet, as his will was shown to her by his directions, and she had no property of her own at the time, and the provisions of his will have obvious reference to her will, it will be held that her will was made in pursuance of the power.

The clause in the will of the husband giving power to the wife must have been intended to take effect from its date; and so the will of the wife, as an execution of the power, will be intended to take effect from its date, though not to divest and pass the title in the lifetime of her husband and herself. The will of the wife was not revoked by the death of the husband, leaving the wife surviving him, and therefore it was not necessary for her to re-execute the will after his death.

Though the wife survives the husband, and thereupon becomes absolutely entitled to the property, this does not extinguish the power; but the will of the wife, executed under the power in the lifetime of the husband, not having been revoked

by her, or re-executed, passes the property, at her death, to her devisees and legatees.

H. dies, leaving a will and three codicils, in each of which he gives valuable property to his wife, if she survives him; and in some of these bequests he authorizes her to make a will in his lifetime to dispose of it. By the third codicil he gives her one-half of his residuary estate, and then adds: "And for all the purposes contemplated in my will and the codicils thereto, I authorize and empower my wife to make a will in my lifetime which shall be good and effectual in law and equity." This is a valid power to the wife to make a will in the lifetime of the husband, and to dispose of the property bequeathed to her; and looking to the language employed, all the provisions of the will, and the surrounding circumstances, the intention of the testator was held to be that the power was not confined to the bequest of the residue, but to all the bequests to her in the wills and codicils.

SECTION 2517.

In the case of *Wilcox vs. Rootes et als.*, 1 Wash., 140, decided at the fall term of 1792, it was held: A subsequent marriage and birth of a child was clearly an implied revocation of a will, and ought to operate as such.

In the case of *Yerby vs. Yerby*, 3 Call, 334 (2d edition, 289), decided April 20, 1803, it was held: If, since the act of 1792 and before the act of 1794 concerning wills, a man having children makes a will and devises his whole estate amongst them, after which he marries a second wife, by whom he has children, and dies without altering his will, the second marriage and birth of children is a revocation of the will.

An implied revocation of a will may be rebutted by circumstances. *Sed Quære*: Can the court of probate decide whether the will was revoked or not?

In the case of *Phaup et als. vs. Wooldridge et als.*, 14 Grat., 332, decided May 11, 1858, it was held: Under the statute marriage is a revocation of a will, "except a will made in pursuance of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her (the testator's) heir, personal representative, or next of kin.

SECTION 2518.

In the case of *Glasscock vs. Smither & Hunt*, 1 Call, 479 (2d edition, 414), decided October 31, 1798, it was held: A will of personal estate, legally executed, is revoked by a subsequent will not written or subscribed by the testator, but which was prepared by his directions, corrected by him, and which he afterwards declared was his last will.

[The facts in this case were supported by the testimony of

the draftsman, and on his testimony alone the will was admitted to probate.]

In the case of *Bates vs. Bates' Executor*, 3 H. & M., 503, decided April, 1809. A testator made a will in due form of law, to which he afterwards added a codicil, he then made a second will and annexed a postscript to it, by which he revoked all former wills, and signed the postscript, the second will was cancelled by cutting his name out from the body of it, but leaving the postscript with his name subjoined to it. This paper was carefully preserved by the testator as also the first will, both of which were found after his death. Held: That the postscript of the second will was a substantial revocation of the first will, and that the cancelling of the second will did not necessarily cancel the postscript also, so as to set up the first as the will of the testator.

In the case of *Boyd et als. vs. (Cook Executor of Vass)*, 3 Leigh, 32, decided May, 1831, it was held: A blind testator orders a will made by him to be destroyed, and believes it is destroyed accordingly, but it is not destroyed, and no act towards destruction done; this is not a revocation by destruction or cancellation within the statute; at least, a court of probate cannot consider this as amounting to a revocation.

In the case of *Hansborough's Executors vs. Hooe and Wife*, 12 Leigh, 316, decided April, 1841. Testator by his will devises two thousand acres of land, and bequeathes twenty-eight slaves and sundry bonds, amount not mentioned, and one-fourth of proceeds of sales of land not specifically devised, to his granddaughter, Maria, and five other children of his son, John, deceased, to be divided among them; and that one-fifth part of the general *residuum* of his estate shall be equally divided among the same persons; and by codicil provides that Maria's part shall be settled to her separate use for life, remainder to her children if any, and if none, to the use of the other children of her father; after which, on the marriage of Maria, testator by marriage contract gives her four hundred acres, not parcel of the two thousand acres of land, nine slaves, parcel of the twenty-eight slaves named in the will, and fifteen hundred dollars in money, all to be settled on her for her use and the heirs of her body; but in the case of her death without issue, or in the event of such issue as she may have not arriving to twenty-one years of age, or marrying, then to the heirs of her father. Held:

1. All the legacies of personal property to Maria were addeemed or satisfied by the gift to her in the marriage contract.

2. The devise of land to her is also addeemed or satisfied by the land portion given her by the contract.

In the case of *Barksdale vs. Barksdale*, 12 Leigh, 535, decided March, 1842. Testator in 1838 made a will, all written with his own hand, whereby he gave three thousand dollars to his

sister, five thousand dollars to S. S., and the residue of his estate to his father; in 1839 he signed another instrument, whereby, revoking all other wills before made, he gave T. Y. T. five thousand dollars and the residue of his estate to his father, but this last paper was not written by him, and it was not duly attested according to the statute of 1834-'35. Held: The clause of revocation in the instrument of 1839 was not so independent of the dispositions contained in it, as to operate as a substantive declaration in writing revoking the will of 1838, but the revocation was made with a view to the new dispositions, and those being void for want of due attestation, the revocation is a nullity.

In the case of *Hylton vs. Hylton*, 1 Grat., 161, decided September, 1844, it was held: Evidence that a subsequent will had been made, and afterwards stolen from the testator, without any proof of its contents, and proof of his declarations after the will was stolen that he would die intestate, and leave his estate to be distributed according to the statute, is not sufficient evidence of the revocation of a former will.

In the case of *Appling vs. Eades' Administrators et als.*, 1 Grat., 286, decided November, 1844, it was held: A person having made a will, which he had in his possession, and on his death, the will not being found, in the absence of all proof that he, or any other person, had destroyed it, it is to be presumed to have been destroyed by himself.

In the case of *Malone's Administrator et als. vs. Hobbs et als.*, 1 Rob., 346 (2d edition, 366). On the trial of an issue whether a writing, admitted to probate as a will, was the will of the decedent or not, it appeared that the decedent had made a codicil to his will, and that the codicil was afterwards destroyed by his direction. The evidence tended to show that the will was written on one sheet of paper and the codicil on another; that the will was left with one person and the codicil with another; and that the will and codicil were with those persons respectively at the time the codicil was destroyed. The circuit court instructed the jury that if they believed from the evidence that the decedent, at the time of destroying the codicil, intended thereby to destroy or revoke the will, in that case the destruction of the codicil was a revocation of both the will and codicil. Held: This instruction was erroneous.

In the case of *Collup vs. Smith*, 89 Va., 258, decided July 6, 1892, it was held: By his will, executed in 1872, testator devised his real estate equally to his wife and his three children in fee. Having been annoyed with law-suits by his son-in-law, he executed a deed in 1887, conveying his real estate to a trustee in fee, for the sole benefit of his wife. Held: The deed was a revocation of the will.

SECTION 2519.

In the case of *Rudisill's Executor vs. Rodes et ux.*, 29 Grat., 147, it was held, September 27, 1877: Where a will which revokes a former will is destroyed by the testator, *animo revocandi*, with intention that the former will shall be his will, but he does not re-execute it, or make a codicil reviving it, though he retains it uncanceled, it is not revived by the destruction of the last will.

In the case of *Corr vs. Porter et als.*, 33 Grat., 278, decided July, 1880, it was held: No particular words are necessary to be used in a codicil to effect a re-publication of the will to which it is annexed. It is only necessary that it shall appear that the testator referred to and considered the paper as his will at the time he executed the codicil; and where this so appears, even though the codicil refers to personal property only, it may operate as a re-publication as to reality, even so as to pass after acquired lands. The effect of a re-publication is to bring down the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time.

SECTION 2520.

In the case of *Hughes vs. Hughes's Executor*, 2 Munf., 209, decided April 18, 1811, it was held: It seems that a deed of trust conveying all the property of the grantor to certain persons and their heirs "forever," with warranty, "nevertheless, upon special trust that they shall pay the profits to himself during his life," concluding with declaring its "true intent and meaning to be, that, at his death, everything therein contained between the parties should become null and void," is a conveyance to the trustees and their heirs of an estate for the life of the grantor only, and not a revocation of a previous will.

In the case of *King's Executors vs. Sheffey's Administrator*, 8 Leigh, 614, decided August, 1837. A testator gives to his wife during her life one-third of the rents and profits of certain property, consisting of houses and lots; to three sons each a small pecuniary legacy, after payment of his debts, which are to be paid out of his rents; and he directs his property to be sold after his wife's death, and devises two-fifths of the proceeds to the children of one daughter, two-fifths to another daughter, and the remaining fifth to a third daughter. The wife dies before the testator, and after her death the testator sells the property on credit, and dies the same year that the sale is made. On a bill to recover a fifth last devised, held: The alienation of the property revoked the devise of its proceeds.

SECTION 2521.

In the case of *Allen vs. Harrison et als.*, 3 Call, 289 (2d edition, 251), decided October 22, 1802, it was held: A will made

since the 1st of January, 1787 (when the act of 1785 took effect), may pass after acquired lands, if it evidently contemplates such property, but not otherwise.

In the case of *Kendall (Executor) vs. Kendall et als.*, 5 Munf., 272, decided November 30, 1816, it was held: The addition of a codicil to a will is not sufficient to operate as a devise of lands purchased by the testator between the date of the will and the date of the codicil, there being no words in the codicil indicating such to be the intention of the testator.

In the case of *Raines vs. Barker et als.*, 13 Grat., 128, decided February 29, 1856, it was held: Testator made his will in 1842, purchased a tract of land in 1849, and died in 1852. His will in respect to this land is to be construed as the law was prior to the Code of 1849. Testator, by his will, made in 1842, emancipates his slaves, and directs his executor to sell the land on which he lives, and another tract, which he specifies, and also certain stocks, which he names; all his household and kitchen furniture; all his stocks of all kinds; plantation tools, with every article of property belonging to him, except his wearing apparel; and after directing that when there is money enough collected from the proceeds of the sale, the negroes shall be sent to Africa and furnished plentifully with everything necessary for their comfort, he gives five hundred dollars to a nephew; and the balance of his estate, after paying all expenses, he wished to go to furnish the expense of carrying the negroes to Africa and furnishing them in a situation to live. A tract of land purchased after making the will does not pass under the devise.

In the case of *Gibson vs. Carrell*, 13 Grat., 136, decided February 29, 1856, it was held: Testatrix, by her will, made in 1837, when she possessed no real estate, gave two slaves to her daughter, M., and six to her son, S., and then says: "All the balance of my property, of every description, real or personal, I give and bequeath to my son, S." But if her daughter had a child or children, three of the slaves given to S. should go to them. Land afterwards acquired by the testatrix does not pass by the devise to S.

In the case of *Thorndike vs. Reynolds*, 22 Grat., 21, decided March 27, 1872, it was held, p. 32: The clause in the will of the husband giving the power to the wife must have been intended to take effect from its date; and so the will of the wife, as an execution of the power, will be intended to take effect from its date, though not to divest and pass the title in the lifetime of her husband and herself. The will of the wife was not revoked by the death of the husband, leaving the wife surviving him, and therefore it is not necessary for her to re-execute the will after his death.

SECTION 2522.

In the case of *Jones vs. Mason (Executor of Jones)*, 5 Rand.,

577, decided August, 1827, it was held: Where a legacy is given to a child, and afterwards an advancement is made to that child, such advancement shall be taken as a satisfaction of a legacy, but this presumption may be rebutted by evidence. The rule that the thing advanced must be *ejusdem generis* with the thing bequeathed may be controlled by evidence showing that it was the testator's intention that the one should be in satisfaction of the other.

In the case of *Kelly, etc., vs. Kelly's Executor*, 6 Rand., 176, decided March, 1828, it was held: Where a father, being indebted to his children, afterwards conveys property to them which is more than equal to the amount of the debt, this conveyance should be presumed to be in satisfaction of the debt if there are no circumstances to prove a contrary intention. Although the property conveyed and the debt are not *ejusdem generis*, the one may be a satisfaction of the other, if the intention of the testator be apparent that such should be the effect. In the case of *Moore vs. Hilton et als.*, 12 Leigh, 1, decided February, 1841, it was held: An advancement to a child made subsequent to a will is to be taken as a satisfaction of a legacy to that child, *pro toto* or *pro tanto*, according to its amount.

In the case of *Hansbrough's Executors vs. Hooe and Wife*, 12 Leigh, 316, decided April, 1841. Testator by his will devises two thousand acres of land, and bequeathes twenty-eight slaves and sundry bonds, amount not mentioned, and one-fourth of proceeds of sales of land not specifically devised, to his granddaughter Maria, and five other children of his son John, deceased, to be divided among them; and that one-fifth part of the general *residuum* of his estate shall be equally divided among the same persons; and by codicil provides that Maria's part shall be settled on her for her separate use for life, remainder to her children if any, and, if none, to the use of the other children of her father; after which, on the marriage of Maria, testator by marriage contract gives her four hundred acres, not parcel of the two thousand acres of land, nine slaves parcel of the twenty-eight slaves named in the will, and one thousand five hundred dollars in money, all to be settled on her for her use and the heirs of her body; but in the case of her death without issue, or in event of such issue as she may have not arriving to twenty-one years of age, or marrying, then to the heirs of her father. Held:

1. All the legacies of personal property to Maria were addeemed or satisfied by the gift to her in the marriage contract.

2. The devise of land to her is also addeemed or satisfied by the land portion given her by the contract.

In the case of *Strother's Administrator et als. vs. Mitchell's Executors et als.*, 80 Va., 149, it was held: Where one *in loco parentis* gives a legacy to a person, and afterwards advances in

the nature of a portion to the same person, such advancement will be deemed an ademption of the legacy. But where the gift is given before the making of the will, and the will does not charge it as an advancement, the court cannot so charge it in settling the estate.

In the case of *Dame's Executor vs. Lloyd*, 82 Va., 859, decided January 27, 1887, it was held: An advancement is the gift by anticipation of the whole or part of what it is supposed a child will be entitled to on the death of the giver intestate.

In the case of *Davies and Wife vs. Hughes*, 86 Va., 909, decided May 8, 1890, it was held: Testator bequeathed two-thirds of his land to his son and executor, and remainder to the children of his deceased son. Sale to be at executor's discretion. He kept possession and all the profits. The children lived with and served him, with no other compensation than their board. Held: Executor should be charged with rent for the children's portion.

SECTION 2523.

In the case of *Wood et ux. vs. Sampson's Executor et als.*, 25 Grat., 845, decided February 18, 1875, it was held: Testator gives a legacy to his wife, but she dies before him. The legacy will not sink into the *residuum* of the estate, but will pass to her issue.

SECTION 2524.

In the case of *Frazier, etc., vs. Frazier's Executors, etc.*, 2 Leigh, 642, decided April, 1831, it was held: The rule that all legacies which fall by lapse or otherwise, fall into the *residuum* and go to the residuary legatees, applies to specific or pecuniary legacies, but not to the subject of the residuary legacy itself.

In a suit in chancery the defendants are in default; yet the record or proceedings in another suit *inter alios* is not competent evidence against them.

SECTION 2525.

The case of *Aylett's Executor et als. vs. Philip Aylett*, 1 Wash., 300, decided at the fall term of 1794, upheld the common law doctrine on this point and left the testator intestate as to his leasehold lands; hence the statute.

SECTION 2526.

In the case of *Machir et als. vs. Funk et als.*, 18 Southeastern Reporter, 197, decided November 9, 1893. E. M. by second clause in her will devises her property equally to P. M., Catherine F., and P. M. trustee for the separate use of Harriet M. for life, remainder to her children, and, in default of issue with power of appointment to said P. M. and Catherine F., Harriet died, leaving said P. M. and C. F. surviving her. She made a will disposing of her whole estate, but made no mention either

of the power above or of the property described under E. M.'s will. Her will contained a general residuary clause. Held: That under Section 2526, Code 1887, providing that a bequest shall operate as an execution of a power, there was a sufficient appointment under the power conferred in E. M.'s will.

By third clause of said E. M.'s will it is provided that in the event of said Catherine F.'s death without issue her share goes to P. M., and P. M. trustee for Harriet. Held: When Catherine died without issue, that her part was equally divided between P. M. and the appointee under Harriet's will, as the latter acquired title thereto under Section 2526, Code of 1887.

Where a power is authorized to be executed on a contingent event it may, unless contrary to the intention of the party creating it, be executed before the event, though it cannot take effect until the contingency happens.

SECTION 2528.

In the case of *Yerby vs. Yerby*, 3 Call, 334 (2d edition, 289), decided April 20, 1803, it was held: An implied revocation of a will may be rebutted by circumstances. An expression of intention to revoke a will *in futuro* does not revoke the will unless the alteration be made; much less will the intention to alter a will be presumed to revoke it.

In the case of *Armistead et als. vs. Dangerfield et ux.*, 3 Munf., 20, decided November 12, 1812, it was held: A devise in general terms to testator's children does not comprehend a posthumous child so as to prevent it from claiming under the act of assembly, as pretermitted by the will. *Quære*: Does the testator's knowledge at the time of making the will that his wife is pregnant make any difference in the case?

A posthumous child unprovided for by settlement, and pretermitted by the last will of its father, is entitled to a share of the real estate, notwithstanding such child be a daughter, and it appear from the will that the testator intended to give all his lands to his sons.

Such posthumous child is entitled to such share of the real and personal estate as it would have been entitled to if the father had died intestate, including profits of lands, hires of negroes, and interest and profits of other personal estate.

The portion of such posthumous child is not to be raised by a division of the estate into equal parts, but by a proportionate contribution by the devisees and legatees, and those claiming under them.

Purchasers from the devisees and legatees are not exempted from contributing to make up the portion of such posthumous child by their having purchased without notice of such a claim.

In the case of *Savage vs. Mears*, 2 Rob., 570, decided Decem-

ber, 1843. A testator having six children, four the issue of a deceased wife, and two the issue of his present wife, devises to his two sons each a tract of land described by metes and bounds, directs that all his other lands shall be equally divided among his four daughters and their heirs, and then devises and bequeaths as follows: "My will is, that my negroes be apportioned equally among my six children, under the following regulations to say: that the one-third of them which shall be allotted to my wife as her dower shall be the full part of the two children I had by her, and also that the several negroes I have from time to time furnished any of my children be their right, but that they shall be each appraised and accounted for in their part of the devision of my slaves.

Lastly, I desire that all the residue of my estate, not before specifically given, be equally divided amongst my six children.

The will is made the 31st of December, 1792, and the testator dies in 1794, prior to the 28th of October, between which periods, to-wit: in November, 1793, a third child of the testator by his second wife is born. Held:

1. According to the authority of *Yerby vs. Yerby*, 3 Call, 334, the birth of such third child is not a revocation of a will.

2. As the will was published, and the testator died before the act of 1794 providing for pretermitted children, the case does not fall within the operation of that statute.

3. Upon the true construction of the will, the after-born child has no claim to share in the division of the dower slaves after the death of the widow.

SECTION 2529.

In the case of *Croft et als. vs. Croft, Executor, etc.*, 4 Grat., 103, decided July, 1847, it was held: By the Act 1, Rev. Code, Chapter 104, Section 11, p. 377, a devise or bequest, whether of real or of personal estate, to an attesting witness to a will, without whose testimony the will may not be otherwise proved, is void.

In the case of *Martz's Executor vs. Martz's Heirs*, 25 Grat., 361, decided October 2, 1874, it was held: Upon the proceeding for the probate of a will, J., who is the nominated executor and propounder of the paper, and also a devisee and legatee under it, is a competent witness to sustain the probate.

A will is not a contract, and an executor or legatee is not a party to it in the sense of the statute.

One party to a suit is incompetent as a witness on account of the disqualification of the other party only in a case where he was a party to the transaction which is the subject of the suit or proceeding, and the other party to it is dead, insane, or incompetent from some legal cause. Where the objection is to the

competency of the witness, and the objection is sustained, it is not necessary to state in the exception what the party offering him expects to prove by him.

If an exception to the ruling of the court excluding a witness is taken at the time, the bill of exception may be prepared and signed and sealed after the verdict and judgment; and if the counsel of the parties do not agree as to the fact whether the exception was taken at the time, the court, not remembering, may certify the facts; and, the entry of the clerk in the memorandum stating that the exception was taken on the trial, the court was right in certifying the facts, and the appellate court may consider the question raised by the bill of exceptions.

SECTION 2531.

In the case of *Coalter's Executor vs. Bryan et ux. et als.*, 1 Grat., 18, decided May, 1844, it was held: An executor claiming no interest as devisee or legatee under the will, and not having acted in such a way as to subject him to a decree for costs, is a competent witness between parties claiming the estate he represents; though he is a party defendant in the suit; though he has settled his accounts, showing large balances in his hands, and though he is entitled to commissions upon his receipts and disbursements. Upon directing the issue *devisavit vel non*, the court should, if moved so to do by the party desiring his testimony, direct the executor, if a competent witness, to be received and examined before the jury upon the trial of the issue.

SECTION 2532.

In the case of *Raines vs. Barker*, 13 Grat., 128, decided February 29, 1856, it was held: Testator made his will in 1842, purchased a tract of land in 1849, and died in 1852. His will, in respect to this land, is to be construed as the law was prior to the Code of 1849.

A testator, by his will, made in 1842, emancipates his slaves, and directs his executors to sell the land on which he lives, and another tract which he specifies, and also certain stocks which he names, all his household and kitchen furniture, all his stocks of all kinds, plantation tools, with every article of property belonging to him, except his wearing apparel; and after directing that when there is money enough collected from the proceeds of the sale, the negroes shall be sent to Africa and furnished plentifully with everything necessary for their comfort, he gives five hundred dollars to a nephew; and the balance of his estate, after paying all expenses, he wished to go to furnish the expense of carrying the negroes away and furnishing them in a situation to live. A tract of land purchased after making the will does not pass under the devise.

SECTION 2533.

In the case of *Smith vs. Jones*, 6 Rand., 36, decided October, 1827, it was held: A court of probate occupies the place of a jury as to facts, and ought to find all proper inferences from facts proved.

In the case of *Commonwealth vs. Hudgin*, 2 Leigh, 248, decided June, 1830. A resident of Kentucky dies intestate there, having no estate in Virginia, but a claim on this Commonwealth for money. Held: The Circuit Court of Henrico county, wherein is the seat of government, has jurisdiction to grant administration of such decedent's estate.

In the case of *Ex-parte Barker*, 2 Leigh, 719, decided June, 1830, it was held: Letters of administration granted by a court having no jurisdiction to grant them are merely void; and the court having competent jurisdiction to grant the administration may proceed to grant it, though the letters of administration before improperly granted have not been revoked.

In the case of *Fisher vs. Bassett*, 9 Leigh, 119, decided December, 1837. A county or corporation court grants administration of the estate of a foreigner, who died abroad, and who had no residence in the county or corporation at the time of his death, and had no estate of any kind there, so that in truth the state of facts is not such as to give the court jurisdiction to grant administration in the particular case according to the provisions of the statute; yet held: That such a grant of administration is not a void but only a voidable act, and therefore rightful acts of, and fair dealings with, the administrator, consummated before his administration is revoked or superseded, cannot be impeached.

Quære: Whether if a county or corporation court grant administration of a decedent's estate in a case when the true state of facts is not such as to give such court jurisdiction to grant administration, and yet such grant is only voidable, not void, the General Court can make a valid grant of administration until the former irregular grant by the county or corporation court shall have been duly revoked or superseded?

In the case of *Burnley vs. Duke*, 2 Rob., 102, decided May, 1843. Pending a suit in chancery by legatees against an executor to recover their legacies, the executor died. Process was awarded to revive the suit against his administrator; and the administrator dying, process was issued and an order entered to revive the suit against his representative. But afterwards that process was quashed and that order set aside as early as 1811, and then, by consent of the parties, the suit was revived against the administrator *de bonis non* of the executor, and by like consent it was entered that the cause was not to abate by the death of any of the parties. A personal decree was obtained in 1818 by the legatees against

the administrator *de bonis non*, from which he appealed. Pending the appeal he died. Whereupon, though the two former grants of administration on the executor's estate had been by the court of Orange, the court of Hanover now granted administration on the same estate, not in the form of a grant *de bonis non*, but of an original grant. At the instance of the legatees, a *scire facias* issued to revive the appeal against this new administrator (calling him administrator *de bonis non*), which was duly executed, and in 1822 the decree affirmed. In the caption of the decree of affirmance, the name of the administrator *de bonis non*, against whom the decree of the court below was entered, did not appear as a party, but the new administrator was mentioned therein as appellant. In 1823 a bill of revivor and supplement was filed in the court below, convening before the court, and seeking to charge the representatives of the first administrator and of the first administrator *de bonis non*. It turned out that after the *scire facias* to revive the appeal had been executed, and before the decree of affirmance, the new administrator had, in the character of administrator *de bonis non*, brought suits and obtained decrees for the assets of the executor's estate in the hands of the representatives of the first administrator, and of the first administrator *de bonis non*, against those representatives respectively, without opposition on their part; and the decrees so obtained were soon after satisfied. Those decrees were in 1820 and 1821, about six years before the decision in *Wemick's Administrator vs. McMurdo*, 5 Rand., 51. Held: 1. That the grants of administration by the court of Orange to the first administrator and to the first administrator *de bonis non*, never having been reversed or revoked, must be considered valid grants, which conferred upon those administrators respectively all the power of rightful administrators.

2. That when the grant to the first administrator *de bonis non* expired by his death, and there was no conflicting right in existence, it was competent for the court which might in the first instance rightfully have exercised jurisdiction, to act on the subject; and Hanover court having acted when there was no such conflicting right, and its grant not having been reversed or revoked, that grant is good and valid, and the sureties in the administration bond taken in Hanover court are liable thereupon.

3. That as the legatees after the death of the first administrator dismissed his representative from the suit, it was lawful for that representative to pay over to the administrator against whom the legatees were proceeding, the unapplied assets of the executor's estate; and such payment made in good faith and under the sanction of a decree of a court of competent jurisdiction, is a complete protection to such representative against the legatees as to the money so paid.

4. That the decree in favor of the legatees against the administrator *de bonis non* was personal, only in respect to the assets in his hands, and (it being nowhere alledged that he had converted or wasted the same) such unapplied assets coming to the hands of his representatives must in equity be regarded as unadministered assets of the executor's estate; and the representative of the administrator *de bonis non* having in good faith and in pursuance of the decree of a court of competent jurisdiction, paid over the said assets to the administrator against whom the legatees revived the appeal, such payment protects the estate of the administrator *de bonis non* from the claims of the legatees.

5. That for the assets so paid over by the representatives of the first administrator and of the administrator *de bonis non*, the administrator to whom such payment was made and the sureties in his official bond are liable.

6. That the dismissal of the bill as to the representatives of the first administrator and of the administrator *de bonis non*, should be without costs.

In the case of *Hutcheson vs. Priddy*, 12 Grat., 85, decided January, 1855, it was held: If the county court commits an estate to the sheriff for administration before the expiration of three months from the death of the testator or intestate, the act is not void but voidable. In such a case the county court having general jurisdiction to grant administration, the act of the court in committing the estate to the sheriff cannot be questioned in any collateral proceeding.

In the case of *Ballow vs. Hudson*, 13 Grat., 672, decided February 24, 1857, it was held: A paper is propounded for probate to the County Court of C. as the will of B., and is rejected on the ground that B. was incompetent to make a will. Afterwards the paper is propounded to the Circuit Court of C., and that court, with knowledge that it had been rejected in the County Court, admits it to probate. The sentence of the County Court is conclusive against the will, and the sentence of the Circuit Court is a nullity.

In the case of *Andrews vs. Ivory et als.*, 14 Grat., 229, decided February 16, 1858, it was held: Administration granted where the deceased lived and died out of the State, and left no estate within, is not void.

An administrator appointed in Virginia, whose intestate lived and died in North Carolina, and left no estate in Virginia, goes to North Carolina, and without qualifying there, takes possession of the assets and brings them to Virginia. His sureties in Virginia are liable for his faithful administration of those assets.

In the case of *Conolly vs. Conolly et als.*, 32 Grat., 657, decided January, 1880, it was held, pages 664-65: The court in which a bill is filed under the statute to impeach or establish a

will is not a mere court of probate, but something more. It is a court of equity, and though its powers over the subject confided to it are limited, it may, on a proper bill, review and correct errors in its proceedings after final decree in the cause.

The present state of the law of probate in Virginia is, that a sentence pronounced by a court having jurisdiction, whether it be a sentence admitting a paper to probate or excluding it from probate, as long as it remains in force binds conclusively, not only the immediate parties to the proceeding in which the sentence is had, but all other persons and all other courts; and the principle applies as well to a sentence represented by a verdict of a jury and decree thereon in the proceeding by bill under the statute, as to a sentence pronounced in any other authorized probate proceeding.

In the case of *Norvell et als. vs. Lessueur et als.*, 33 Grat., 222, decided April, 1880, it was held: It is a settled rule of law of the State of Virginia, that the admission of a will to probate generally is conclusive of its validity, both as a will of realty and personalty, which cannot be drawn in question, except on an issue *devistavit vel non* within the time and mode prescribed by the statute.

A case in which a will, good as a will of personalty, but not good as a rule of realty, though admitted to probate generally. Held: Upon the action of the same court, between the same parties, on the same day, treating the probate as only of a will of personalty, and this acted on for forty years, that the order admitting the order to probate will be considered as only a probate of a will of personalty.

SECTION 2534.

In the case of *Wynn's Executor vs. Wynn's Administrators*; *Wynn's Administrators vs. Wynn's Executor*, 8 Leigh, 264, decided April, 1837, it was held: When a court of probate under the 24th Section of the statute concerning wills appoints a person to collect and preserve the estate of a decedent until administration be granted, such appointee cannot properly be sued on a bond of the decedent. If he be sued and judgment be rendered against him, a *scire facias* upon the judgment will not lie after administration is granted against the administrator, nor will the judgment be any bar to a new action against the administrator upon his decedent's bond.

The reference to 9 Leigh, 242, is an error, nothing in point appearing there.

In the case of *Helsley et als. vs. Craig's Administrators et als.*, 33 Grat., 716, decided September, 1880. H. is appointed curator of the estate pending a contest over C.'s will, and whilst curator collects an ante-war debt well secured in Confederate

money. C.'s will having been established, H. qualifies as executor, but is afterwards removed, and the administrator *de bonis non*, with the will annexed, files a bill against H., as curator, and his sureties, seeking to subject them to the payment of said debt, and the defendant demurs to the bill. Held: The administrator *de bonis non*, with the will annexed, may maintain the suit against the curator and his sureties under the statute, Code of 1873, Chapter 118, Section 24.

SECTION 2536.

In the case of *Rice vs. Jones*, 4 Call, 89, decided November, 1786, it was held: A will devising lands in Virginia may be proved in this State, although it may have been declared void in any other of the United States.

In the case of *Burnley's Administrator vs. Duke et als.*, 1 Rand., 108, decided March, 1822, it was held: Where a testator leaves two wills, one in Virginia and the other in England, the English will being the last in date, and his executor takes out letters of administration on the posterior will in England, this does not *ipso facto* repeal letters of administration which have been granted in Virginia on the first will; the English executor must first qualify by giving bond and security as the law directs.

In the case of *Ex Parte Povall*, 3 Leigh, 816, decided by the General Court, July, 1831, it was held: When an authenticated copy of a will proved in another or foreign State is offered for probate here, if the probate show that the will has been so proved there, as that if proved in like manner here it could only be admitted to probate here as a will of personalty, it shall be so admitted; but if the proof in the foreign court of probate be such as if taken here would suffice to establish it as a will of lands, it shall be admitted to probate here also as a will of lands.

SECTION 2537.

In the case of *Nalle's Representatives, etc. vs. Fenwick*, (*Surviving Partner, etc.*), 4 Rand., 585, decided December, 1826, it was held: It seems that a will of lands where two of the three attesting witnesses reside out of the State, and cannot be procured by any legal means, may be proved by the remaining witness, he proving the attestation of the absent witnesses. The mode pointing out in the act "prescribing the method of proving certain wills," gives an additional mode of proceeding, and does not deprive a party of any of which he might have pursued before.

In the case of *Pollard's Heirs vs. Lively*, 2 Grat., 216, decided July, 1845, it was held: This court will presume that a deposition has been taken upon a regular commission and notice, where no

objection has been raised to it on that ground in the court below.

A person taking a deposition under a regular commission and notice, certifies that the deposition was taken before him, and signs his name to the certificate, with the addition of the letters J. P. Held: It sufficiently appears he is a justice of the peace.

A witness giving his deposition *de bene esse*, states in it that he is unable, from his age and health, to attend the court. This is sufficient to authorize his deposition to be read upon the trial of the cause in which it is taken.

In the case of *Nuckol's Administrator vs. Jones*, 8 Grat., 267, decided October, 1851. In a case of probate, the deposition of an aged witness taken *de bene esse* is allowed to be read, upon proof either by witnesses or by his own affidavit of his inability to attend the court.

In a case of probate a witness unable to attend the court, is examined as to the handwriting of a testamentary paper which had been shown to him by the propounder of the will, but which was not before him at the time he gave his deposition. Held: That the testimony is admissible, its weight depending upon the certainty of the proof that the paper propounded for probate is the paper that was shown to the witnesses.

In the case of *Septoe vs. Read*, 19 Grat., 1, decided October 27, 1868, it was held: A commission to take deposition, being in all other respects correct, the omission, from inadvertence of the clerk issuing it, to sign his name to it at the bottom, will not vitiate it.

Though the commissioner taking a deposition does not give the names of the parties in his certificate, or state that it was taken in pursuance of a commission, yet, as the names are given in the caption to the certificate, and the commission is returned with the deposition and attached to it, the certificate is sufficient.

The certificate of a commissioner who takes a deposition does not state that it was taken pursuant to notice, but though the deposition is excepted to on the ground that there was no commission, and that the certificate does not state the parties to the suit in which it is taken, no objection is taken to it in the court below for want of notice. Although there is no notice, or evidence of notice in the record, the objection for want of notice cannot be taken in the appellate court.

SECTION 2542.

The reference to 10 Grat., 259, is an error.

In the case of *Tucker et als. vs. Sandidge*, (Curator), 82 Va., 532, decided November 11, 1886. In a proceeding at law to contest paper-writing propounded by the executor S. for probate, a jury was empaneled to ascertain whether the paper-

writing was the last will and testament of T. The verdict was that it was not. On motion of the propounder, the verdict was set aside, and a new trial awarded. Contestants appealed. Held: The appeal was improvidently awarded, and must be dismissed, and the case remanded for trial and final order. This is the case cited from 11 Va. Law Journal, 107.

SECTION 2544.

In the case of *Ford vs. Gardiner*, 1 H. & M., 71, decided October 30, 1806, it was held: Upon an issue from a court of chancery to try the validity of a will, the court ought to give directions respecting the reading of the papers filed in the cause, otherwise the omission to read any of them on the trial of such issue will not be ground for reversing the proceedings if the court of chancery refuses to grant a new trial when the verdict in such case is certified to the court sitting in chancery, and a new trial refused; the allegations relative to what passed at the trial, stated in the bill of exceptions to the opinion of the court in refusing the new trial, if no proof of the truth of these allegations appear on the record, are not to be taken as admitted to be true by the courts signing and sealing.

After the probate of a will, any person interested who had not appeared and contested such probate, may, within seven years (now two years), file a bill in equity to contest its validity, and any such person, even though he had appeared and contested the probate, may file a bill as aforesaid on the ground of fraud, to the existence of which he was a stranger at the time of the probate.

A county court sitting in chancery has the right to direct an issue to be tried on the common law side of the same court.

An issue to try the validity of a will has the same effect as an issue to try whether the writing in question is the will or not.

In the case of *Vaughan vs. Doe on demise of Green*, 1 Leigh, 287, decided June 18, 1829, it was held: Will disposing of real and personal estate, but not duly executed as to the real, was admitted to probate by county court in general terms 1785, and never contested. Held: This was full probate, the heir could only have contested the will by bill in chancery, within seven years, and he, instead of contesting it, having taken as devisee under it, it must now be regarded as a complete will of lands.

In the case of *Street vs. Street*, 11 Leigh, 498 (2d. edition, 521), decided January, 1841. A will devising or charging lands is admitted to full probate, without proof appearing in the sentence of probate that it was duly attested by witnesses, or that it was wholly written by the testator. Held: That according to our

laws and course of judicial decisions, the will cannot be controverted as a will of lands after the lapse of seven years from such full probate. But if the sentence of probate distinctly shows that the will was not duly executed to pass real estate. *Quere*: Whether the sentence of probate, though general, ought not in such case to be understood in the restricted sense of declaring the instrument a good will of personalty only?

In the case of *Malone's Administrator et als. vs. Hobbs et als.*, 1 Rob., 346, (2d edition, 366), decided November, 1842. Where a will has been admitted to probate, and a person interested appears within seven years afterwards and files a bill in chancery under the Act 1, Rev. Code of 1819, Chapter 104, Section 13, it is sufficient in such bill to aver in general terms that the writing of which probate has been received is not the will of decedent.

An answer to a bill contesting the validity of a will states that some of the plaintiffs had accepted legacies and devises under the will; and the fact appears to be so by exhibits filed with the answer. After verdict and decree against the will, the objection is taken in an appellate court, that those parties had precluded themselves from disputing the validity of the will, and that as they are improperly joined with the other plaintiffs, the suit cannot be sustained. Held: The objection will not avail.

On the trial of an issue whether a writing, admitted to probate as a will, be the will of the decedent or not, the evidence against the will consists of statements by witnesses of what a legatee told them had passed on one occasion when he and the decedent were together. That legatee is one of many defendants, and it does not appear that he refused to testify. The admissibility of such evidence is questioned before the appellate court by counsel, but not decided.

In the case of *Coalter's Executor et als. vs. Bryant et ux., et als.*, 1 Grat., 18, decided May, 1844, it was held: Upon a bill to contest the validity of a will which has been regularly admitted to probate, the function of the suit is exhausted when the question is decided; and if the will is declared invalid and null, it is not competent for the court to proceed in that cause to make any farther decree.

A person acting as executor is not to be made a party in his own right to a bill filed to contest the validity of a will under which he is acting.

In the issue *devisavit vel non*, the party sustaining the will is the plaintiff, and entitled to the opening and conclusion of the case before the jury; and the party contesting the will is the defendant, and this though the contestant may propose to

admit on the record a *prima facie* case in favor of the will.

When a party has interests under and against a will, he may be authorized by the court to choose whether he will be plaintiff or defendant in the issue.

In the case of *Wills vs. Spraggins*, 3 Grat., 555, decided January, 1847, it was held: The sentence of a court of probate fairly obtained and pronounced upon, the merits by which a paper propounded by a will by the nominated executor is rejected in a proceeding in which some of the next of kin interested to defeat it are parties defendants, is conclusively binding upon a legatee in said paper, though he was an infant at the time, and no party to the proceedings, and the paper cannot be again propounded by the legatee.

In the case of *Ballow vs. Hudson*, 13 Grat., 672, decided February 24, 1857, it was held: A paper is propounded to the county court of C. as the will of B., and is rejected on the ground that B. was incompetent to make a will; afterwards the paper is propounded for probate to the Circuit Court of C., and that court, with knowledge that it had been rejected in the county court, admits it to probate. The sentence of the county court is conclusive against the will, and the sentence of the circuit court is a nullity.

Bill to set aside a will states the facts showing the probate is a nullity, but asks for an issue *devisavit vel non*, and for general relief. The court may disregard the prayer for an issue, and give the proper relief under the prayer for general relief.

In the case of *Lamberts vs. Cooper's Executor et als.*, 29 Grat., 61, decided September, 1877, it was held: On the trial of an issue of *devisavit vel non*, if one of the parties object to the admission of a person to testify, on the ground of interest; or if objection is made to the admission of evidence of the character of a witness who had testified, on the ground that no proper foundation had been laid for its introduction; and the objections are overruled, and the witness and the evidence is admitted, and the objector does not except at the time, or give notice of his intention to except before the verdict is rendered, he waives the objection, and cannot rely upon it upon a motion for a new trial. The same rule applies upon the trial of such an issue as implies on a trial at common law.

Upon a motion to set aside the issue, on the ground that the verdict was contrary to the evidence, the court overrules the motion and makes a decree according to the verdict, and the party moving files a bill of exceptions to the refusal of the court to set aside the verdict, and all the evidence is set out in the bill of exceptions. The appellate court will reject all the parol evidence of the exceptor which is in conflict with that of

the other party; and if, upon the evidence of the appellee and written evidence of the appellant, the case is in favor of the appellee, the decree will be affirmed.

The attesting witnesses of a will who are introduced to prove a will was not properly executed, or to the incapacity of a testator, will not be excluded; but their evidence will be received with much suspicion.

Though the statute requires at least two witnesses to a will, it may be proved by one of them, he proving the attestation of the other.

In the case of *Conolly vs. Conolly et als.*, 32 Grat., 657, decided January, 1880, it was held: The court in which a bill is filed under the statute to impeach or establish a will is not a mere court of probate, but something more. It is a court of equity, and though its powers over the subject confided to it are limited, it may, on a proper bill, review and correct errors in its proceedings after final decree in the cause.

The present state of the law of probate in Virginia is, that a sentence pronounced by a court having jurisdiction, whether it be a sentence admitting a paper to probate or excluding it from probate, as long as it remains in force binds conclusively not only the immediate parties to the proceeding in which the sentence is had, but all other persons and all other courts; and the principle applies as well to a sentence represented by a verdict of a jury and decree thereon in the proceeding by bill under the statute, as to a sentence pronounced in any other authorized probate proceeding.

In the case of *Norvell et als. vs. Lessueur et als.*, 33 Grat., 222, decided April, 1880, it was held: It is a settled rule of law of the State of Virginia, that the admission of a will to probate generally is conclusive of its validity, both as a will of realty and personalty, which cannot be drawn in question, except on an issue *devisavit vel non* within the time and mode prescribed by the statute.

A case in which a will, good as a will of personalty but not good as a rule of realty, though admitted to probate generally, held: Upon the action of the same court, between the same parties on the same day, treating the probate as only of a will of personalty, and this acted on for forty years, that the order admitting the order to probate will be considered as only a probate of a will of personalty.

In the case of *Hartman vs. Stickler*, 82 Va., 225, decided July 8, 1886, it was held: On motion for new trial of issue, *devisavit vel non*, where the certificate is of the evidence, and not of the facts, the verdict must stand, unless, after rejecting all the exceptor's parol evidence, and giving full force and credit to the adverse party's, the decision of the court below shall appear

to be wrong. This is the case quoted from 10 Va. Law Journal, 525.

In the case of *Kirby vs. Kirby*, 84 Va., 627, decided March 15, 1888, it was held: Upon a bill filed under this section to impeach or establish a will, the court can exercise only the special and limited powers conferred upon it by the statute; it can only ascertain by a jury trial, whether the paper in question is or is not the will of the decedent; it can go no further, and cannot make an order respecting his estate; and a decree appointing a receiver to take charge of the estate *pendente lite* is *ultra vires* and void.

SECTION 2546.

For 1 Grat., 18 and 19, see *Coalter's Executors et als., supra*, Section 2544.

CHAPTER CXIII.

SECTION 2549.

In the case of *Blunt vs. Gee*, 5 Call, 481, decided October, 1805. C. N. in 1788, devised a tract of land to C. N. B., and all the residue of his lands to the testator's son, J. N. To his wife, M. N., the use of all the said residue of his lands for the benefit of his children E. N., J. N., and S. N., during her life or widowhood, or until his son, J. N., came of age, when his wife was to have the use only of the plantation whereon he lived. He then devised her the use, during her life or widowhood, of all the rest of his estate to make use of for his children E. N., J. N., and S. N. The wife was entitled to the use of the whole of the subjects devised to her as aforesaid for the maintenance of herself and the children during her widowhood, without accountability, and upon her second marriage her last husband was entitled to compensation for board of the children from that time. And as J. N. attained to twenty-one years of age, and then died intestate and without issue, his whole estate was decreed to be divided as follows: To his mother two-seventh parts, to his sisters of the whole blood two-seventh parts each, and to his brother of the half-blood one-seventh part, but his other half-sister, not born at his death, was entitled to no part thereof. And as S. N. died under age, without issue, her lands devised from her brother, J. N., were decreed to be divided thus: To her mother one-third, to her sister of the whole blood one-third, to her brother of the half-blood one-sixth, and to her sister of the half-blood one-sixth.

In the case of *Garland vs. Harrison*, 8 Leigh, 368, decided May, 1837, it was held: Under the statute of Virginia directing the course of descents, bastards are capable of transmitting inheritance on the part of their mother, and where a bastard dies intestate, leaving no children or descendants, but leaving his

mother surviving and two bastard brothers by other fathers, the estate will pass to the mother and the two bastard brothers.

In such case the two bastard brothers, being regarded as of the half-blood only, will each inherit only half so much as the mother.

SECTION 2550.

In the case of *Davis vs. Rowe*, 6 Rand., 355, decided May, 1828, it was held: The act of descents entirely repealed and abrogated the common law course of descents, and all the principles thereof. If an intestate dies without children, or their descendants without a father, mother, brother, or sister, but having had a brother and a sister, both of whom died before him, leaving a niece, the only child of the brother, and two nephews, and two nieces, the children of the sister, the real estate of the intestate will descend, and the personal estate be distributed to all of these nieces and nephews *per capita* and not *per stirpes*, they being all in the same degree of consanguinity to the intestate.

In such case the estate will not be divided into moieties, to be given one moiety to the child of the brother, according to the common law doctrine of *jus representationis*, and the other moiety to the four nephews and nieces, as representing their mother, but it will be divided into five equal parts, one to each of the nephews and nieces, each one taking *jure proprio*.

If in such case the two nieces (children of the deceased sister) be dead before the intestate, living, the two nephews and the niece (the child of the brother), and one of those deceased nieces has left two children, and the other six children, the estate will still be divided into five parts, of which one part will be allotted to the niece (the daughter of the brother), another part to each of the nephews, one other part to the two children of the deceased niece, as representing their mother, and the other fifth part to the six children, as representing their mother, and this on the principle contained in this section, that if a part of those in the same degree be dead, and a part living, the issue of those dead shall take *per stirpes*, that is, the share of their deceased parent.

Although this section does not provide in terms for the case of a brother and sister dying before the intestate, and leaving an unequal number of children, and does not in words declare what portion of the inheritance shall descend to those children, yet the spirit of the section, taken in connection with the first and fourth sections of the entire act, justifies the construction that they will take *per capita*.

It is a just inference from this decision, that if a grandfather die intestate, having had two children, A. and B., both of whom died before their father, but A. leaves one child, and B. leaves six children, the estate of the grandfather will descend to all the

grandchildren equally, and the child of A. will only get a seventh part, although if A. had been alive, and the other brother dead, A. would have got a moiety, and the other moiety would have been divided between the six children of B., and so of all other cases of like kind.

In the case of *Ball et als. vs. Ball et als.*, 27 Grat., 325, decided March 23, 1876, it was held: B. dies intestate, leaving as her heirs five children of her deceased son, S., six children of her deceased son, W., and a grandchild of W., the only child of a deceased daughter of W. B.'s real estate is to be divided into twelve equal parts, of which the five children of her son, S., the six children of her son, W., and the grandchild of W., representing her deceased mother, are each to take one part.

SECTION 2551.

In the case of *Jacksons vs. Sanders and Wife et als.*, 2 Leigh, 109, decided March, 1830. A citizen dies seised of lands in Virginia, leaving a brother who is a citizen, a sister who is an alien, yet living, children of the alien sister, who are citizens, and grandchildren of the alien sister, who are citizens, though their fathers as well as their grandmothers are aliens. Held: Under the statute of descents, the descendants of the alien sister take by descent one moiety to be divided among them *per stirpes*, and the citizen brother the other moiety.

In the case of *Hannon et als. vs. Honnihan et als.*, 85 Va., 429, decided September 20, 1888, it was held: By this section it is provided that, in making title by descent, it shall be no bar to a party that any ancestor (whether dead or living) through whom he derives his descent from the intestate is or hath been an alien.

SECTION 2552.

In the case of *Doe on demise of Thompson vs. Anderson*, 4 Leigh, 118, decided January, 1833. Testator devises real and personal estate to his natural daughter, P. A., to her and her heirs forever; and if she should die leaving no child, the estate before given should return into his estate, and be divided among his legitimate children; but should she leave a living child or children, then the estate should be heired by him, her or them, as the case might be. Held: P. A. took by the will an estate-tail in the lands devised to her, which the statute for abolishing entails converted into a fee-simple, and barred the contingent remainder limited on the estate-tail, the devisee, P. A., having left illegitimate children living at her death, capable of inheriting and of transmitting inheritance on the part of their mother in like manner as if they had been her lawful children, by the provision of the statute of descents, 1 Rev. Code, Chapter 96, Section 18.

In the case of *Garland vs. Harrison*, 8 Leigh, 368, decided May, 1837, it was held: Under the statute of Virginia directing the course of descents, bastards are capable of transmitting inheritance on the part of their mother, and where a bastard dies intestate, leaving no children or descendants, but leaving his mother surviving and two bastard brothers by other fathers, the estate will pass to the mother and the two bastard brothers. In such case the two bastard brothers being regarded as of the half-blood only, will each inherit only half so much as the mother.

In the case of *Hepburn vs. Dundas*, 13 Grat., 219, decided March 7, 1856, it was held: There are three negroes, children of the same mother, born slaves, and the mother and children are afterwards emancipated. One of the three dies, having acquired real estate, intestate and without children. The mother is dead. The other two take the estate as heirs of the deceased sister.

In the case of *Bennett et als. vs. Toler et als.*, 15 Grat., 588, decided April, 1860, it was held: Upon a devise to a daughter for life, and at her death the property to be equally divided among her children, an illegitimate child of the daughter will take with her legitimate children

SECTION 2553.

In the case of *Sleigh vs. Strider*, 5 Call, 439, decided April, 1805, it was held: A child born out of wedlock in the year 1774 was legitimated by the subsequent marriage and acknowledgment of the parents in 1776.

In the case of *Rice et als. vs. Efford et als.*, 3 H. & M., 225, decided November 16, 1808, it was held: An illegitimate child, born before the 1st of January, 1787, of parents who intermarried also before that period (the father, who died in 1799, having recognized the child by his will as his own, though born before wedlock), is entitled to an equal distribution of the father's unbequeathed estate with his other children born after the marriage.

In the case of *Ash vs. Way's Administrators et als.*, 2 Grat., 203, decided July, 1845, it was held: A bastard marries, and dies, leaving a legitimate child; and then the parents of the bastard marry. The father of the bastard, before the father's marriage, and in the lifetime of the bastard, recognized her as his child, and so recognizes her after his marriage, which is after her death. Held: The child of the bastard may inherit through his mother from her father.

For the reference to 15 Grat., 588, see the case of *Bennett et als. vs. Toler*, *supra*, Section 2552.

SECTION 2554.

In the case of *Heckert et als. vs. Hile's Administrator et als.*, 18 Southeastern Reporter, 841, decided January 11, 1894, it was held: Under Code of 1887, this section, declaring that the issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate, children by the second marriage of a man whose wife had left him and gone to another State are legitimate, though born before the first marriage was dissolved.

SECTION 2556.

In the case of *Browne et als. vs. Turberville et als.*, 2 Call, 390 (2d edition, 329), decided October 24, 1800. W., of full age, died intestate, without issue and unmarried, seised and possessed of an estate partly derived by devise from his father, G. W., and partly by descent from his brother, R. W., leaving an uncle and three cousins, children of a deceased uncle of the whole-blood on the mother's side, and an uncle of the half-blood, likewise on the mother's side, and leaving also two relations on the father's side. The estates were ordered to be divided into two moieties, of which one was to be divided between the two relations on the father's side, and the other moiety was to be allotted those on the mother's side, as follows, to-wit: two-fifths to the uncle of the whole-blood; two-fifths to the three cousins, and one-fifth to the uncle of the half-blood.

In the case of *Tomlinson et als. vs. Dillard*, 3 Call, 106 (2d edition, 93), decided November 13, 1801, it was held: By the act of 1792, the personal estate is distributable among the persons entitled to the real; and therefore, the mother of a deceased infant is not entitled to any part of his personal property derived from the father.

In the case of *Dillard vs. Tomlinson et als.*, 1 Munf., 183, decided April, 1810, it was held: It is now settled that the mother of an infant who died intestate between the 1st of October, 1793 (when the suspended acts of 1792 took effect), and the 22d of January, 1802 (when the act concerning the distribution of unbequeathed personal estate was passed), or any of her issue, by a person other than the father, was not entitled to any part of such infant's personal estate derived immediately from the father. But the law was otherwise relative to the property of an infant who died intestate between the 1st of January, 1787 (when the act of 1785 took effect), and the 1st of October, 1793, the distribution during that interval being regulated by the acts of 1781, Code 60 and 61. Neither was the mother or her issue, as above mentioned, excluded, where the property was derived not immediately, but by intervening succession, from the father.

In the case of *Steptoe's Executor vs. Steptoe et als.*, 1 Munf.,

339, decided October 8, 1810, it was held: Where an infant having title to real estate of inheritance, derived by purchase or descent immediately from the father, dies without issue, and with no brother or sister, or descendant of either, the father being dead, but the mother living, the right of inheritance is not in abeyance, but goes in parcenary to the brothers and sisters of the father, or their lineal descendants, and *vice versa*, such estate being derived immediately from the mother, and she being dead, but the father living, it goes to her brothers and sisters, or their lineal descendants.

In the case of *Addison and Wife vs. Core's Administrator*, 2 Munf., 279, decided May 8, 1811, it was held: The true construction of the seventh section of the act "reducing into one the several acts directing the course of descents" as to the case of an infant, is, that if there be no mother, etc., and the estate was derived from the father or mother, the inheritance shall not be divided into moieties, but the whole shall go to the kindred of that parent from whom the estate was derived. And the law was the same as to the distribution of unbequeathed personal estate belonging to infants who died between the 1st of October, 1793, and the 22d of January, 1802.

In the case of *Liggon vs. Fruqua and Wife*, 6 Munf., 281, decided February 10, 1819, it was held: Under the fifth section of the Act of Descents of 1792, where an infant died without issue, having title to certain real estate derived by descent immediately from the father, leaving no relations in the paternal line but a grandmother and uncle, the grandmother was not entitled to inherit any part of such estate, but the paternal uncle was entitled to the whole.

In the case of *Vaughn vs. Jones et als.*, 23 Grat., 444, decided April 25, 1873. The real estate of R., a female infant, is sold under decree of court, and turned over to V., her guardian, upon his giving bond and security for the faithful accounting therefor; in 1862, R. married B., to whom V. paid over the estate upon his giving security to indemnify V., and in 1864 R. died, still under the age of twenty-one years, leaving a child which survived her but a few hours, and her husband who survived the child. Held: The proceeds of the real estate of R. descended as real estate to her child, subject to a life estate in her husband, and upon the death of her child it passed as real estate to the heirs of the child on the part of the mother.

SECTION 2557.

In the case of *Paup's Administrator et als. vs. Mingo et als.*, 4 Leigh, 163, decided January, 1833, it was held: The executor is not entitled to the surplus of profits, but the same is part of his testator's estate undisposed of by his will, which belongs to his next of kin.

It seems, that since the statute of distributions of 1785, the executor is not, in any case, entitled to the *residuum* of his testator's personal estate not actually bequeathed away by the will.

In the case of *Bossieux vs. Aldridges*, 5 Leigh, 222, decided April, 1834. B. in his lifetime signs and seals the following instrument: "Not having made a will so as to dispose of my property, and two of my sisters having married contrary to my wishes, I wish this instrument to prevent either of their husbands from having one cent of my estate; say, the husbands of my two sisters, M. and D., nor either of them to have one cent, unless they survive their husbands, in that case I leave them five hundred dollars each to be paid," etc., on which he endorses "Mem. To prevent Bennet and Burwell Aldridge (the two husbands) from having any part of my estate that each might claim in right of their wives without a will made by me." Held: The instrument is a testamentary paper, but a man cannot disinherit his heirs without giving his estate to some one else. The instrument is not a devise and bequest of the testator's estate by implication to his heirs or next of kin, other than the two sisters M. and D. and their husbands.

These two sisters are entitled to their shares of his estate undisposed of by the will.

In the case of *Templeman vs. Fauntleroy*, 3 Rand., 434, decided June, 1825, it was held: It seems that the executor or administrator of a husband who had survived his wife, but had never taken administration on her estate, may sue the guardian of the wife for her estate committed to him.

In the case of *Wade vs. Boxley*, 5 Leigh, 442, decided November, 1834. Testator bequeathed slaves to his wife for life, remainder to be equally divided between his seven children and their heirs, to them and their heirs forever; one of the testator's children at the time of his death is a married woman. She dies before the widow, legatee for life, leaving a husband and children surviving her. Held: The daughter took a vested remainder in her seventh part of the slaves, which at her death devolved to her husband, not to her children.

In the case of *Breeding vs. Davis et als.*, 77 Va., 639 and 650, decided July 26, 1883. Before issue born, husband and wife in her right are jointly seised during their joint lives of a freehold in her fee-simple lands. After issue born alive, in such lands he becomes tenant by the curtesy initiate, and holds an estate therein in his own right, which, after her death, *illo vivente*, becomes an estate by the curtesy consummate.

By the act of April 4, 1877, the wife's property is her separate estate, which she may possess, enjoy, and devise as if sole; the husband must unite with her in alienating it, and if he refuse, the court will, if of opinion that her interest will be

benefited thereby; cause the absolute title to be conveyed. No interest or estate in the wife's lands vests in husband during the coverture. But if after issue born alive he survive her, he has an estate by the curtesy in the fee-simple lands of which she was seised, but made no alienation during the coverture. The act only protects the estate of the wife during her life, but does not after her death affect the law of succession as to her real or personal property.

On April 11, 1877, there descended on E., wife of C., real estate in fee. Issue has been born alive of their marriage. D., a creditor of C., who was a non-resident, levied an attachment on C.'s interest in that real estate, and sale thereof was decreed to pay a debt less than five hundred dollars in amount. Before sale, C. and wife conveyed the real estate to B., who conveyed the same with general warranty and covenant to quiet title, purchase-money withheld until its performance, to M. B. obtained an injunction to the sale. Held :

1. The controversy is not concerning the debt of C. to D. The question is: "Where is the title to E.'s land vested?" The title to her land is the issue. The jurisdiction of this court is undoubted.

2. C. has no interest or estate whatever in the land by reason of his marriage with E. The injunction should have been perpetuated.

3. The adjudications in the attachment suit in no way affect E. or her land, she having been no party to that suit.

4. Under the circumstances B. was entitled to bring this suit by reason of his subsisting interest in the subject-matter.

In the case of *Bernard vs. Hipkins*, 6 Call, 101, decided April, 1806, it was held: If the wife renounce the will of her husband, who has a child alive, she is entitled to dower in his slaves and a moiety in his other personal estate in absolute property although he left grandchildren. The word child or children in a will does not extend to grandchildren, unless such intent be clear.

In the case of *McCargo (Executor of James Callicott) vs. Susanna Callicott*, 2 Munf., 501, decided October 15, 1811, it was held: When a widow marries again, the slaves which she held for the term of her life as part of the estate of her first husband, belong to her second husband and his representatives until her death.

In the case of *Lightfoot vs. Colgin et ux.*, 5 Munf., 42, decided January 21, 1813, it was held: A deed of trust, if not revokable by the grantor, is not to be considered a will in disguise, on the ground that nearly all his personal estate is thereby conveyed, and that he reserves to himself the possession and control of the property during his life.

The reference to 5 Munf., 555, is to the opinion of Judge Cabell in the case of *Lightfoot vs. Colgin et ux.*, 5 Munf., 42, quoted *supra*, which was omitted there by accident, and coincides with the opinions therein stated.

In the case of *Ruth et als. vs. Owens*, 2 Rand., 507, decided June, 1824, it was held: Notes to the same amount as legacies specified in the will, and declared by the testator at the time of signing them to be intended to reduce the legacies, are to be regarded as legacies in disguise, and therefore subject to the widow's interest in the personalty, and not as debts due by the testator.

In the case of *Gentry et als. vs. Bailey*, 6 Grat., 594, decided January, 1850, it was held: A conveyance by a husband, by which he parts absolutely with an interest in personal property, though it is not to take effect until his death, and though he retains the power to sell and re-invest or account, and also the power to re-appoint among specified objects, is valid to bar the wife of her distributable share therein.

SECTION 2559.

In the case of *Noel vs. Garnet*, 4 Call, 92, decided October, 1786, it was held: If the widow does not relinquish the will within the prescribed period, she is barred from dower in the undevise estate.

In the case of *Blunt vs. Gee*, 5 Call, 481, decided October, 1805, it was held: If the widow does not renounce her husband's will within one year after his death, she loses her distributive share of the personal estate and is confined to the provisions of the will, but is entitled to her dower in the lands.

As to those lying within the State of Virginia, the court of chancery had authority to decree an allotment of her dower; but not as to those lying in another State, without the jurisdiction of the court.

In the case of *Taylor and Wife vs. Brown et als.*, 2 Leigh, p. 419, decided November, 1830. B. makes a deed of settlement of property upon his wife, and then by will makes a disposition of his property different from that made by deed of settlement, and far less beneficial to the wife, and dies; the wife takes administration with the will annexed. Held: 1. The widow may claim under the deed of settlement, without having renounced the provision made for her by the will according to the statute; 2. The widow taking administration with the will annexed is not an election by her to take under the will, and not to claim under the deed of settlement.

In the case of *Dupree's Administrator et als. vs. Cary and Wife et als.*, 6 Leigh, 36, decided January, 1835. Testator, by

his will, gives real and personal estate to his wife, and leaves part of his personal estate undisposed of; the wife does not renounce, but accepts the provision made for her by the will. Held: She is excluded by the statute, 1 Rev. Code, Chapter 104, from any share of her husband's personal estate undisposed of by his will.

In the case of *Kinnaird's Executor, etc., vs. Williams's Administrator et als.*, 8 Leigh, 400, decided July, 1836, it was held: A widow cannot effectually renounce the provision made for her by the will of her husband, so as to entitle herself as distributee, but by declaration made within one year after the husband's death, before the General Court, or court having jurisdiction of the probate of the will, or by deed executed in the presence of two or more creditable witnesses.

In the case of *Cock's Executors et als. vs. Phillips*, 12 Leigh, 248, decided April, 1841. A married man dies possessed of personal estate, leaving a will wherein he bequeathes his whole estate to his nephews and nieces, and makes no provision for or mention of his wife. Held: Upon the construction of the statute, 1 Rev. Code, Chapter 104, Sections 26 and 29, that, in order to entitle her to a distributive share of her husband's personal estate, the widow must declare her dissatisfaction with the will and renounce all benefit under the same, within the time and in the manner prescribed by the statute.

In the case of *Findley's Executors vs. Findley*, 11 Grat., 434, decided July, 1854. By an agreement in contemplation of marriage, the intended husband bound his estate to pay to the intended wife certain sums of money, if she survived him, which were to be in bar of and in full compensation for her dower. Held: This agreement barred her of her dower in her husband's real estate, but does not deprive her of her distributal share of his personal estate.

The husband by his will gave to the wife certain personal estate absolutely, and a tract of land for life, but she, after his death, renounced the will in the mode prescribed by the statute. Held: She is not entitled to take under the will what is thereby given to her. But the property bequeathed to her is to be applied to compensate the legatees who are disappointed by her taking her distributal share of the personal estate.

In the case of *Nelson's Administrator vs. Kownslar's Executor*, 79 Va., 468, decided October 6, 1884, it was held: Under Code of 1860 in order that provision for wife in will of husband shall be held to be in lieu of dower, the will must so declare in terms, or the conclusion from the provisions of the will must be as clear and satisfactory to that effect as if it was so expressed.

Under Code of 1860 no question of election between dower and provision in lieu thereof arises, unless the intention to bar

dower is clear. Under Code of 1873, unless the intention plainly appears not to bar dower, the election must be made by the widow between the dower and the provision. When any provision is made for a wife in her husband's will, she may, within one year from the admission of the will to probate, renounce such provision, and take such share of his personal estate as she would have had if he had died intestate.

SECTION 2561.

In the case of *Sir Jonathan Beckwith vs. Beckwith Butler et als.*, 1 Wash., 224, decided at the fall term, 1793, it was held: All advancements must be brought into hotchpot in order to entitle the heir or distributee to his share of the estate.

The reference to 3 Rand., 117-'20, is to a mere *obiter dictum* in the case *Hudson et als. vs. Hudson's Executor*, as that case went off on the statute of limitations.

In the case of *Christian and Wife and Another vs. Coleman's Administrator et als.*, 3 Leigh, 30, decided May, 1831. A mother tenant for life of lands, gives possession of several parcels thereof to four of her children respectively, to be cultivated by them for their own use, but makes them no conveyance; these children hold the respective parcels of land as tenants at the will of their mother till her death, taking the profits to their own use, no rents being rendered or demanded. Held: They are not bound to account for these profits, and bring them into hotchpot, as an advancement, real or personal, in the division and distribution of the mother's estate under the statute.

In the case of *Chinn et als. vs. Murray et als.*, 4 Grat., 348, decided January, 1848. A father conveys to a child a tract of land in fee, subject to the father's life estate. In bringing this advancement into hotchpot, on the partition of the father's estate. *Quære*: If the advancement is to be valued as at the time of the advancement, or at the death of the father?

In the case of *Lee's Executors vs. Boak*, 11 Grat., 182, decided April, 1854. Testator gives a legacy to his nephew, but directs that he shall account for the amount of certain bonds and receipts of the nephew which the testator had paid off for him as his security. After making his will, testator shortly before his death, and in contemplation of that event, delivers to the nephew the bonds, etc., with the view of it becoming his absolute property in the event of the testator's death, and for the purpose of discharging the nephew from all accountability for the same as one of his legatees, in his settlement with the executor. Held: The intention of the testator being that the nephew does not account for the moneys paid by the testator for him, the gift of bonds and receipts is not an advancement in satisfaction of the legacy to the nephew.

In the case of *Knight et ux. vs. Oliver*, 12 Grat., 33, decided January 29, 1855, it was held: Advancements to children are not brought into hotchpot for the benefit of the widow; she is only entitled to share in the estate of the intestate of which he died possessed. The slaves allotted to the widow are not a part of the distributable surplus to be divided amongst the children at the death of the intestate, and a child refusing to bring his advancements into hotchpot upon the first division, is not thereby precluded from claiming to share in the division of the dower slaves.

A child having received advancements, and refusing to share in the first division, but claiming to share in the division of the dower slaves, is to be charged with interest on his advancements, or their value, from the death of the intestate to the date of the division; and if the principal and interest of his advancement exceed the amount received by the other children, he is then to be charged with interest on such excess from that time to the period of the second division. But having elected not to come in on the first division, if his advancements with interest thereon were not equal to the shares of the other children, he is not entitled to have the deficiency made up upon the second division.

In the case of *Gaw vs. Huffman*, 12 Grat., 628, decided September 11, 1855, it was held: Advancements made by testator in his lifetime are not to be taken into account in fixing the proportion of the debts which each devisee is to pay.

In the case of *Gregory et als. vs. Winston Administrator et als.*, 23 Grat., 102, decided January, 1873, it was held: J. held an estate for her widowhood in a tract of land, remainder to the children of her husband, two of whom were by her. Her son, R., used her money, with her concurrence, to buy the interest of the remaindermen in the land, and took the conveyances to himself. Upon the evidence in the cause, held: that the money so used by R. was intended as an advancement by his mother to him.

In the case of *Puryeur et als. vs. Cabell et als.*, 24 Grat., 260, decided January, 1874. W. died in 1857. By his will he gave his estate to his wife, W., for her life, to be used and controlled by her at her entire discretion; but as certain of his children named came of age, or married, she was at liberty to give them, or either of them, as also his daughter Mrs. C., such part of his estate as she could conveniently spare; she to be the sole judge of it. And at her death he gave his estate among his children named, each of whom was to account for what they had or were to receive. In 1858 W. has a tract of land and a number of slaves divided and valued, to allot a part to each to whom she was authorized to make advancements, and she conveys and delivers one of the parts to each of said children, she being then dead.

On dividing the estate on the death of W. Held: The advancements made to the children in 1858 are to be taken at the valuation then put upon them, but without interest during W.'s life.

The advancement to Mrs. C.'s children is to be valued as at the time it was delivered to the guardian.

The slaves in this lot were not then free, and are to be valued at what they are then worth to the children of Mrs. C.

The husband of one of the children, having cut timber off of another tract, which he and W. intended should be accounted for, its value is to be charged to him and his wife in the division.

In the case of *Persinger et als. vs. Simmons et als.*, 25 Grat., 238, decided June, 1874, it was held: The dower of a widow in the land of her husband is assigned to her; and upon bill filed the other two-thirds of the land is divided among ten of the twelve heirs, the other two refusing to bring their advancements into hotchpot. Upon the death of the widow, the heirs who refuse to come into the first division may come into the division of the dower property.

Though there may be cases in which a court of equity would, in her lifetime, decree a division of the property assigned to the widow for dower, in a suit for partition brought during her life, in which some of the children refuse to bring their advancements into hotchpot, the decree, though broad enough in its terms to exclude them from any share of the dower lands, will be restricted to their interest in the two-thirds then divided, unless the pleadings make a case for the division of the dower land.

One of the children who had failed to come into the first division died after the death of the widow, leaving children. Her husband is a proper party plaintiff for a division of the dower land.

In the case of *Cabells vs. Puryear et als.*, 27 Grat., 902, decided November, 1876. W. in his lifetime made advancements to some of his children. By his will he gave his estate to his widow for her life, and authorized her to make advancements to their children; and he directed at her death that his estate, including these advancements, should be equally divided among his children. Mrs. W. did make advancements to all of the children, but to one much less than to the others. She died in February, 1868, but the estate was not ready for a division until October, 1874. Held: Interest should be charged to each legatee on the excess of the advancements made to him or her from the death of Mrs. W. in 1868 until the time of the division in 1874.

In the case of *Lewis vs. Henry's Executors et als.*, 28 Grat., 192, decided March, 1877. Testator, by his will, gives land, and stock upon it, to his son H. By the third clause of his

will he gives to his five daughters, by name, the balance of his land, his daughter M. to account to the rest of his daughters in the sum of three thousand five hundred dollars, and his daughter L. five thousand two hundred dollars, these being the amounts paid for homes for them. By the fourth clause he gives to his son H., and his five daughters, the balance of his personal property, to be equally divided among them. Held: The advancements of M. and L. are only to be brought in the division of the real estate. The personal estate embraced in the fourth clause is to be equally divided among the son H. and the five daughters.

In the case of *Watkins et als. vs. Young et als.*, 31 Grat., 84, decided November, 1878, it was held: If a gift, unexplained in the lifetime of a father, who dies intestate, to one of his children, is to be presumed in law to be an advancement, this presumption may be repelled by evidence.

Whether a gift by a father in his lifetime to a child is an absolute gift or an advancement, depends upon the intention of the father; and his statements or declarations made at the time of the gift are subsequently competent evidence to show what was his intention in making the gift. In this case the evidence is conclusive to prove it was an absolute gift and not an advancement. The only issue in the cause being whether the gift of the father was intended to be absolute or an advancement, and all the evidence having been taken with reference to that issue, it was proper for the court to decide it without a reference to a commissioner to inquire and report upon the question.

In the case of *Barrett and Wife vs. Morriss's Executor et als.*, 33 Grat., 273, decided April, 1880. M. died in 1867, having made large, though unequal, advancements to his four children. By his will he gave an annuity of two thousand dollars to his wife, secured on all his estate, and directed that his real estate should not be sold during her life, and gave some small legacies. He then says: "What shall remain of my estate, after funeral charges, expenses of administration, and debts and bequests shall have been paid and satisfied, I direct to be so divided as that there shall be four shares." Whereof the first, together with thirty-one thousand dollars, he gives to C., and in the same manner to each of the other three children, stating the advancement made to each; and concludes, "shall severally and respectively be equal to one another." Mrs. M. died in 1872, but owing to suits for large debts of uncertain amount sued for and not ascertained until December, 1875, the estate was not ready for division until that time. Held: Interest on the excess of advancements to the children is to be charged to this date.

In the case of *Strother's Administrator et als. vs. Mitchell's Executor et als.*, 80 Va., 149, decided January 29, 1885, it was held: Where one *in loco parentis* gives a legacy as a portion, and afterwards advances in the nature of a portion to the same person, such advancement will be deemed an ademption to the legacy. But where the gift is given before the making of the will, and the will does not charge it as an advancement, the court cannot so charge it in settling the estate.

A letter written by a distributee, after assigning his share of the estate, is not admissible as evidence for any purpose in suit to settle the estate. One not a party to the suit is not bound by any proceedings or decrees therein.

In the case of *Darne's Executor vs. Lloyd*, 82 Va., 859, decided January 26, 1887, it was held: An advancement is the gift, by anticipation, of the whole or part of what it is supposed a child will be entitled to on the death of the giver intestate.

In the case of *McDearman vs. Hodnett et als.*, 83 Va., 281, decided April 28, 1887, it was held: A gift unexplained in the lifetime of an intestate father, to one of his children, is *prima facie* an advancement. His statements at the time, or subsequently, are competent evidence to show what was his intention. And so such a gift to a son-in-law is *prima facie* an advancement to the daughter. The married woman's act does not affect the question of advancements.

The case of *McDearman vs. Hodnett*, 11 Va. Law Journal, 694, is the same case above quoted from the 83 Va.

In the case of *West vs. Jones et als.*, 85 Va., 616, decided January 10, 1889, it was held: Where three heirs were advanced in slaves in 1855, 1859, and 1861 respectively, it was held proper, in allotting slaves in December, 1864, to equalize an heir who had received none, to allot them as of their value in 1861, the subsequent emancipation causing a loss common to all the heirs.

In the case of *Davies and Wife vs. Hughes*, 86 Va., 909, decided May 8, 1890, it was held: Testator bequeathed two-thirds of his land to his son and executor, and remainder to the children of his deceased son. Sale to be at executor's discretion. He kept possession and all profits. The children lived with and served him, with no other compensation than their board. Held: Executor should be charged with rent for the children's portion.

In the case of *Biedler vs. Biedler*, 87 Va., 300, decided January 8, 1891. Where testator devises certain land to his two sons, and directs the residue to be disposed of as the law directs. Held: It was his intention to equalize the two sons with his other children, to whom gifts had been previously made, and

not that the devise should operate as an advancement to be brought into hotchpot under this section.

The reference to 4 Grat., 397, is to the same case above cited from 348.

TITLE XXXI.

CHAPTER CXIV.

SECTION 2562.

In the case of *Christian's Devisee vs. Christian et als.*, 6 Munf., 534, decided March 18, 1820, it was held: In decreeing a partition in favor of a plaintiff claiming by equitable title, the court ought not to direct that the holders of the legal title stand seised of the plaintiff's part to his use, but that they convey the same by deed to him and his heirs.

In the case of *Weisley vs. Findlay et als.*, 3 Rand., 361, decided March, 1825, it was held: The power of a court of equity to grant partitions is not discretionary but *ex debito justitiæ*; and whenever a plaintiff has a right to partition at law, he has the same right in equity. In a suit brought by the purchasers of the interests of devisees for a partition, it is not regular to impeach the conveyances to him, on the ground of fraud or mistake.

In the case of *Castleman & McCormick vs. Veitch et als.*, 3 Rand., 598, decided December, 1825, it was held: Where a division of land is sought, a court of equity has jurisdiction.

A claim for a deficiency in the quantity of land sold gives jurisdiction to a court of equity. Where a bill in chancery sets forth various claims, and the defendant files a general demurrer, the demurrer will be overruled if any of the claims be proper for the jurisdiction of a court of equity.

In the case of *Stuart's Heirs, etc. vs. Coalter*, 4 Rand., 74, decided February, 1826, it was held: The power of a court of equity to decree partition is governed by the same principles which govern cases of partition at law. It may decide on the rights of the parties to participate in the division, but not on the simple question of title to the land.

In the case of *Straughan et als. vs. Wright et als.*, 4 Rand., 493, decided November, 1826, it was held: A bill in equity for partition is a matter of right, if the title of the plaintiff is admitted or clear, but, if that be denied, and it depends on doubtful facts, or questions of law, a court of equity will either dismiss the bill or retain it until the right is decided at law.

In the case of *Ruffner's vs. Lewis's Executors et als.*, 7 Leigh, 720, decided July, 1836. P., after taking the oath of insolvency, with the assent of his judgment-creditor, conveys an undi-

vided moiety in the ten acres to L., another creditor of P., in trust that L. shall sue for and recover the moiety and its profits, and after such recovery sell the land, and out of the proceeds of the sale and the profits recovered pay the expenses of suit and the debts secured, and the surplus, if any, to P.; then a bill in equity is filed in the name of L., the trustee, P., the judgment-debtor and the judgment-creditor, as plaintiffs against defendants, holding adverse possession in the land, and R., to whom the ten acres were conveyed jointly with P., seeking a recovery against the adverse defendants, partition between R. and P., and application of the funds according to the deed to L. Held: Equity has jurisdiction, and should not refuse to entertain the bill on the ground of maintenance.

In the case of *Otley vs. McAlpin's Heirs*, 2 Grat., 340, decided October, 1845. A tenant by curtesy of lands purchased the reversionary interest of one of three heirs. Another interest is held by infants. Held: That a court of equity will decree a partition of the lands at the suit of the tenant by the curtesy.

In the case of *Currin et als. vs. Spraul et als.*, 10 Grat., 145, decided July, 1853, it was held: Upon a bill for a partition of land, if the title of the plaintiffs is doubtful, the court, prior to the act, Code, chapter 124, section 1, p. 526, should have sent the parties to law to try their title.

In the case of *Custis vs. Snead*, 12 Grat., 260, decided March 10, 1855, it was held: Under a bill for partition of land, as a general rule, the share of each parcener should be assigned to him in severalty. And if, from the condition of the subject or the parties, it is proper to pursue a different course, the facts justifying a departure from the rule should, at least when infants are concerned, be disclosed by the report, or otherwise appear, to enable the court to judge whether or not their interest will be injuriously affected where the same parties are entitled to lands derived from the father, and also to lands derived from the mother, and some or all of them are infants; if these lands are blended in the division, it must appear to the court that the interest of the parties in general will be promoted by this mode of partition, to enable the court to protect the rights of the infants.

When the widow of the person who died seised of the lands of which partition is sought is alive and entitled to dower, she should be a party to the suit, and her dower should be assigned to her, and partition made of the residue. And it is error to proceed in her absence, and make partition of the lands subject to her right of dower.

In the case of *Cox et als. vs. McMullin*, 14 Grat., 82, decided September 8, 1857, it was held: In the partition of real estate, each part owner is entitled to have in severalty a part equal to

his interest in the whole subject, if this is practicable, with due regard to the interest of all concerned. But if such partition cannot be made without impairing the portion of some others, the property may be divided into shares of unequal values, and the inequality may be corrected by a charge of money on the more valuable, in favor of the less valuable portion, or other means recognized in the law of partition.

The general rule of partition requires an allotment of the several parcels to the part owners. Yet it may benefit both classes of owners to assign the parcels, or it may benefit one class without injury to the other, to assign rather than to allot, and in either case the commissioners may avoid the risk of an unfortunate allotment by resorting to an assignment.

In the case of *Early et ux. vs. Friend et als.*, 16 Grat., 21, decided August 28, 1860, it was held: One tenant in common may maintain a suit in equity against his co-tenant who has occupied the whole of the common property, for an account of the rents and profits.

Whenever the nature of the property is such as not to admit of its use and occupation by several, and it is used and occupied by one only of the tenants in common, or whenever the property, though capable of use and occupation by several, is yet so used and occupied by one as in effect to exclude the others, he receives more than comes to his just share and proportion in the meaning of the statute. When the common property is rented out by one tenant in common, he is accountable to his co-tenants for their share of the rents he has received, and when he occupies and uses the whole property for himself, he is liable to his co-tenants for a reasonable rent for it in the condition it was when he took possession.

Interest is to be paid upon the rents found to be due from the tenant in common in possession to his co-tenants.

In the case of *Graham vs. Pierce*, 19 Grat., 28, decided January 29, 1869, it was held: Every tenant in common has a right to possess, use, and enjoy the common property, without being accountable to his co-tenants for rents or profits, except under the statute, for so much as he may receive beyond his just share or proportion.

Tenants in common are not bound to use the common property jointly by means of a contract of partnership between them, but may possess, use, and enjoy the common property severally, accounting to their co-tenants for so much of the rents and profits as they may receive beyond their just share and proportion.

As a general rule, when a tenant in common uses the common property to the exclusion of his co-tenants, or occupies and uses more than his just share or proportion, the best measure of his

accountability to his co-tenants is their share of a fair rent of the property so occupied and used by him.

But there may be peculiar circumstances in a case, making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common.

In the case of a tenancy in common in lead mines, an account of issues and profits is the proper mode of adjustment, and in settling the accounts of the operating tenants they should not be charged a certain sum per ton for the ore raised from the mine, or credited with an estimated sum per ton for raising the ore and manufacturing the lead; but each so operating is to be charged with all his receipts, and credited with all his expenses, on account of the operation of the mine. In such case the operating tenant in common should have a credit in his account for improvements made by him which were necessary to his operation of the mine.

A tenant in common, occupying and using the common property separately, will be responsible to his co-tenants if he wilfully or by gross negligence has destroyed or wasted the common property. But he cannot be held responsible for such destruction or waste in a case in which the bill does not charge it.

The commissioner for settling the accounts of the parties says in his report, "the complainants will hereafter render an account of a remnant of the business still left in their hands." There are exceptions by both parties to the accounts as stated, but the court overrules them all, confirms the report, and makes a final decree in favor of the defendant. It being not probable that the further account referred to by the commissioner will lessen the amount due the defendant, if there be no other error, the appellate court may amend the decree by providing for the further account and affirm it.

In the case of *Howery vs. Helms et als.*, 20 Grat., 1, decided September, 1870, it was held: In a suit for partition the court has no authority to order a sale of the land, unless it is made to appear by an inquiry before a commissioner, or otherwise, that partition cannot be made in some of the modes provided by the second and third sections of Chapter 128 of the Code. But when it did not so appear, and no such inquiry was asked in the court below, a party who promoted the suit and at whose instance the decree was made, will not be allowed to raise the objection for the first time in the appellate court.

In the case of *Frazier vs. Frazier*, 26 Grat., 500, decided September 23, 1875. F. and R. owned one-half of two tracts of land, one in Bath county called the Bath Alum, and the other in Rockbridge county called the Rockbridge Alum. The other half of these tracts was owned by J., an infant aged seventeen years, subject to his mother's dower, and she had married P., who became

the guardian of J. F. sold the Bath Alum tract with some furniture to B. for thirty thousand dollars in Confederate eight per cent. bonds, subject to the ratification of the court. F. and R. then brought their suit in equity to have the sale ratified, alleging that the property could not be conveniently divided, and that it was for the interest of all parties, including the infant, that the property should be sold. P. and wife and J. answered, concurring in the statements of the bill, and in the prayer that the sale to B. should be confirmed. Three witnesses concur in sustaining the statements of the bill, and that the price is a full price for the land; and the court confirms the sale. Held: The suit of F. and R. was a suit for partition, and the proceeding having been regular throughout, the fact that the sale was made for Confederate bonds, which have since become worthless, is no ground for setting aside the sale. The fact that the parties owned another tract of land, and that it did not appear that partition in kind of the two tracts could not be made, is not ground for setting aside the sale, the parties not wishing to sell this other tract, which was productive.

The fact that the witnesses spoke of the value of the land, not referring to the furniture, which was not worth more than two thousand dollars or twenty-five hundred dollars in Confederate money, but estimating the price to be given as a very full price for the land, is not ground for setting aside the sale, especially as this objection was not made till the court had decreed to dismiss the bill, when it was set up by an amended bill.

In the case of *Zirkle vs. McCue*, 26 Grat., 517, decided September 24, 1875, it was held: A guardian of infants may maintain a suit for partition of real estate held jointly by the infants and other adult parties. In a suit for partition, to authorize the sale under the statutes of lands in which infants have an interest, the case must be one in which partition cannot be conveniently made, and it must appear that the interests of the parties will be promoted by a sale of the property.

It is not necessary that the facts necessary to warrant a decree for sale should appear from the report of commissioners or by the depositions of witnesses. It is sufficient if the facts appearing in the record reasonably warrant the decree of sale; and this especially when the proceeding is to defeat the title of an innocent purchaser.

In the case of *Wright, etc., vs. Strother et als.*, and *Wright, etc., vs. Wright et als.*, 76 Va., 857.

2. Co-tenants.—Partition.—Where some of the co-tenants have sold undivided interest in lands and reserved liens for the unpaid purchase-money, the existence of these liens on the undivided shares does not, *per se*, prevent the division of the common property among the owners. The liens will be

considered as attaching to the parcels under the partition in severalty.

3. *Idem.*—Rehearing.—Reversal.—Where partition has been made among the co-tenants, it will not be disturbed at the instance of the lien creditors, unless they show that it is unequal and unfair as respects the security for their debts.

In the case of *Effinger vs. Hall*, 81 Va., 94, decided November 19, 1885, it was held: Testator intended to bequeath his property to eight persons or classes enumerated in his will. By manifest mistake the number of parts is styled seven instead of eight, and each part is styled one-seventh instead of one-eighth. Equity has power to correct such mistake, and it is its duty to do so.

In the case of *Davis vs. Tebbs et als.*, 81 Va., 600, decided April 18, 1886, it was held: The jurisdiction of equity to decree partition of lands, and take cognizance of all questions of law arising therein affecting title, is settled by statute, Code 1873, Chapter 120, Section 1. A bill averring that the plaintiff, under a duly probated will, is entitled to part of tract of land held by defendant owning the other part under the same will, and praying for partition, is sufficient, though it fails to aver that defendant purchased his part with notice of plaintiff's claim; it sufficiently appearing that defendant was put on inquiry, and being bound to make it, was affected with knowledge of all he might have discovered had he done his duty.

In the case of *Bradley vs. Zehmer*, 82 Va., 685, decided December 16, 1886, it was held: This section authorizes the court, in making partition of land, to take cognizance of all questions of law affecting the legal title that may arise in any proceeding. This doctrine applies to all matters existing at the time of giving the judgment or decree, which the party had opportunity to bring before the court.

This is the case cited from 11 Va. Law Journal, 223.

In the case of *Fry et als. vs. Payne*, 82 Va., 759, decided January 27, 1887, it was held: In suits for partition, the court has jurisdiction to settle all questions of title arising in the case.

In the case of *Fry vs. Thomas*, 11 Va. Law Journal, 295, decided January 27, 1887, it was held: In suit for partition, a court of equity has authority to pass upon all questions of law affecting the legal title that may arise in the proceedings.

SECTION 2563.

In the case of *Wimer et ux. vs. Wimer et als.*, 82 Va., 890, decided October 8, 1886, it was held: Courts in Virginia have no jurisdiction to partition lands situated in another State, because such right can only be exercised under the *lex loci rei sita*.

SECTION 2564.

In the case of *Hinton et als. vs. Bland's Administrator et als.*, 81 Va., 588, decided April 18, 1886, it was held: Court of equity hath authority to pass upon all questions necessary to justice between the parties in suits for partition, such as accounts for liens and priorities on the lands to be partitioned.

SECTION 2565.

In the case of *Bolling vs. Teel et als.*, 76 Va., 487.

2. Coparceners.—At common law, coparceners could make partition even by parol. No conveyance is necessary. They are seised of their shares by descent from the common ancestor, and partition only adjusts their rights. *Quere*: Has the rule been changed by statute?

3. Mutual conveyances are necessary to pass title in all cases where partition can only be made by deed, as between joint tenants.

SECTION 2566.

In the case of *Turner vs. Dawson et als.*, 80 Va., 841, decided October 8, 1885, it was held: Where court of equity causes land to be sold for partition, it leaves it to the party entitled to the proceeds to designate whether it will hold them as personalty or as realty. And when, for any reason, that party is incapable of making such designation, the court will hold them subject to all the incidents of realty.

SECTION 2569.

The Code refers to page 13, 6 Call, as an authority on this subject. No such authority exists in 6 Call, save the case of *Turpin vs. Locket*, page 113, where the question was, had the legislature power to order the glebe lands sold and the money applied to the use of the poor? The court was equally divided in opinion, but held: The court of chancery had jurisdiction in the case, and might have awarded an injunction to prevent the sale.

In the case of *Smith et als. vs. Smith, etc.*, 4 Rand., 95, decided February, 1826, it was held: Tenants in common of personal estate cannot have partition at common law, and, therefore, a court of equity is the proper tribunal to decree a partition of it.

TITLE XXXII.

CHAPTER CXV.

SECTION 2581.

In the case of *Cooper vs. Saunders*, 1 H. & M., 412, decided October 6, 1807, it was held: No appeal lies from an order of a

county or corporation court for binding out an apprentice, or for rescinding his indentures.

It seems that in such case, a writ of *certiorari* lies from the General Court to bring up the record and correct the proceedings.

In the case of *Pierce vs. Massenburg*, 4 Leigh, 493, decided May, 1833, it was held: A father cannot bind his infant child apprentice by indentures to which the child is not a party, and indentures of apprenticeship executed by the father without the child's concurrence are not voidable only, but void.

In the case of *Brewer vs. Harris et als.*, 5 Grat., 285, decided October, 1848, it was held: The word month in a statute is a calendar month.

The order of the county court directs a bastard child to be bound out by the overseers of the poor. If one overseer of the poor of the county executes the indenture, it is sufficient.

The master covenants with the overseers of the poor of the county without naming them, and the indenture is in the name of but one, and he and the master only execute it. The indenture is valid.

The indenture contains covenants by the master in favor of the mother of the apprentice, and also in favor of the apprentice, but they are not parties to it. It is nevertheless valid, and the remedies will be adapted to the case.

The statute directs that female apprentices shall be bound out until they are eighteen years of age. A binding out until the age of seventeen years is valid.

The reference to 5 Grat., 385, is an error. The case referred to is the one above, cited from page 285.

SECTION 2585.

In the case of *Bullock vs. Sebrell*, 6 Leigh, 560, decided July, 1835, it was held: Covenant will not lie in the name of apprentice on an indenture of apprenticeship entered into by the overseers of the poor without any previous order of court for binding out the apprentice; such indenture is not a statutory deed, and, therefore, covenant can only be maintained on it in the name of the overseers who are the parties to it.

SECTION 2587.

In the case of *Brewer vs. Harris et als.*, 5 Grat., 285, decided October, 1848, it was held: The word month in a statute is a calendar month.

The order of the county court directs a bastard child to be bound out by the overseers of the poor. If one overseer of the poor of the county executes the indenture, it is sufficient.

The master covenants with the overseers of the poor of the

county without naming them, and the indenture is in the name of but one, and he and the master only execute it. The indenture is valid.

The indenture contains covenants by the master in favor of the mother of the apprentice, and also in favor of the apprentice, but they are not parties to it. It is nevertheless valid, and the remedies will be adapted to the case.

The statute directs that female apprentices shall be bound out until they are eighteen years of age. A binding out until the age of seventeen years is valid.

SECTION 2592.

In the case of *Cooper vs. Saunders*, 1 H. & M., 412, decided October 6, 1807, it was held: It belongs by law to the county, city, and borough courts of this State exclusively to make orders for binding out poor orphans as apprentices, and to hear and determine in a summary way all complaints of apprentices against their masters, and to make orders for removing them when it shall seem necessary, from which orders no appeal lies.

CHAPTER CXVI.

SECTION 2597.

In the case of *Kewan vs. Waller*, 11 Leigh, 414, decided November, 1840. Testator bequeathes his infant son fifteen thousand dollars, to be invested in bank stock, or such other stock as his executors shall think more profitable, and from the proceeds or dividends to educate him in the best manner under the direction of his executors, and the surplus, if any, to be vested in like manner; and appoints two executors. Held: This was not an appointment of the executors as testamentary guardians of the infant son. If two persons be appointed testamentary guardians, the office is joint and several, and either may qualify without the other, and without summoning the other to accept or renounce the guardianship.

SECTION 2599.

In the case of *Durrett vs. Davis (Guardian) et als.*, 24 Grat., 302, decided January 28, 1874, it was held, p. 315: A court of chancery may appoint a guardian in the first instance, as well as remove and re-appoint where a guardian has been previously appointed.

SECTION 2600.

In the case of *Ham vs. Ham*, 15 Grat., 74, decided January 1859, it was held: A county court having regularly appointed a guardian for an infant under fourteen years of age, the infant,

after he attains that age, has not the right at his mere election to have his guardian thus appointed displaced, and a new one of his own nomination substituted.

SECTION 2601.

In the case of *Call vs. Ruffin*, 1 Call, 333, decided May 5, 1798, it was held: A guardian's bond is sufficiently accurate, though the condition does not state the appointment of a guardian. One guardian's bond may be taken for two orphans.

In the case of *Page (Administrator of Nelson) vs. Taylor & Thornton*, 2 Munf., 492, decided November 21, 1811, it was held: The taking a guardian's bond is not a ministerial, but a judicial, act imposed by law on the court, which (and not its clerk) is to judge of the sufficiency or insufficiency of the security offered.

In the case of *Austin vs. Richardson*, 1 Grat., 310, decided December, 1844. The justices of the county court appoint a guardian, and take from him and his sureties a defective bond, so that the sureties are released from all liability for the default of the guardian. Held: Equity has no jurisdiction to enforce the liability imposed upon the justices by statute, and this, whether they are sued alone or are joined in a suit against the guardian for the settlement of his guardianship accounts.

In a suit against the guardian, the surviving justices, and the representatives of a deceased justice, the surviving justices answer, but the bill is taken for confessed against the representative of the deceased justice. Held: The court not having jurisdiction of the cause as against the justices and their representatives, the bill should be dismissed as against the representative of the deceased justice as well as of the surviving justices.

SECTION 2603.

In the case of *Ross vs. Gill et ux.*, 1 Wash., 87, decided at the spring term, 1792, it was held: There is no doubt but that a guardian may lease the lands of the ward during infancy, if the guardianship so long continue.

The reservation of the rent to the infant was proper.

In the case of *Ross vs. Gill et ux.*, 4 Call, 250, decided April, 1794, it was held: Guardian appointed by the court continues to the infant's age of twenty-one unless it be revoked.

In the case of *Truss vs. Old*, 6 Rand., 556, decided November, 1828, it was held: Possession is indispensably necessary to support trespass *quære clausam fregit*.

Guardians in socage and testamentary guardians (although they have no beneficial interest) have a legal interest and the possession of the ward's land during the guardianship. If, therefore, a person trespass on the lands of an infant, and cut

and carry away his trees without the license of the guardian, the ward cannot maintain trespass, but the guardian may and must account to the ward for the damages recovered.

If the trees are cut and carried away by permission of the guardian, no trespass is committed, and the infant, even after the guardianship has ceased, cannot maintain trespass for the act. The wrong must be compensated to the ward by the guardian.

It seems that if timber trees growing on the inheritance of the ward are thrown down by tempest or otherwise, they become personal property, and the guardian has a legal right to sell them as being perishable, and of no value except as a subject of sale, and in such case the infant cannot bring trover for them.

In the case of *The Bank of Virginia vs. Craig*, 6 Leigh, 399, decided May, 1835, it was held: Bank stock standing in the name of F., guardian of C., may be sold and transferred by the guardian, and the officers of the bank have no right to control or prevent him from transferring it on their transfer book.

A guardian has the like power to sell the personal estate of his ward which an executor has to sell the assets of his testator.

In the case of *Armstrong's Heirs vs. Walkup et als.*, 9 Grat., 372, decided September 3, 1852, it was held: A guardian of infants is entitled to compensation for their support, though he may have promised their friends that he would not make any charge for it, and in fact kept no accounts against them.

A payment made to the husband of one of three wards, who is the guardian of another of them, though intended to be a payment to all of them, is not to be credited against the third ward, who is then an adult, she not having authorized him to receive it, but it is to be credited against the husband and wife and his ward.

The accounts of the three wards should be stated separately from the commencement, or at least from the time when their expenses differed in amount.

In the case of *Hunter vs. Lawrence's Administrator et als.*, 11 Grat., 111, decided April, 1854. A bond executed to an executor is transferred by him to a guardian as a part of the ward's estate. Whatever interest the ward has in the bond is subject to the control of the guardian, who may receive the money due thereon if voluntarily paid; may sue for it in a common law court in the name of the executor, for his own use as guardian, and cannot be prevented by the executor; or he may sell and transfer the bond.

As a general rule, a guardian has the legal title of the ward's personal estate, and has the power and authority to sell it.

A guardian violates his trust when he sells or transfers the property of his ward to pay his own debt.

The fraud of a guardian in disposing of the property of his ward is not sufficient of itself, under all circumstances, to invalidate his transactions with innocent parties.

A bond executed to an executor is transferred by him to the guardian as part of the ward's estate; the guardian is himself a legatee for a large amount of the same testator, and is guardian of another legatee; and he receives the amount of those legacies from the executor in bonds and other evidences of debt. Upon the marriage of the last-mentioned legatee, he transfers to her husband the bond belonging to the first-named ward in part discharge of her legacy, he being at the time in good circumstances, and his sureties as guardian being wealthy. The husband takes the bond at par, without knowing or suspecting that it is the property of the first-named ward; and takes it without a hope of gain or fear of loss, but simply as a mode of payment convenient to both parties. Years afterwards the guardian becomes insolvent by the failure of speculations in which he is then engaged. Held: The husband who received the bond is not responsible to the ward whose property it was for the amount thereof.

The principle upon which a party dealing with a fiduciary is held responsible is, that he has co-operated in the fraud of the fiduciary.

A guardian qualifies in 1821. In 1825 he transfers a bond of his ward to a party wholly innocent of any participation in the guardian's fraud, in payment of a debt. The ward comes of age in 1832, and takes no steps to obtain his estate from his guardian until 1840, when the guardian becomes insolvent. He then sues the sureties of the guardian, and recovers from them the amount due to him from his guardian. In all this time the sureties had done nothing to secure the faithful discharge of his duties by the guardian, or to compel him to pay over to the ward his estate after he became of age. Held: That even if the party who had received the bond from the guardian could be held responsible to the ward, he is not responsible to the sureties.

In the case of *Barnum et als. vs. Frost's Administrator et als.*, 17 Grat., 398, decided April 30, 1867, it was held: A guardian is not personally responsible for the support and education of his wards, unless he consents to become bound for them.

A guardian placing his ward with a third person to be supported and educated, though he may undertake to pay the ward's expenses, does not thereby relieve the ward's estate, but the person with whom the ward has been placed may proceed in equity to subject the profits of the ward's estate to the payment of her expenses. Bonds executed by the guardian as guardian, showing on their face that they are given for the

ward's expenses, and which at the time he promises to pay out of the profits of the ward's estate as soon as he can collect them, will not relieve the ward's estate from liability for these expenses. If the condition of the guardian's bond is as prescribed by the statute, and the guardian wastes the profits of the ward's estate, a creditor for the support of the ward, though she has taken the bonds of the guardian for the same, not thereby intending to release the ward's estate, may proceed in equity against the guardian and his sureties, and subject them to the payment of the amount due her. The condition of the guardian's bond is to pay and deliver to the ward her estate when thereto required by the justices. A creditor for necessities furnished to the ward may be substituted to the rights of the ward upon the bond, against the guardian and his sureties, for the payment of her debt.

In the case of *Coffee vs. Black*, 82 Va., 567, decided November 18, 1866, it was held: When a person entitled to, but not having the custody of an infant, is claiming to recover it, the court will exercise its discretion according to the facts, consulting infant's wishes if of years of discretion, and if not, exercising its own judgment as to what will be best calculated to promote the infant's welfare, having due regard to the legal rights of the claimant.

A parent may transfer to another the custody of his child, and the court will not pronounce that custody an illegal restraint which is held under fair agreement, and is not injurious to the child.

A case where at the death of its mother the father transferred his daughter, three years old, to her mother's sister, who reared her properly and made her happy, and was desirous and able to continue so to do, and the child was loth to leave her aunt. After several years the father, by writ of *habeas corpus*, sought to recover the custody. It appeared that the change was calculated not to promote the child's welfare. On appeal, Held: Under the circumstances the situation of the child should not be changed, and the writ should be denied.

This is the case cited as 11 Va. Law Journal, 103.

SECTION 2604.

In the case of *Hooper vs. Royster*, 1 Munf., 119, decided April, 1810, it was held: A guardian may be allowed for moneys paid and advanced for the clothes, schooling, and other necessary expenses of the ward, out of the principal of the ward's estate, if it appear that from extraordinary circumstances such disbursements were unavoidable without culpable neglect on the part of the guardian, otherwise such allowance ought to be made out of the profits only.

In the case of *Myers vs. Wade*, 6 Rand., 444, decided May, 1828, it was held: A guardian cannot apply any part of the principal of the infant's estate to his education or maintenance without the previous consent of the court appointing the guardian.

A parent who is guardian of his children is more bound than others to a strict observance of this rule, for there is a natural, if not a legal, obligation on all parents to support their children, if of ability to do so.

If the expense of maintaining and educating infant wards exceeds their annual income until they become of an age to render service (say fourteen, fifteen, or sixteen years), and if when they arrive at that age their services are equal to their support, the surplus of expenditure during the former period ought to be set off against the income of their estates during the latter period till they arrive at the age of twenty-one.

In the cases of *Broadus et als. vs. Rosson and Wife et als.*, *Winston vs. Same*, 3 Leigh, 12, decided May, 1831, it was held: Though a guardian has no right to expend the principal of his ward's estate, yet if he take up goods for his ward, the merchant who furnishes them is not bound to see that the profits of ward's estate are sufficient to pay for them and that the principal is not applied to pay for them.

In the case of *Foreman vs. Murray et ux. et als.*, 7 Leigh, 412, decided March, 1836, it was held: A guardian shall be allowed his disbursements on account of the ward, though they exceed the income of the ward's whole estate in the hands of the guardian and of the administrator of the ward's father.

In the case of *Anderson vs. Thompson*, 11 Leigh, 439, decided November, 1840, it was held: A guardian shall not be allowed for his disbursements for the maintenance and education of the ward more than the profits of the ward's estate, and those profits shall be taken exclusive of the increase of slaves belonging to the ward.

In the case of *Armstrong's Heirs vs. Walkup et als.*, 9 Grat., 372, decided September 3, 1852, it was held: A guardian of infants is entitled to compensation for their support, even though he may have promised their friends that he would not make any charge for it, and in fact kept no accounts against them.

A payment made to the husband of one of three wards, who is a guardian of another of them, though intended to be a payment to all, is not to be credited against the third ward, who is then an adult, she not having authorized him to receive it, but it is to be credited against the husband and wife and his ward.

The accounts of the three wards should be stated separately from the commencement, or at least from the time their expenses differed in amount.

In the case of *Evans vs. Pearce*, 15 Grat., 513, decided January, 1860, it was held: A father has property of his infant children in his possession, and during his life does not apply to the court to have any of the profits of that property applied to their support, nor does he make any charge against them during his life. His estate will not be allowed anything for their support without the clearest proof that justice requires it.

In such a case the father will be treated as a guardian, and his accounts will be settled on the principles applicable to guardians' accounts.

In the case of *Rinker and Wife vs. Streit*, 33 Grat., 663, decided September, 1880. The income of the estate of M., the ward, being insufficient for her support and education, her guardian, S., expended the principal of the proceeds of the sale of her real and personal estate upon her, and upon the settlement of his account after the termination of his guardianship he was still in advance to his ward. Held: The guardian was not authorized to use the principal of the ward's real estate for the support and education of his ward, and the court of equity settling his account could not render the expenditure valid by its decree.

Chapter 123, Section 13, Code of 1873, which authorizes the chancery court in certain cases to allow the application of the real estate to the maintenance and education of a ward, does not authorize the court to sanction such application already made by the guardian; but the order of the court must be first made by the guardian in order to authorize it.

The guardian may apply the principal of the ward's personal estate to her maintenance and education, in a proper case, and if the court would have authorized it upon application to the court before it was done, the court may and will sanction it upon settlement of his accounts.

In the case of *Gayle vs. Hayes' Administrator*, 79 Va., 542, decided August 14, 1884, it was held: What are necessities for which an infant's estate is liable depend upon his condition and circumstances.

In 1871 G. married a widow having a son ten years old, and lived with them on land owned by her as her dower and by son in fee expectant on her decease. Present worth of his interest was only \$977.55. He had no personalty. In 1874 he was reasonably well educated. He died in 1878. G. set up against his estate a claim of \$799.83 for his maintenance and education during years 1874 to 1878 inclusive. Held: G.'s claim is not sustainable as being for necessities.

Out of annual proceeds of ward's estate his maintenance and education may be provided. To pay expense thereof in excess of annual income, chancery court may order sale of his person-

alty; but neither ward himself nor his real estate is liable therefor.

Not until present statute was passed was it lawful for the court to order application of proceeds of ward's real estate beyond annual income to his maintenance and education. And under this section such order must always precede such application.

SECTION 2605.

In the case of *Harkrader vs. Bonham*, 88 Va., 247, decided July 9, 1891, it was held: Under this section the court must order sale or sanction previous sale of such of ward's personalty as may be necessary to pay proper expenditures beyond income; but neither ward personally nor his realty are liable therefor.

SECTION 2606.

In the case of *Hooper vs. Royster*, 1 Munf., 119, decided April, 1810, it was held: A reasonable time ought to be allowed a guardian to put the money of a ward out at interest, and in this case six months were considered as such reasonable time.

In the case of *Garrett (Executor of Allen) vs. Carr and Wife and Another*, 1 Rob., 196 (2d edition, 209). (Absent, Stanard, and Baldwin, J.*) The decree of this court at the time of the decision reported in 3 Leigh, 407, having remanded this cause with directions that the account of the land fund and the hire of the slaves should be stated as a guardian's account, question now whether those directions have been complied with.

Construction of the 7th Section of the act in 1 Rev. Code, 1819, p. 407, concerning guardians, which requires every guardian to exhibit to the court which appointed him, once in every year, "accounts of the produce of the estate, of the sales and disposition of such produce, and of the disbursements"; and of the 9th Section, which provides that the balance appearing against the guardian "may be put out to interest for the benefit of the ward, upon such security as the court shall direct and approve; or the guardian, if it remain in his hands, shall account for the interest to be computed from the time his account was, or ought to have been, passed."

If, upon the first settlement by the guardian of his account, a balance remain in his hands on which he is to account for interest, such interest must, in his second annual account, be credited to the ward, like other profits of the estate; and if the interest and other profits credited in this second account exceed the disbursements, the surplus, whether it arise from the interest aforesaid, or from other profits, will constitute a balance against the guardian, on which, if it remain in his hands, he must ac-

* They had been counsel for the appellees.

count for interest, which interest must, in the third annual account, be credited to the ward; and so on, *toties quoties*.

The case of a guardian indebted to his ward for the annual value of land occupied, and of a slave possessed by him, forms an exception to the general rule that interest is not to be allowed on estimated rents and hires. Such annual value must, in the annual account exhibited by the guardian, be credited to his ward, and the surplus beyond the disbursements will bear interest like other profits of the estate.

Where a guardian has returned no account to the court which appointed him, and a bill in equity is filed against him, the court of equity will charge him with interest from the time and in the manner that he would have been charged if his account had been exhibited annually to the court which appointed him; and will settle the accounts, in other respects, upon the principles that would have governed the settlements if regular returns had been made to that court.

From the time that the guardianship terminates, the account between the guardian and ward will be stated upon the ordinary principle that prevails between debtor and creditor. Sums paid after that time by the guardian to the ward will be credited at the respective dates of such payment, so as to stop interest *pro tanto* from those dates.

In the case of *Cunningham vs. Cunningham*, 4 Grat., 23, decided July, 1847, it was held: It is error to aggregate the principal and interest due on the guardian's account, and give a decree for the whole sum with interest thereon.

In the case of *Armstrong's Heirs vs. Walkup*, 12 Grat., 608, decided September 11, 1855, it was held: Upon the coming of age or marriage of a ward, or the death of a guardian, the guardianship terminates; and from that time only simple interest is to be charged on any balance then in his hands or which he afterwards received.

The estate of the ward having come into the possession of the guardian, his bond of office binds him in his lifetime, and his estate after his death, for the interest, hires, and profits received by him, whether received before or after the termination of his authority as guardian; but from the termination of the guardianship, the same to be accounted for on the ordinary principles governing accounts between debtor and creditor.

A guardian is not to be charged interest upon the money received by him from the day it is received, but he is to be allowed six months in which to invest it.

SECTION 2608.

In the case of *Snaveley vs. Harkrader et als.*, 29 Grat., 112, decided September, 1877. A guardian who receives the money

of his wards and does not invest it, but retains it in his own hands, is to be charged interest thereon from the date of its receipt, and not from the end of the thirty days allowed by the statute to the guardian to make investments.

A guardian receiving from the administrator of the father of his ward his own bonds bearing 12 per cent. interest as a part of the ward's estate, and not investing the same, is to be charged the same rate of interest upon it to the termination of his guardianship.

In the stating of a guardian's account, his commissions on the money received by him should be credited at the time of the receipt of the money, and interest only charged on the balance.

SECTION 2609.

In the case of *Lemon (Guardian) vs. Hansbarger*, 6 Grat., 301, decided July, 1849, it was held: A second guardian of an infant has no authority to file a bill in his own name, against a former guardian, for an account of his transactions in relation to the ward's estate.

An infant may by his next friend call the acting guardian, or any preceding guardian, to account by a bill in chancery; but the bill must be in his own name by his next friend.

In the case of *Snaveley vs. Harkrader et als.*, 29 Grat., 112, decided September, 1877. Infants by their next friend file their bill against their guardian, first to discharge and falsify the settled account of their guardian and to have him removed; and second, to have a sale of their lands. The guardian demurs to the bill on the ground that it is multifarious. Held: That, as the court cannot sell the infants' land on a bill filed by them, and no relief on that part of the bill can be given, the court will consider the case as if that part of the bill was not in it; and the demurrer was properly overruled.

Pending the case some of the plaintiffs came of age, and they all unite in an amended bill asking the same relief against the guardian; and the plaintiffs who have come of age ask for a partition of the land and the sale of it, on the ground that it cannot be divided in kind without injury to all. The guardian demurs to the amended bill on the same ground. Held: The court cannot decree a partition and sale of the land on this bill, and, therefore, it will be treated as if this part of the bill was not in it; and the demurrer was properly overruled.

Pending the suit all the plaintiffs go off to their relations in the State of Illinois, and one of them qualifies in that State as guardian of the infants, and they then amend their bill, stating these facts and filing a copy of the guardian's bond, and asking that their property may be turned over to their Illinois guardian. The account of the guardian having been settled, show-

ing the amount due to each of his wards, the cause came on to be heard, when the court made a decree moving the first guardian, and that he should pay over to the Illinois guardian the amounts severally reported to be due to his wards. Held: Upon the large discretion vested in the courts in the appointment and removal of guardians, and the circumstances in this case as developed by the evidence, the court did not err in removing the guardian.

It was error to decree the payment of the money of the wards to the Illinois guardian without proceeding in the mode prescribed by the statute, Code of 1873, Chapter 125, Section 5.

The Illinois guardian may file his petition in this cause for the removal of the personal property of his wards, and the proceedings prescribed by said statute may be had therein.

The sale or partition of lands of the infants cannot be made in this case, but the proceeding to effect this object must be as prescribed by the statute, Code of 1873, Chapter 124, Sections 2 to 8.

In the case of *Rinker and Wife vs. Streit*, 33 Grat., 663, decided September, 1880, it was held: Chapter 123, Section 13, Code of 1873, which authorizes the chancery court in certain cases to allow the application of the real estate to the maintenance and education of a ward, does not authorize the court to sanction it upon settlement of his accounts.

In the case of *Gayle vs. Haye's Administrators*, 79 Va., 542, decided August 14, 1884, it was held: Not until the present statute was passed was it lawful for the court to order application of proceeds of ward's real estate, beyond annual income, to his maintenance and education, and under that act such order must always precede such application.

In the case of *Cummings vs. Simpson*, 11 Va. Law Journal, 462, decided January 6, 1887, it was held: A guardian cannot expend, for the maintenance or education of his ward, his real estate or the proceeds thereof in the guardian's hands, stamped with the character of realty, in excess of the annual income from the same, without first obtaining from the circuit court having jurisdiction in the premises an order authorizing such expenditure as provided for in said section.

In the case of *Harkrader vs. Bonham*, 88 Va., 247, decided July 9, 1891, it was held: Under this section the chancery court may order sale of ward's realty when it appears that his proper maintenance and education, or other interests require the proceeds beyond the annual income thereof, to be applied for his use; but if, when the court is called upon to confirm such sale, the necessity therefor, which seemed to exist when the sale was ordered, shall have ceased, it is proper that the court should refuse to confirm the sale.

SECTION 2610.

In the case of *Latham, by, etc., vs. Latham*, 30 Grat., 307, decided July, 1878, it was held: The father is the legal custodian of the minor children, and they will not be taken from his custody without the strongest reasons therefor; and this right is not affected by the voluntary separation of the parties.

Notice is given to take depositions at two distant places on the same day. The other party may attend at one of the places, and object to the depositions taken at the other place for want of notice; but if he attends by his counsel at both places, he cannot except to the depositions taken at either or at both places.

SECTION 2614.

In the case of *Stewart vs. Crabbs (Guardian)*, 6 Munf., 280, decided February 10, 1819, it was held: An action for an assault and battery committed on an infant ought not to be brought in the name of the guardian of such infant, but in the name of such infant by his or her guardian or next friend; an error in this respect before January 1, 1820, was fatal, even after general verdict for the plaintiff.

In the case of *Burwell et als. vs. Corbin et als.*, 1 Rand., 131, decided April, 1822, it was held: A man who is made a *prochein ami* to an infant without his knowledge or consent is not disqualified from being a witness; but *quære*, what shall amount to a recognition by such *prochein ami* that his name was properly used?

In the case of *Lemon (Guardian) vs. Hansbarger*, 6 Grat., 301, decided July, 1849, it was held: An infant may, by his next friend, call the acting guardian, or any preceding guardian to account by a bill in chancery; but the bill must be in his own name by his next friend.

TITLE XXXIII.

CHAPTER CXVII.

SECTION 2616.

In the case of *Garland vs. Loving*, 1 Rand., 396, here referred to, there is nothing which can be used as a guide in this work.

In the case of *Pierce's Administrator, etc., vs. Trigg's Heirs*, 10 Leigh, 406 (2d edition, 423), decided July, 1839, it was held: Where land is purchased by partners for partnership purposes with partnership funds, and is used as a part of the stock in trade, a court of equity deems such land partnership's property; and though, if the conveyance has been made to both parties, there will, upon the death of one, pass to his heirs a legal title,

yet the whole beneficial interest devolves upon the survivor, and he may sue the heirs, compel a sale, and dispose of the proceeds as he would of the personal estate of the firm.

In the case of *Talley et als. vs. Stark's Administratrix et als.*, 6 Grat., 339, decided October, 1849. Testator says: "Believing that a sale of my property at this time would be ruinous to the general interest of my wife and our children, my will and desire is that all my estate (after payment of my debts as provided for) be kept together until my youngest child becomes of age; to be controlled and managed by my executors and my wife with their best discretion, so as to make it productive of the greatest amount of profit for the support of my wife and children." Held: That a court of equity may direct a sale of the real estate if it is for the benefit of the infant children, and those who are of age consent.

In a suit in equity by the guardian of infants for the sale of their real estate, a guardian for the infants *ad litem* may be appointed at rules. It is not necessary in the decree for the sale of the land to direct that the guardian shall give security, under Section 20 of the act, 1 Rev. Code, Chapter 108, pages 408-'10. The decree directing the sale to be made on the premises, the commissioner acts irregularly in making it at a different place; especially after advertising that it was to be made on the premises. He should report to the court that it could not be made there for want of bidders, and obtain instructions for his future action. A sale having thus been irregularly made, as the purchasers could not enforce their contracts if resisted by the parties in the cause, they ought not to be compelled to perfect them if they object.

The appellate court having set aside certain parcels of the land at the instance of the purchasers, who were the appellants in the cause, and the ground of the objection to the sale being such as the infant parties may make to all the sales, the court will set aside the whole decree confirming the sale of all the parcels, and though the other purchasers are satisfied with their purchases, and are not parties to the appeal; and will send the cause back for the court below to determine whether these last-mentioned sales ought to be set aside, or confirmed with the consent of the purchasers, and for the benefit of the infant defendants.

In the case of *Cooper vs. Hepburn*, 15 Grat., 551, decided May 15, 1860, it was held: H. devises real estate to M. during his natural life, and to his children if he should have lawful issue; if not, then at his decease to H.'s grandchildren. At the death of M., H. is not married, but he afterwards marries and has lawful children. Upon the birth of the first child of M. the remainder vests in the child, subject to open and let in the after-

born children as they severally come into being; and the remainder in favor of the grandchildren was defeated, and therefore the grandchildren were not necessary parties to a suit by the guardian of M.'s children for a sale of the real estate.

M., as guardian of his infant children, files a bill for the sale of the real estate held by himself for life and by his children in remainder, and it is sold accordingly. This is authorized by the statute.

In the case of *Faulkner et als. vs. Davis et als.*, 18 Grat., 651, decided April, 1868, it was held: A court of equity will enjoin a sale under a deed of trust given to secure the purchase-money of land where there is a cloud upon the title which would occasion a sacrifice at such a sale.

It seems that in Virginia a court of equity has not authority, under its general jurisdiction as guardians of infants, to sell their real estate whenever it is for the advantage of the infants to do so. The statutes in relation to the sale of infants' lands are remedial in their nature, and should be construed liberally.

By the act of February 18, 1853, Session Acts, Chapter 34, p. 39, and the previous acts on the subject, courts of equity had authority to sell the lands in which the infants had an interest, whether in possession or remainder, vested or contingent, if the proper parties should be brought before the courts.

Two vacant lots in the city of Richmond are conveyed to trustees in trust for N. and his wife, L., and the survivor of them for life, and at the death of the survivor to be conveyed by the trustees to the children of N. and his wife, who should be living at the death of the survivor, and the descendants of such of the children as would be then dead leaving descendants; and upon the further trust, that if N. should think it expedient to sell the lots, or any part of them, the trustees should permit him to do so, the proceeds of sale to be secured and held upon the same trusts. N. dies without selling the lots, leaving his wife and five children surviving him. The trust to sell continues, and a court of equity may execute it.

Upon a bill filed by the widow of N. against the children and trustees for the sale of the lots, the court may decree a sale, and the descendants of any child dying in the lifetime of the widow will be bound by the decree, the parties before the court representing any such descendants who may become entitled under the trusts of the deed.

Although the bill was prepared with reference to the sale of the land of infants under the statute, yet all the facts having been stated in it, and all the proceedings having been regularly conducted, it was competent for the court to make a decree therein for the sale of the property, if upon these facts, upon

any ground whatever, the court of chancery had authority to make such a decree.

See the case of *Snaveley vs. Harkrader*, 29 Grat., 112, quoted *supra*, Section 2609.

In the case of *Quisenberry et als. vs. Barbour*, 31 Grat., 491, decided January, 1879. F. conveys land to Q. in trust for J., the daughter of F. and wife of Q., for her life, and then to her children. Afterwards J. and her children, who are infants under fourteen years of age, by their next friend file their bill against Q., the trustee, for the sale of the land, and there is a decree for the sale, and a sale made more than six months after the decree, and this sale is confirmed and a conveyance made to the purchaser. In an action of ejectment by the children of J. after her death to recover the land from a vendee of the purchaser. Held: The court having had jurisdiction of the case under the statute, the validity and propriety of the decree for the sale of the land cannot be questioned in a collateral proceeding.

The sale having been made more than six months after the decree for the sale, the sale cannot be set aside, even if the decree was erroneous.

The facts that the infants were plaintiffs with their mother instead of being made defendants, is no objection to the proceeding in the suit for a sale of the land.

In the case of *Palmer et als. vs. Garland's Committee et als.*, 81 Va., 444, decided February 11, 1886. H., committee of G., a female lunatic, institutes a suit under Code 1873, Chapter 124, to sell her contingent estate in lands, and conducts it in the proper manner, and against the proper parties, and adduces the proper evidence, in every respect in accordance with the requirements of the statute, and in his bill he presents the bids of certain parties who already owned other contingent interest in the same lands. The court deeming that the interest of the lunatic will be promoted, and the rights of no one violated by the sale of her said contingent estate, decrees that the proposed sale be confirmed at the said bids, and the said estate of the lunatic therein be conveyed to the said bidders. Held: The sale is lawful.

SECTION 2618.

In the case of *Garland vs. Loving*, 1 Rand., 396, here referred to, there is nothing which can be of use in a work of this character.

In the case of *Talley et als. vs. Starke's Administratrix et als.*, 6 Grat., 339, decided October, 1849, it was held: In a suit in equity by the guardian of infants for the sale of their real estate, a guardian *ad litem* for the infants may be appointed at rules.

In the case of *Ewing's Administrator et als. vs. Ferguson's*

Administrator et als., 33 Grat., 548, decided September, 1880, it was held: The heirs of E. being infants, though their guardian was a party and answered, they were entitled to be defended by a guardian *ad litem*, and although one was appointed for them, and there was a paper purporting to be an answer found among the papers of the case, yet as it did not appear that it had been filed, it was error to decree a sale of the infant's land without an answer filed by the guardian *ad litem*.

SECTION 2620.

In the case of *Garland vs. Loving*, 1 Rand., 396, here referred to, there is nothing to guide one as to the principle on which this section is based.

See the case of *Faulkner et als. vs. Davis et als.*, 18 Grat., 651, *ante*, Section 2616.

See the case of *Palmer et als. vs. Garland's Committee et als.*, 81 Va., 444, cited *ante*, Section 2616.

In the case of *Palmer et als. vs. Garland's Committee et als.*, 81 Va., 444, decided February 11, 1886. H., committee of G., a female lunatic, institutes a suit under Code 1873, Chapter 124, to sell her contingent estate in lands, and conducts it in the proper manner, and against the proper parties, and adduces the proper evidence, in every respect in accordance with the requirements of the statute, and in his bill he presents the bids of certain parties who already owned other contingent interest in the same lands. The court deeming that the interest of the lunatic will be promoted, and the rights of no one violated by the sale of her said contingent estate, decrees that the proposed sale be confirmed at the said bids, and the said estate of the lunatic therein be conveyed to the said bidders. Held: The sale is lawful.

SECTION 2621.

In the case of *Redd vs. Jones et als.*, 30 Grat., 123, decided April 4, 1878, it was held: In a writ by a guardian for the sale of his ward's lands, a decree is made appointing commissioners to sell it, and in October, 1859, they sell the land at public auction, when the guardian becomes the purchaser at a full price, makes the cash payment, and executes his two bonds, with sureties, for the deferred payments. All the papers in the case were destroyed by the Union forces during the war, except the order-book of the court, extending from 1858 to 1863, and the two bonds of the purchaser, which were found among the scattered papers in the office. The purchaser goes into possession of the land, which he has held ever since without question. Though the order-book does not contain a decree confirming the sale, yet no question having been made as to the purchaser's title down to 1873, when suit is brought by the commissioner and the

parties entitled to the proceeds against the purchaser's assignee in bankruptcy, and the sureties of the purchaser to enforce the payment of the purchase-money of the land which had fallen very much in value, the sale will be held to be valid, and the sureties in the bond held liable.

SECTION 2622.

In the case of *Talley et als. vs. Starke's Administratrix et als.*, 6 Grat., 339, it was held: It is necessary, in the decree for the sale of the land, to direct that the guardian shall give security, under Section 20 of the act, 1 Rev. Code, Chapter 108, pages 409-'10.

SECTION 2626.

In the case of *Vaughn vs. Jones et als.*, 23 Grat., 444, decided March, 1873. The real estate of R., a female infant, is sold under decrees of court and turned over to V., her guardian, upon his giving bond and security for the faithful accounting therefor. In 1862 R. married B., to whom V. paid over the estate upon his giving security to indemnify V.; and in 1864 R. died, still under the age of twenty-one years, leaving a child which survived her but a few hours, and her husband who survived the child. Held: The proceeds of the real estate of R. descended as real estate to her child, subject to a life estate in her husband; and upon the death of the child it passed as real estate to the heirs of the child on the part of the mother.

In the case of *Rinker and Wife vs. Streit*, 33 Grat., 663, decided September, 1880. The income of the estate of M., the ward, being insufficient for her support and education, her guardian, S., expended the principal of the proceeds of the sale of her real and personal estate upon her, and upon the settlement of his account after the termination of his guardianship, he was still in advance to his ward. Held: The guardian was not authorized to use the principal of the ward's real estate for the support and education of his ward; and the court of equity settling his account could not render the expenditure valid by its decree.

Chapter 123, Section 13, Code of 1873, which authorizes the chancery court in certain cases to allow the application of the real estate to the maintenance and education of a ward, does not authorize the court to sanction such application already made by the guardian; but the order of the court must be first made by the guardian in order to authorize it.

The guardian may apply the principal of the ward's personal estate to her maintenance and education, in a proper case, and if the court would have authorized it upon application to the court before it was done, the court may and will sanction it upon settlement of his accounts.

In the case of *Hurt vs. Jones and Wife*, 75 Va. Reports, 341, decided March 10, 1881, it was held, p. 350-'51: The one-sixth interest of the wife, H., passed by the sale in the suit for partition, and her interest thereto was her share of the purchase-money retained by H. under the decree of the court. *Quære*: Whether under the amended act of February 28, 1868, it passes to heir at law?

In the case of *Turner vs. Dawson et als.*, 80 Va., 841, decided October 8, 1885, it was held: Where court of equity causes land to be sold for partition, it leaves it to the party entitled to the proceeds to designate whether it will hold them as personalty or as realty. And when, for any reason, that party is incapable of making such designation, the court will hold them subject to all the incidents of realty

TITLE XXXIV.

CHAPTER CXVIII.

SECTION 2629.

See the case of *Snaveley vs. Harkrader et als.*, 29 Grat., 112, cited *ante*, Section 2609.

SECTION 2631.

See the case of *Snaveley vs. Harkrader et als.*, 29 Grat., 112, cited *ante*, Section 2609.

In the case of *Coltrane vs. Norrell*, 30 Grat., 434, decided July, 1878, it was held: The trust deed provides that D. shall have the interest and so much of the principal of the trust fund as shall be necessary for her support. If she dies in the lifetime of her husband she may dispose of the whole of the trust fund by her will, and if she shall survive him it shall be hers absolutely. She may have the trust-fund removed to Missouri, and vested in a trustee appointed in that State to receive and hold it on the same trusts.

SECTION 2632.

In the case of *Coltrane vs. Norrell*, 30 Grat., 434, it was held, Page 449: It is too late to object to the transfer of trust funds, on the ground of informality in the proceedings in the appellate court.

TITLE XXXV.

CHAPTER CXIX.

SECTION 2636.

In the case of *Fleming vs. Bolling*, 3 Call, 75 (2d edition, 66), decided October 26, 1801. The testator devised that his

book be given up to A., and that he shall receive all the debts due, and pay all the testator owes. Held: This is an appointment of A. to perform the duties of executor, but does not entitle him to the surplus of the debts due the testator, nor does it discharge him from a debt which he himself owed.

In the case of *Monroe (Executor of Jones) vs. James*, 4 Munf., 194, decided January 20, 1814, it was held: A sale of a slave belonging to the estate of a testator, by a person named as one of the executors, but who, at the time of such sale, had not qualified, and afterwards died without having qualified, by giving bond and security is void against the executor who did qualify, notwithstanding such sale was made for valuable consideration, and at a time when there was no qualified executor.

In the case of *Mills et als. vs. Mills' Executors*, 28 Grat., 442, decided March 22, 1877, it was held, p. 491: Where two of three executors qualify, they may act, and upon the qualification of the third he is entitled to act as to the estate not yet administered.

SECTION 2637.

In the case of *Burnley's Administrator vs. Duke et als.*, 1 Rand., 108, decided March, 1822, it was held: Where a testator leaves two wills, one in Virginia and the other in England, the English will being the last in date, and his executor takes out letters of administration on the posterior will in England, this does not *ipso facto* repeal letters of administration which have been granted in Virginia on the first will; but the English executor must first qualify by giving bond and security as the law directs.

In the case of *Thompson vs. Meek*, 7 Leigh, 419, decided April, 1836. A court of probate receives proof of a will and admits it to record, and six months afterwards grants administration with the will annexed; and it does not appear by the record of the court of probate that the executors named in the will had ever renounced. Held: The failure to state such renunciation upon the record does not make the grant of administration absolutely void.

In a suit in equity by devisees against an administrator, with the will annexed, and a purchaser from him, the court will presume the grant of administration to be regular, unless its regularity be drawn in question by the pleadings. If the grant of administration with the will annexed be alleged to be irregular, upon the ground that the executor had not renounced, the fact of such renunciation may be established by parol evidence.

In the case of *Gibson vs. Beckham et als.*, 16 Grat., 321, decided November 18, 1862. A will is offered for probate in the proper court, and it is proved by one of three subscribing witnesses, which is ordered to be certified. At the next term of

the court the executors renounce, and the widow relinquishes her right to administer, and administration c. t. a. is committed to G., who executes his official bond, with sureties, in the proper form. Held: The bond is valid, and binds the administrator and his sureties for his default.

When a court has cognizance of the subject-matter, its judgment, though it may be erroneous, is not void. It is binding until it is set aside or reversed, and cannot be questioned incidentally; acts done and bonds taken under it bind the obligors.

Where a court or officer has authority or capacity to take a bond, and makes a mistake by omitting some condition prescribed, or inserting a condition not authorized or illegal, unless the statute, by express words or necessary implication, makes it wholly void, the bond is not void; the good shall not be vitiated by the bad; and the bond may be sued on, so far as the conditions are good, as a statutory bond.

When the court has cognizance of the subject-matter, or capacity to take a bond, and takes a bond which on its face is valid,* but contains a recital of facts necessary to its validity, as in the cases of the election and induction into office of a sheriff, the presence of the justices named as obligees, and the like, the obligors shall be estopped from denying the truth of such recitals.

SECTION 2639.

In the case of *Cutchins vs. Wilkinson*, 1 Call, 1, decided April 22, 1797. W. died intestate, leaving a widow and three children; the children died infants and intestate in the lifetime of their mother; the widow administered on the estate of her husband; died, leaving a will appointing executors. Held: The brother of the widow was entitled to the administration *de bonis non* of the husband in preference to W.'s brother. But, it seems, had the executors of the widow applied, the administration would have been committed to them.

In the case of *McCandlish vs. Hopkins*, 6 Call, 208, decided December, 1814, it was held: A creditor since the act of 1792 has no preference over any other person in an application for administration upon an intestate's estate; but every case must depend upon its own circumstances.

Under a power of attorney authorizing a person to execute an administration bond for the person giving the power, the attorney may be allowed to execute the bond accordingly.

In the case of *Hendren vs. Colgin*, 4 Munf., 231, decided March 12, 1814, it was held: Upon the death of a husband, who survived his wife, and administered upon her estate, his executor (or, it seems, his administrator) is entitled to be administrator *de bonis non* of the wife, in preference to her next of

kin. It seems, too, that his executor is entitled, in preference to his residuary legatee.

In the case of *Bray vs. Dungeon*, 6 Munf., 132, decided February 24, 1818, it was held: Where the personal property of the wife is so settled by a deed executed before the marriage, and duly recorded, that upon her dying intestate in her husband's lifetime the trustee is to convey the same to her legal heirs, her nearest blood relation is, in such event, entitled to the administration of her estate in preference to her husband.

In the case of *Cotton vs. Cotton*, 4 Rand., 192, decided May, 1826, it was held: Wherefore two successive applications are made to a county court for administration, and rejected, appeals taken to the circuit court from both decisions, and the judgments of the county court affirmed; upon an appeal to this court on the second case, the court cannot reverse the first judgment and grant administration.

In the case of *Commonwealth vs. Hudgin*, 2 Leigh, 248, decided June, 1830. A resident of Kentucky dies intestate there, having no estate in Virginia, but a claim on this Commonwealth for money. Held: The circuit court of Henrico county, wherein is the seat of government, has jurisdiction to grant administration of such decedent's estate.

In the case of *Haxall vs. Lee*, 2 Leigh, 267, decided June, 1830. A person dies intestate in 1825; and in 1830 a distributee and a creditor come, at the same time, to ask administration. Held: The court has no discretion to choose between them, but must prefer the distributee.

In the case of *Ex Parte Barker*, 2 Leigh, 719, decided June, 1830, it was held: Letters of administration granted by a court having no jurisdiction to grant them are merely void; and the court having competent jurisdiction to grant the administration may proceed to grant it, though the letters of administration before improperly granted have not been revoked.

In the case of *Ex Parte Lyons*, 2 Leigh, 761, decided November, 1830, it was held: When administration of a decedent's estate has been duly granted by any court of competent jurisdiction, that same court only, upon the death of the administrator, has the jurisdiction to grant administration *de bonis non*.

In the case of *Thornton vs. Winston*, 4 Leigh, 152, decided January, 1833. There may be a valid renunciation of the executorship of a will, by matter *in pais*. An executrix declines to qualify as such, and agrees that administration with the will annexed shall be granted to her daughter, reserving her right to qualify after her daughter's death. Held: This renunciation of the executorship is absolute and perpetual, and cannot be retracted after the death of the administratrix, nor does the nomination of the executrix in the will give her any preferable right

to the administration *de bonis non* with the will annexed. The person entitled to the estate of a decedent is entitled to the administration. A testator by his will gives personal property to his wife, and she takes the provision made for her by the will. Held: She is entitled to no part of an undisposed of *residuum* as distributee of her husband, being excluded from distribution by the statute, 1 Rev. Code, Chapter 104, Section 26, and in a contest between the widow and a distributee, for administration with the will annexed, the distributee is entitled to it.

In the case of *Charles vs. Charles*, 8 Grat., 486, decided January, 1852, it was held: If the husband had relinquished his marital rights to his wife's property, he is not entitled to administration upon her estate.

SECTION 2641.

In the case of *Jones vs. Hobson*, 2 Rand., 483, decided June 11, 1824, it was held: Where a suit is brought against an executor and his securities, and the executor confesses assets, it is competent for a court of equity to decree immediately against the executor, and that liberty should be reserved to the creditor to proceed against the sureties by motion if it should become necessary.

The sureties of an executor are not responsible for the proceeds of land sold by them under the will.

The sureties of an executor are not responsible for the acts of his executor in the administration of the estate of the first testator.

In the case of *Burnett et als. vs. Harwell et als., etc.*, 3 Leigh, 89, decided October, 1831, it was held: Under the former provisions of the statute concerning executors' bonds, the sureties of an executor are not responsible for the proceeds of land sold by him under a power in the testator's will.

In such an action the declaration must aver that the assets came to his hands, and the *devastavit* thereof; and if the declaration contain no such averment, it is bad on general demurrer; per Tucker, P.

In the case of *Morrow's Administrators vs. Peyton's Administrator et als.*, 8 Leigh, 54, decided February, 1837. Where two administrators execute a joint administration bond, each is a surety for the other; and if one commit a *devastavit* the other is chargeable, but only as surety, and *pari passu* with the other sureties in the bond; dissentient Brook, J., who held that for a *devastavit* by one administrator the other is not responsible, either as principal or surety.

Where the estate of one decedent is indebted to that of the other, and the same person is administrator of both, and wastes assets of the debtor's estate which he was bound, but has failed, to pay over to the creditor's estate, the sureties for his due ad-

ministration of the creditor's estate are liable for such default and *devastavit*.

After the death of an executor who had qualified as such, the court grants administration of the testator's unadministered estate, but the bond taken from the administrator is in the form of a bond for administration *de bonis non* of an intestate, not in the form of a bond for administration *de bonis non* with the will annexed of a testator. Held: The bond is void.

An administrator makes a verbal promise to the agent employed to collect a debt from the estate, that if he will pay the amount to his principal, the administrator will repay it to him with interest; the agent accordingly pays his principal the debt, and the administrator afterwards refunds to the agent the sum paid with interest. Held: The payment by the agent was payment by the administrator, for which he is entitled to credit at the date thereof, whatever be the time at which the amount was paid to the agent.

In the case of *Boyd's Executor vs. Boyd's Heirs*, 3 Grat., 113, decided July, 1846, it was held: Co-executors joining in the same executorial bond are sureties for each other.

In the case of *Atkinson vs. Christian*, 3 Grat., 449, decided January, 1847, it was held: By the statute it was intended that the court granting administration on an estate, or admitting an executor to qualify as such, should have a discretion in regard to the amount of the security. And the general rule of practice requiring security in double the estimated value of the estate is a proper exercise of that discretion.

The other good security authorized to be required is not to be in lieu of, or by way of substitution for, the former security, but in addition thereto. And the former securities are not thereby exonerated.

In determining the amount for which the other good security ought to be required, regard ought to be had to the value of the estate remaining unadministered, including any accessions thereto beyond the original estimate thereof, and to the extent of the available security still furnished by the original bond.

In the case of *Hutcheson, etc., vs. Pigg*, 8 Grat., 220, decided October, 1851, it was held: The official bond of an executrix only binding the obligors for the due administration of the personal estate, the sureties are to no extent responsible for rents and profits of the real estate.

All the sureties in the official bond of an executrix should be parties to a suit by legatees for distribution, or a sufficient reason should be shown for failing to make them parties, before a decree is made against one of them.

In the case of *Reherd et als. vs. Long et als.*, 77 Va., 839, decided October 18, 1883, it was held, p. 845: In the absence of evi-

dence directly to the contrary, it must be presumed that the official bond of the executor and his sureties was in the usual form, with a condition "for the faithful discharge by him of the duties of the trust."

As the law aforetime stood, when *Jones vs. Hobson*, 2 Rand., 483, was decided, the sureties could not have been held liable for the land payments collected by the executor, but as the law stood when the bond was executed and stands now, the sureties are liable therefor, and should have not been released.

SECTION 2642.

In the case of *Bryce vs. Stevenson et als.*, 2 Rand., 438, decided May 14, 1824, it was held: When an executor who has been permitted to qualify without security brings a suit in chancery to reduce into possession the funds of his testator, the court may, in its discretion, require security before it will lend its aid.

In the case of *Fairfax vs. Fairfax (Executor)*, 7 Grat., 36, decided May 11, 1850, it was held: To the judgment of a county court refusing to permit a person named as executor in a will to qualify without giving security, an appeal, demandable as of right, lies to the circuit court.

A testator appointed his wife and son executrix and executor, and expressed his confidence in them, directing that they should be permitted to qualify without giving security. Some years afterwards he added a codicil, by which he says, "I further appoint J. H. executor to the within will with my wife and son. Held: J. H. is not entitled to qualify without giving security. *Quære*: If in such case parol testimony is admissible to show the intention of the testator?

SECTION 2645.

In the case of *Cooke vs. Harrison*, 3 Rand., 494, decided October, 1825, it was held: A sheriff, to whom the estate of a decedent is committed, is, to all intents and purposes, an administrator under the present law, whatever he may have been previously; and, therefore, is responsible for the due administration of the estate after his term of office as sheriff expires.

Where the representative of a sheriff is sued on account of an estate committed to his hands, and it appears that his deputy (who is also sued) had the entire management of the estate, the court may decree against the deputy in the first instance, if assented to by the plaintiff, reserving liberty to him to resort to the court for ulterior decrees against the other parties; but if such consent be not given, it is the duty of the court to decree between the defendants in order to throw the burden on the person ultimately liable.

In the case of *Dabney's Administrator vs. Smith's Legatee*, 5 Leigh, 13, decided January, 1834. Administration of a decedent's estate *cum testamento annexo* was committed to a sheriff under the statute, and the administration was conducted by his deputy, and, for the most part, after the sheriff's term of office expired. Held: The administration did not devolve on the sheriff's successor, but he was bound to complete it, and he and his official sureties are answerable for his deputies after, as well as before, the expiration of his office.

In a suit in chancery by the legatees against the personal representatives of sheriff, of his deputy, and of his official sureties, decree first against the representatives of the sheriff and of the deputy for the balance due; and *fi. fa.* on the decree returned *nulla bona testatoris*. Held: No necessity to direct accounts of administration by their representatives, to ascertain whether they have committed a *devastavit*, before proceeding to decree against the sheriff's sureties. Nor necessary to make the heirs of the sheriff and the deputy sheriff parties to inquire whether any real estate descended to them before proceeding to decree against the sureties. Nor necessary, two of the sureties having died insolvent, to order accounts of administration of their estates before decreeing against the solvent sureties.

Decree being first against the representatives of the sheriff and his deputy, with liberty to apply to court for decree against the representatives of the sureties, the executor of one of the sureties dies, and then, without reviving the suit against his administrator *de bonis non*, notice is given to him of a motion for a decree against him, and upon such notice the decree is made against him. Held: The proceeding is regular.

In the case of *Douglas (Executor) vs. Stumps et als.*, 5 Leigh, 392, decided May, 1834. D. is commissioned sheriff of L. county in July, 1805, but receives no commission in 1806 for a second year of shrievalty, and yet continues to act as sheriff for the second year of 1806-'7; the estate of a decedent is committed to him by order of court during the second year. Held: The sheriff, though not regularly commissioned, was sheriff until his successor was appointed, and he is responsible for the administration of the decedent's estate by his deputy.

In the case of *Mosby (Administrator) et als. vs. Mosby (Administrator)*, 9 Grat., 584, decided February 7, 1853, it was held: One of the executors having died, and the other having been removed, and the administration c. t. a. having been committed to the sheriff, he was authorized as such administrator to execute the power and trust, and is, therefore, bound to account for the rents and profits; the case, though not within the letter of the statute, being within its spirit and meaning. The rents and profits of the land having been received by the deputy of the high sheriff, he is responsible for them.

In the case of *Hutcheson vs. Priddy*, 12 Grat., 85, decided February 12, 1855, it was held: If the county court commits an estate to the sheriff for administration before the expiration of three months from the death of the testator or intestate, the act is not void, but voidable.

An estate having been committed to the sheriff, the county court cannot grant the administration to a distributee without notice to the sheriff of the application.

It is not imperative on the county court to grant administration to a distributee after the estate has been committed to a sheriff; but there is a legal discretion in the court.

SECTION 2646.

In the case of *Dickinson (Administrator, etc.) vs. McCraw*, 4 Rand., 158, decided March, 1826, it was held: The certificate of probate, or of administration, granted by a court of this State, and attested by the clerk, will enable the executor or administrator to act, and may be given in evidence in any court of this Commonwealth.

SECTION 2647.

The reference to 2 H. & M., 361, cannot be ascertained, as the paging of that book is, from 350 to 370, in complete confusion, and nothing appears there on this section.

In the case of *Rogers (Administrator) vs. Chandler (Administrator)*, 3 Munf., 65, decided January 10, 1811, it was held: Upon issue joined on plea of fully administered, a verdict finding in general terms "the issue for the plaintiff, and that assets equal to the claim of the plaintiff came to the hands of the defendant," is uncertain and insufficient. It should set forth with sufficient certainty what portion of the assets which came to the defendant's hands was unadministered at the time of suing out the plaintiff's writ. An appraisement of a decedent's estate, though not signed by the executor or administrator, and therefore not to be received as an inventory, is admissible as *prima facie* evidence of the value of the estate.

In the case of *Park's Administrator vs. Rucker*, 5 Leigh, 149, decided March, 1834, it was held: An inventory not signed by an administrator is no inventory as to him, and so no ground on which to charge him.

SECTION 2648.

In the case of *Dandridge, etc., vs. Minge*, 4 Rand., 397, decided July, 1826, it was held: It is the duty of an executor or administrator to apply the assets of the estate not necessary for the payment of debts to the exoneration of the real estate of his testator or intestate which may be under mortgage.

In the case of *Coleman (Administrator de bonis non Wernick)*

vs. *McMurdo & Prentis*, 5 Rand., 51, decided March, 1827, it was held: An administrator *de bonis non* cannot sue the representative of a former executor or administrator, either at law or in equity, for assets wasted and converted by the first executor or administrator; but such suit may be brought directly by creditors, legatees, or distributees.

In the case of *Morris (Administrator) vs. Morris (Administrator) et als.*, 4 Grat., 294, decided January, 1848, it was held: An administrator not having settled his accounts is not entitled to commissions. In a suit by an administrator *de bonis non* against the representative of the first administrator for the settlement of the first administrator's accounts of his administration, it is irregular to decree payment to the administrator *de bonis non*, but the distributees, being party to the suit and not complaining, so that a payment to the administrator *de bonis non* would be a valid discharge to the representative of the first administrator, he will not be heard to complain of the irregularity in the appellate court.

At the close of an administration account, the interest due from the administrator is not to bear interest.

In the case of *Clarke vs. Wells (Administrator)*, 6 Grat., 475, decided January, 1850. The sale by an administrator of his intestate's effects, though upon a credit, must be treated at law as a conversion thereof. There is an exception to this rule in equity when, upon a settlement between proper parties of the administration of the administrator, it appears that the collection of such sale bonds by his personal representative is unnecessary for the reimbursement or indemnity of his decedent's estate, and may therefore be confided as unadministered assets to the administrator *de bonis non*.

W., administrator of C., sells assets on a credit, and dies indebted to his intestate's estate. A purchaser at the sale qualifies as administrator *de bonis non* of C. Held: The proceeds of sale not being necessary for the reimbursement or indemnity of W.'s estate, his administrator shall be enjoined from proceeding to collect the debt from the administrator *de bonis non* of C., but he shall hold it as unadministered assets of his intestate.

In the case of *Tyler et als. vs. Nelson's Administratrix*, 14 Grat., 214, decided February 9, 1858, it was held: A court of equity has jurisdiction in a suit by a high sheriff against his deputy and the sureties of the deputy to have a settlement of the accounts of several administrations upon estates committed to the high sheriff, and which went into the hands of the deputy. And the suit may be maintained, though the deputy had settled the administration accounts before the probate court, and though the bill does not allege, and it is not proved, that the high sheriff had paid the balances reported to be due on the settled accounts,

or any part of them. Upon the death of the high sheriff, the suit should be revived in the name of his personal representative, and not in the name of the personal representative of the different estates, it being his suit against his agent.

The bond of the sureties for the deputy, which was given during the first year of the sheriffalty, bound them to indemnify the high sheriff for the acts of his deputy during the continuance in office of the high sheriff. Their liability does not extend to indemnify the high sheriff for the acts of the deputy in relation to an estate committed to the sheriff during his second year in office.

The sureties of the deputy are liable for the amount of bonds taken by the first administrator on the estate, and after his death delivered by his administrator to the sheriff in the first year of his sheriffalty. The sureties of the deputy will be responsible for assets received by him after the end of the year.

In the case of *Utterback's Administrator vs. Cooper*, 28 Grat., 233, decided March, 1877, it was held: Although at common law the appointment by a creditor of his debtor as executor operated as against legatees and distributees, with certain exceptions, as a release of the debt, this rule never applied to a debtor who was appointed administrator of his creditor.

If the obligor of a bond take out administration to the obligee, and dies, the administrator *de bonis non* of the obligee may maintain an action for such debt against the executor of the obligor. And so, if the debtor administrator is removed from his office, the action may be maintained against him by the administrator *de bonis non* of the obligee.

A lien given to secure the debt due from an executor or administrator to his testator or intestate is of course discharged when the debt is actually paid to the creditors or legatees or distributees of the creditor; but the introducing a debt into an administration account as a charge to the executor or administrator is not sufficient to discharge the lien either as against creditors, legatees, or distributees of the creditor, or as against the sureties of the executor or administrator.

A. sold to his son U. a tract of land, taking his bonds for the purchase-money, and a deed of trust on the land to secure them. He died, and his son U. qualified as his administrator. Shortly afterwards U. obtained a loan of money and stock from C., and gave a deed on his same land to secure it. Upon a bill by C. against the administrator *de bonis non* of A., and U. and his sureties on his official bond, to enforce his lien, the court being of opinion from all the evidence that U. had not paid any part of his debt to A., though he represented to C. he had done it, and that he was fraudulently trying to get rid of the lien in favor of A. in order to raise money for his own purposes, and that C.

either knew, or might have known if he had wished it, the facts, and made the loan with the knowledge of them, or in wilful ignorance, held: In favor of A.'s estate and U.'s sureties, that the lien to secure A.'s debt was a valid, subsisting lien, and had preference to the lien of C.

In the case of *Hinton et als. vs. Bland's Administrator et als.*, 81 Va., 588, decided April 8, 1886, it was held: Administrator *de bonis non* is entitled to all the personal estate of intestate which has not been converted by the former administrator. And where in suit there is money ordered to be paid to the intestate's estate, the administrator *de bonis non* must be a party.

In the case of *Smith vs. Pattie*, 81 Va., 654, decided April 15, 1886, it was held: Where administrator is sole heir and distributee of his intestate, and there are judgments against him individually which attached to the intestate's estate as soon as it descended upon his said heir and distributee, and there are debts against the intestate which are barred by the statute of limitations, the administrator cannot review those debts and repel the bar by any promise in writing, or otherwise, but is bound to plead the statute against those debts; and if he refuses or fails to do so, it is the right of the judgment-creditor, by reason of his interest in the fund, to interpose the plea.

In the case of *Harman vs. McMullin*, 85 Va., 187, decided August 2, 1888. Appointment of receiver does not affect title to fund which is still regarded as *in custodia legis*. When administrator has been removed and estate committed to sheriff as administrator *de bonis non*, and unadministered assets are insufficient to pay debts, and to pay same that fund must be drawn upon to some unknown extent. Held: It is proper not to pay the fund at once to distributees, but to appoint a receiver to hold same for protection of sureties, creditors, and distributees, especially as administrator *de bonis non* cannot sue his predecessor for assets wasted or converted.

SECTION 2651.

In the case of *Lawrason's Administrators vs. Davenport et als.*, 2 Call, 95 (2d edition, 79), decided October 31, 1799. An administrator selling a large certificate to pay a small debt was held (under the circumstances) not liable for what the certificate would have sold for if kept, but for the market price at his own residence.

In the case of *McCall vs. Peachey's Administrators*, 3 Munf., 288, decided January 25, 1812, it was held: In determining which of the goods and chattels of a testator, or intestate, shall be sold "as liable to perish, consume, or be the worse for using or keeping," some latitude of discretion must be allowed to the executor or administrator, and his conduct appearing to be fair,

and probably proceeding from a good intention, ought to be sanctioned by a court of equity. An administrator with the will annexed has, in general, the same powers which, under the will, the executors would have had if they had qualified.

SECTION 2652.

In the case of *Sale vs. Roy*, 2 H. & M., 69, decided March 9, 1808, it was held: The right of a purchaser at public auction from an executor of slaves specifically bequeathed by the testator cannot be disturbed by the legatee, whether the sale was necessary for the payment of debts or not, unless it be proved that the purchaser knew there were no debts to render such sale necessary, the remedy of the legatee being otherwise against the executor only; neither can such purchaser himself compel the executor to rescind the contract.

In the case of *Anderson vs. Fox*, 2 H. & M., 245, decided April, 1808, it was held: If an executor sells the slaves of his testator when there are no debts to render such sale necessary, and buys them himself, the sale may be set aside at the instance of any person interested.

An executor having sold certain slaves which were specifically bequeathed by his testatrix, having become the purchaser himself, and afterwards recovered damages in an action of trespass against the sheriff for seizing and selling them as the property of the specific legatee in whose possession they were found, a court of equity will require an account of his administration, to ascertain whether the sale at which he was himself the purchaser was necessary for the payment of debts or not, and (even if the sale and purchase by himself be justified by the result of the investigation) will grant a new trial of the issue in the action of trespass (though no motion to that effect was made at law) in case the damages were excessive and produced by erroneous impressions on the minds of the jury; and where the damages are evidently excessive, the testimony of the jurors will be received to declare the motives which induced them to give such damages. In such case the damages ought not to be vindictive, but only for the value of the slaves, with a reasonable allowance for hire.

NOTE.—In this case a doubt was suggested whether an executor could legally purchase the property of his testator sold by himself, though the sale were public and necessary for the payment of debts, but it appears from the decree that such sale and purchase (the sale being necessary for the payment of debts) would be confirmed if no fraud were proved.

In the case of *Hudson et als. vs. Hudson's Administrators*, 5 Munf., 180, decided October 25, 1816, it was held: If an executor or administrator sell the shares of his testator or intestate

by private contract for ready money, he ought to be charged therefor such sum as they would have sold for upon a reasonable credit, if the situation of the estate would admit of such credit; and if not, such a sum as they would have sold for, in cash, at public auction.

A purchase by an executor or administrator of any part of the estate of his testator or intestate, where other persons were debarred from bidding in consequence of doubts concerning the title suggested by himself, whereby he obtained the property for less than its value, ought to be annulled by a court of equity.

In the case of *Knight vs. Yarborough*, 4 Rand., 566, decided December, 1826, it was held: An executor may make a valid sale of his testator's effects, whether they be necessary for the payment of debts or not, if there is no fraud or collusion in the purchaser.

SECTION 2654.

In the case of *Daniel's Executor vs. Cook*, 1 Wash., 306, decided at the fall term, 1794, it was held: If the testator is bound, the executor is also bound, though not named in personal contracts.

The court avoided giving any opinion in regard to real contracts.

In the case of *Payne's Executor vs. Sampson*, 2 Wash., 200 (1st edition, p. 155), decided at October term, 1795, it was held: An action of covenant respecting real estate will lie against executors, though not expressly bound.

In the case of *Fitzhugh's Executor vs. G. F. Fitzhugh*, 11 Grat., 300, decided April, 1854, it was held: A personal representative cannot be sued as such for services rendered or goods furnished to his testator's or intestate's estate since his death. It seems that an action will not lie against the personal representative as such for the funeral expenses of his testator or intestate.

In some cases, where money is paid for a deceased person, an action for money paid will lie against the personal representative as such, as where money has been paid by a joint surety.

Where the demands made in all the counts in a declaration are such that an action cannot in any case be maintained upon them against the personal representative as such, the description of him as such may be considered as mere surplusage, and the judgment may be against him personally.

But if the demand set out in any one of the counts may possibly be maintained against the personal representative as such, then the description of him as such cannot be treated as surplusage, and if the action cannot be maintained against him in his representative character, it must fail.

In the case of *Georgia Home Insurance Co. vs. Kinnier* (*Administrator*), 28 Grat., 88, decided January, 25, 1877, it was held, p. 92: A policy of insurance on a building insures K. and his legal representatives. The building having been burned after the death of K., his administratrix may maintain an action on the policy.

One of the conditions of the policy is, that it shall be void "if the title of the property is transferred or changed." This does not apply to the descent of the property on the death of the assured to his heirs.

In the case of *Grubb's Administrators vs. Sult*, 32 Grat., 203, decided September 19, 1879, it was held: An action for breach of promise of marriage will not lie against the personal representative of the promisor, either at common law or under our statute, in a case where no special damages are alleged and proved. In such a case, the maxim *actio personalis moritur cum persona* applies. *Quære*: Can such an action be maintained against the personal representative of the promisor where special damages are alleged?

SECTION 2655.

In the case of *Ferril vs. Brewis's Administrators*, 25 Grat., 765-770, decided January 21, 1875, it was held: Trover may be sustained against a personal representative as such, though the goods never came into his hands.

In the case of *Lee's Administrator vs. Hill*, 87 Va., 497, decided March 5, 1891, it was held: Where one was wrongfully discharged by decedent, trespass on the case may be maintained under this section against the personal administrator, or *assumpsit* for breach of contract at common. In either case the action survives. And when defendant dies pending the action it may be revived against the personal representative.

SECTION 2657.

In the case of *Dykes & Co. vs. Woodhouse's Administrators*, 3 Rand., 287, decided March, 1825, it was held: An administrator *de bonis non* may maintain an action of debt on a judgment obtained by the executor. In such an action, it will be sufficient to allege in the declaration that A. B., executor of C. D., recovered the judgment, and it will be inferred that the debt was originally due to the testator on the plea of *nul tiel record*.

SECTION 2658.

In the case of *Braxton's Executor vs. Winslow*, 1 Wash., 31, decided at the spring term, 1791, it was held: For creditors of decedent to charge the securities on the bond of a personal representative, it is necessary to prosecute suit against personal representative to judgment, and execution must bear a return of *nulla bona*, and must prove that the said personal representative has committed a *devastavit*.

In the case of *Allen et als., etc., vs. Cunningham et als.*, 3 Leigh, 395, decided December, 1831. A *fi. fa.* on judgment against an administrator is returned "no unadministered or unincumbered effects found," etc. Held: This is a return of *nulla bona*, to entitle the plaintiff to an action on the administrator's bond.

In the case of *Bush vs. Beale*, 1 Grat., 229, decided September, 1844, it was held: A creditor of a decedent who has obtained a decree *de bonis testatoris* against the executor, on which an execution has issued, and has been returned *nulla bona*, may maintain an action against the executor and his sureties on the executorial bond.

In the case of *Kent's Administrators vs. Cloyd's Administrators*, 30 Grat., 555, decided August 1, 1878, it was held, p. 559: It is error to decree that an administrator *de bonis non* shall pay a debt of his testator out of the assets in his hands, upon an admission in his answer that there are debts due the estate, uncollected, more than sufficient to pay all the debts.

SECTION 2659.

In the case of *Eppe's Administrators vs. Smith (Administrator of Bagley)*, 4 Munf., 466, decided October, 1815, it was held: On the plea of "no assets," a verdict finding that the administrator has in his hands assets belonging to the estate of his intestate, without saying to what amount, is defective, and a new trial ought to be directed.

If a judgment be rendered against an administrator for a debt of his intestate, and after his death an action of debt suggesting a *devastavit* to have been committed by him in his lifetime be brought against his administrator, such defendant is stopped by the judgment from pleading that no assets of the estate of the original intestate ever came to the hands of the said original administrator. A general replication and demurrer to the same plea may be put in.

In the case of *Pendleton's Administrators vs. Stuart & McCoull*, 6 Munf., 377, decided April 13, 1819, it was held: Notwithstanding a judgment against administrators, as such, in an action of debt, to which they pleaded "payment by the intestate," and a subsequent judgment against them personally, in an action suggesting a *devastavit*, to which they pleaded "no waste," relief in equity was granted them in this case, on the grounds that the peculiar and perplexed state of the assets made it difficult, if not impracticable, to plead in relation thereto at law; and that at the trial of the second action their principal counsel was absent, and their assistant counsel withdrew from the cause; in consequence whereof they were wholly undefended, and a verdict perhaps contrary to justice was obtained against them, without any negligence or default on their part.

In the case of *Miller's Executors vs. Rice et als.*, 1 Rand., 438, decided May, 1823, it was held: Where an executor confesses judgment, and gives forthcoming bonds for debts due by his testator, under the belief that the assets of the estate are amply sufficient to pay all claims against it, but afterwards, by an unexpected depreciation of property, the amount of assets proves inadequate, the executor shall be relieved in equity.

In the case of *Henrico Justices at the relation of Craddock vs. Turner's Administrator*, 6 Leigh, 116, decided February, 1835. A man marries a *feme* executrix or administratrix, and so, being executor or administrator in his wife's right, administers the estate and wastes the assets of her testator or intestate, and then dies, leaving the *feme* executrix or administratrix surviving him. Held: The waste committed by the husband during the coverture, does not constitute a debt due from him to the testator's estate, which is entitled to preference in the administration of his own estate over his own proper debts under the statute.

In the case of *Clements vs. Powell's Administrators*, 9 Leigh, 1, decided November, 1837, it was held: In a summary motion against administrators for money paid by plaintiffs for defendant's intestate, it is no sufficient ground for a continuance that defendants had qualified only some seven or eight months before, and so had not had time to settle their accounts of administration, and that they desired to defend themselves on the ground of want of assets to pay the debt, without offering any plea or affidavit that the assets were insufficient.

SECTION 2660.

In the case of *Mayo vs. Bentley*, 4 Call, 528, decided October, 1800, it was held: An administrator who has not notice of a specialty debt, may pay or confess judgment to a simple contract-creditor. *Quære*: Whether a very quick confession of judgment to a simple contract-debt be not fraudulent upon bond creditors? The judges were equally divided upon it. An administrator must take notice at his peril of judgments against the intestate.

If there be two bonds, one payable at the death of the intestate, and the other not, the administrator may delay the creditor in the first with dilatory pleas until the second becomes payable, and then confess judgment upon the latter, pending the prior suit on the first, and plead it in bar on the first action. For among creditors of equal dignity, the administrator may prefer either, and the second bond was *debitum in praesenti*, though payable at a future day.

In the case of *Lindsay vs. Howerton*, 2 H. & M., 9, decided September 9, 1807, it was held: An executor or administrator ought to be credited in his administration account for fees paid

to counsel, notwithstanding those fees were more than the law allowed.

In the case of *Nimmo's Executor vs. The Commonwealth*, 4 H. & M., 57, decided May, 1809, it was held: An executor must, at his peril, take notice of a judgment against his testator, in what court soever it may have been rendered; and if he exhausts assets by paying debts of inferior dignity, must satisfy such judgment *de bonis propriis*.

The proceeds of the sale of land, directed by the will of the testator to be sold for the payment of his debts, are equitable assets, and should be distributed among all the creditors *pari passu*; nor are such assets proper subjects for the cognizance of a court of law.

In the case of *Elliot vs. Carter et als.*, 9 Grat., 541, decided January, 1853, it was held, p. 548: The first fund to be applied to the payment of debts is the personal estate at large, not exempted by the terms of the will or necessary implication; next to it real estate, or an interest therein expressly set apart by the will for the payment of debts; next, real estate descended to the heir; after it, property real or personal, expressly charged with payment of debts, and then subject to such charge, specifically devised or bequeathed. If these prove inadequate, then general pecuniary legacies, and after them specific legacies, both classes ratably; and in the last resort real estate devised by the will.

In the case of *Price's Executor et als. vs. Harrison's Executor et als.*, 31 Grat., 114, decided November, 1878. P., who is trustee under a deed for benefit of infant children, died in June, 1865, indebted to the trust, and his executor pays to the other trustee in the deed a part of that debt. Upon the settlement of P.'s estate in 1877, it appears that he is largely indebted for more than his assets. Held: Under the statute in force at the time of P.'s death his debt as trustee was not embraced in the third class of creditors provided for in that act, but must be placed in the fourth class, with the general creditors of P., and his executor is not entitled to a credit in his administration account for the amount of the trust debt he had paid. See Code of 1860, Chapter 131, Section 25.

The act of July, 1870, Code of 1873, Chapter 126, Section 25, which amends the former law by inserting in the third class debts of trustees for persons under disabilities, is only prospective in its operation and will not authorize the placing of P.'s debt as trustee in the third class, though the estate is not distributed until this last act went into operation.

In the case of *Smith et als. vs. Blackwell et als.*, 31 Grat., 291, decided January, 1879. B. is the guardian of J., and upon J.'s coming of age B. has a settlement with J. of his account as

guardian, and being found indebted on the account in the sum of three thousand dollars, he executes to J. his four bonds, each for seven hundred and fifty dollars, payable in one, two, three, and four years, with interest. B. pays the interest during his life, and a part of the principal, and was, up to the war, able to pay the whole. Held: The giving and taking these bonds was not a novation of the debt, but the debt due from B. to J. continued to be a fiduciary debt and entitled to rank as such in the administration of B.'s estate. In a suit for the administration of B.'s estate the commissioner classifies the debt of J. among the general creditors of B., and there is a decree confirming the report and distributing a fund in court *pro rata* among the creditors. There were several other decrees for accounts of further debts of B., and still a fund in court to be distributed, when J. made himself a defendant in the suit and filed his petition insisting that his was a fiduciary debt. Held: The decree confirming the report was an interlocutory decree, and J. was not precluded from setting up his claim as a fiduciary creditor of B.

In the case of *Brown et als. vs. Lambert's Administrator et als.*, 33 Grat., 256, decided April, 1880. On the 15th of January, 1858, E., by deed recorded the same day, in consideration of love and affection, conveyed to B., trustee, all of his property, including therein several slaves, in trust for the use of himself and wife for their lives, and at the death of both of them for their surviving children, and in case of the death of any of the children before E. and his wife, for the children of the deceased children, and in such portions as his children would have taken had they survived him and his wife. B., the trustee, died in 1832, and the property was without any regularly appointed trustee until 1862, when E., the grantor, instituted proceedings and had himself appointed trustee by the court. E. died in 1872, and his wife in 1874, no children survived either, and the appellants, the grandchildren, were entitled to the trust estate. From the date of the deed to the death of E. the latter continued in possession of the trust property, using it as his own; and between 1832 and 1862 sold several of the slaves, received the proceeds, appropriated them to his own use, and never accounted for them to anyone. In a creditor's suit brought for a settlement of E.'s estate, the grandchildren claimed the proceeds of the slaves sold by E., and that the debt was a fiduciary one, and as such entitled to priority. Held: The debt is entitled to priority as a fiduciary one in the distribution of the assets of the decedent.

In the case of *Strange's Administrator vs. Strange et als.*, 76 Va., 240 and 244.

3. Homestead.—Rules for subjecting to decedent's debts.—Decedent's entire estate may be subjected to a homestead-waived

debt, but the portion not embraced in the homestead deed shall be first subjected. V. C. 1873, Chapter 183, Section 3.

4. *Idem.*—After the exempted property has been set apart, the residue shall be applied towards paying *all* the decedent's debts *ratably* (unless there be some entitled to priority under V. C. 1873, Chapter 126, Section 25), and after the residue has been exhausted, the exempted property may be subjected to pay such portion of the homestead-waived debts as remain unpaid.

5. *Idem.*—Decree that the administrator turn over to widow money and choses in action for her "homestead" before the residue of the estate has been gotten in and applied to the debts, or before it is ascertained whether it will be sufficient to satisfy all the debts, is erroneous. The course proper for the court below is stated by Burks, J., on the last page of opinion.

In the case of *Spillman vs. Payne*, 84 Va., 435, decided January 26, 1888, it was held: The State has no priority under this section on decedent's estate for taxes collected by him as tax collector of the estate and not accounted for, but only for taxes assessed upon him during his lifetime.

In the case of *Robinson vs. Allen*, 85 Va., 721, decided February 7, 1889, it was held: Where deceased partner's separate assets are not sufficient to pay all his debts, those due by him in a fiduciary capacity are to be paid first.

SECTION 2662.

In the case of *Trevillian's Executors vs. Guerrant's Executors et als.*, 31 Grat., 525, decided February 13, 1879, it was held: The lien of an execution of a *fiери facias* upon the debtor's choses in action, though not enforced in his lifetime, continues after his death as against the other creditors of the debtor.

CHAPTER CXX.

SECTION 2663.

In the case of *Johnston vs. Thompson*, 5 Call, 248, decided October, 1804, it was held: If before the revolution the testator directed that his executors should sell his lands, a sale by one was void unless it appeared that the other was dead, or refused to qualify.

In the case of *Deneale vs. Morgan's Executors*, 5 Call, 407, decided April, 1805, it was held: If in a will made before the revolution a general power to executors to sell lands was given, a sale by one without the consent of the rest was void.

In the case of *Geddy & Knox vs. Butler et ux.*, 3 Munf., 345, decided November 27, 1812, it was held: Where a testator who empowered his executors to sell and convey certain real estate died before the 1st of January, 1787, the construction of the will, as to the power of the executors to convey, is to be gov-

erned by the statute of 21 Henry VIII., and not by the act of 1785, Chapter 61, notwithstanding the conveyance was executed after the 1st of January, 1787.

In the case of *Nelson vs. Carrington (Executor of Burwell et als.)*, 4 Munf., 332, decided November 24, 1813, it was held: A testator in the year 1784, having directed that his executors should sell all his real and personal estate for the payment of his debts, and having appointed four executors, three of whom qualified, a sale in the year 1794, by two of the acting executors, was considered valid, and the third executor (as well as the fourth, who never qualified) was presumed to have renounced his right to administer, as at the date of the sale in question. If the written agreement of sale be signed by the purchaser and one of the two acting executors, the other may, by acts *in pais*, though not in writing (such as delivering possession of the land and the like), manifest his assent to the sale, and make it his own act.

Although a tract of land be decreed to be sold to satisfy a mortgage, the executors of a mortgagor, being authorized by his will to sell all his real and personal property, may sell it for a full price with the assent of the mortgagee or his attorney.

In the case of *Grantland vs. Joy's Executor*, 5 Munf., 295, decided December 11, 1816, it was held: An executor selling the lands of his testator, by virtue of a power given by the will, is not bound to convey with general warranty, without an agreement to that effect; but only with special warranty against himself and all persons claiming under him, notwithstanding a written agreement after the sale that he would make "a good and indefeasible" title to the purchaser; for such agreement is to be understood in reference to the terms of sale.

In the case of *Carrington's Executors vs. Belt and Wife*, 6 Munf., 374, decided April 12, 1819, it was held: A testator invested in his executors his whole estate, "to be divided by them among his heirs from time to time as they might think most conducive to the interest of his estate and family." By another clause he empowered them to sell his landed interests in a certain undivided estate, and in the State of Kentucky. According to the true construction of this will, his executors were empowered to divide his other lands and his slaves among his heirs, but not to sell them, nor to make an unequal division, nor to give certain classes of the property to some of the devisees, and others to others.

In the case stated, although the words giving power to divide the estate "from time to time," etc., are very extensive, the court should rather consider them as authorizing the executors, under circumstances, to deliver the property to the devisees before attaining legal age or marriage, than to hold it up indefinitely

thereafter. If thereafter they could, under any circumstances, suspend an allotment, the circumstances must be such as to render the division more injurious to the interests of the estate and family then than at a future period.

In the case of *Brown vs. Armistead*, 6 Rand., 594, decided December, 1828, it was held: When executors are directed by will to sell lands, and they renounce the executorship, an administrator with the will annexed may sell under the authority given by our statute, although the will directs the executors to sell, "provided the said land will sell for as much as, in their judgment, will be equal to its value;" for the power of the executors is rather restricted than enlarged by the proviso. It does not vest any peculiar personal confidence in them.

The executors are made trustees, and within the limit imposed on the exercise of the power the trust is imperative, and, the executors having renounced, the case falls within the letter and spirit of the statute.

In the cases of *Broadus et als. vs. Rosson and Wife et als.*, *Winston vs. Same*, 3 Leigh, 12, decided May, 1831. Testator, being about to leave the country, makes his will, and devises that, in case of his death, or if he should not be heard of for ten years, his land should be sold for the best price that could be got, as was directed by letter of attorney to J. H., of same date with the will, and proceeds divided among his four sisters. Held: The administrator with the will annexed has power to sell the land under the statute.

In the case of *Jackson vs. Lignon*, 3 Leigh, 161, decided November, 1831. Testator, after making provisions for his wife by his will, devises that after his wife's death or marriage his land shall be sold and the money arising from the sale equally divided among his children; widow renounces the will and dower is assigned her. Held: Executor has no power to sell during widow's life and widowhood, or to sell part of the subject.

In the case of *Thompson vs. Meek*, 7 Leigh, 419, decided April, 1836. A testator directs, first, that his funeral expenses and all his just debts be paid; second, he desires that certain lands, which he specifies, be sold by his executors, and the money appropriated to the payment of debts; he then devises a particular tract of land to his son and daughter; afterwards he directs, if necessary for the payment of his debts, that a part, the least in value, of the tract given his son and daughter be sold "to fully satisfy and pay all his just debts." Held: The testator's meaning was, that all his debts should be fully satisfied, and so much of the tract of land last mentioned be sold as would effect the purpose, even though it may take the whole, but that before any part of this tract was sold the other

property specifically appropriated to the payment of debts ought first to be applied to the object.

In the case of *Mills et als. vs. Mills' Executors et als., Same vs. Lancaster et als.*, 28 Grat., 442 and 490, decided March, 1877. Where executors acting during the late war had full power under the will to do the acts which they performed, and in performing them acted in good faith in discharge of what they believed to be their duty as executors, they are not liable for the ultimate loss which had arisen out of the facts. Executors who are empowered by the will under which they act to sell real estate and collect debts, and invest the proceeds for the purpose of the trusts declared in the will, in December, 1862, sell real estate, and in January, March, and April, 1863, collect the war debts well secured on real estate, taking payment in Confederate money, which they immediately invest in Confederate 8 per cent. bonds for the purpose of the trusts of the will. Held: That having acted in good faith, and in the exercise of their best judgments, under the circumstances surrounding them, they are not liable for the losses incurred from such sales, collections, and investments.

Two out of three nominated executors qualify and sell and convey real estate to the purchasers, who pay up the purchase-money in full. Afterwards the third qualifies, and consents to the sale by sharing the commissions. Held: The title of the purchaser is valid, at least in equity.

There is a perpetual rent secured on real estate which the lessee has the right to redeem by paying an amount which at 6 per cent. will produce an interest equal to the rent. Held: One of these executors may receive the payment, though it may require all to execute the release.

SECTION 2664.

In the case of *Jones vs. Hobson*, 2 Rand., 483, decided June 11, 1824, it was held: Where a suit is brought against an executor and his sureties, and the executor confesses assets, it is competent for a court of equity to decree immediately against the executor; and that liberty should be reserved to the creditor to proceed against the sureties by motion if it should become necessary.

In the case of *Burnett et als. vs. Harwell et als., etc.*, 3 Leigh, 89, decided October, 1831, it was held: Under the provisions of the same statute, an action cannot be maintained on an executor's bond, at the relation of an assignee of a legatee of a decree for a legacy; such action can only be maintained at the relation of the person who has the legal right to the debt.

In the case of *Smith's Executors vs. Smith et als.*, 17 Grat., 268 and 277, decided February 5, 1867. "All the rest and

residue of my estate which may at any time come to the hands of my executor, either from the lapsing of the aforesaid legacies or otherwise." Held: Upon a consideration of the whole will and surrounding circumstances, to include the testator's real estate, legacies held to be good out of the real estate if the personal estate is not sufficient.

The references to 22 Grat., 224, 230, are errors.

SECTION 2665.

In the case of *Trent vs. Trent's Executor et als.*, 1 Va. (Gilmer), 174, decided February 7, 1821, it was held: Directing by will "the payment of all just debts," charges the whole estate, which charge is not released by a subsequent selection of particular parts to be sold for that purpose. Charging the whole estate with particular debts lets in every creditor on the whole estate. An annuity is a legacy charged on the whole estate not specifically devised.

The heir is entitled to the real estate, though charged with debts, until convicted of mismanagement or misapplication of profits.

In the case of *Meek's Administrator, etc. vs. Thompson et als.*, 8 Grat., 134, decided July, 1851, it was held: Where the charge upon land by will for the payment of debts is general, the purchaser from the executor or the administrator, with the will annexed, is not bound to see to the application of the purchase-money. In such case, if the sale was necessary at the time it was made, and was fairly made, and the purchase-money has been paid, the failure of the executor or the administrator to account for and pay over the proceeds to the creditors of the estate will not impair the title of the vendee.

Land in which a widow is entitled to dower, being sold by an executor under a charge for payment of debts, should be credited in his account of the proceeds for the amount he has paid the widow in satisfaction of her dower interest.

In the case of *Elliot vs. Carter*, 9 Grat., 541, decided January, 1853, it was held, page 548: The first fund to be applied to the payment of debts is the personal estate at large not exempted by the terms of the will or necessary implication. Next to it real estate, or an interest therein, expressly set apart by the will for the payment of the debts. Next, real estate descended to the heir. After it, property, real or personal, expressly charged with payment of debts, and then subject to such charge. If these prove inadequate, then general pecuniary legacies; and after them, specific legacies, both classes ratably; and in the last resort real estate devised by the will.

In the case of *Gaw vs. Huffman*, 12 Grat., 628, decided September 11, 1855, it was held: Executor having exhausted the

personal estate in payment of debts, and being largely in advance to the estate for the payment of debts which bound the heirs, is entitled to stand in the place of the creditors whose debts he has paid, and charge the real estate. And the real estate in the hands of the devisees is liable in proportion to its value at the death of the testator.

In the case of *McCandlish vs. Keen*, 13 Grat., 615, decided February 3, 1857. C., in 1849, gives a deed of trust upon land to secure a *bona fide* debt, which is duly acknowledged and certified for record, but it is not recorded until after his death. He makes his will in December, 1849, by which he charges his whole estate with the payment of his debts; and he dies in 1851, indebted more than his whole estate will pay, but there were no judgment creditors at his death. Held: The act which declares that all the real estate of a party dying which he has not subjected by his will to the payment of his debts, shall be assets for the payment of debts in the order in which personal estate is to be applied does not apply, except subject to the charge, to the real estate on which the debtor has created a *bona fide* lien, which is good against himself. C. having subjected his whole estate to the payment of his debts, his general creditors must take the real estate under the charge in the will; and must take it in the plight and condition in which he held it; and it is equitable assets, though the statute would have subjected it to the payment of his debts, if there had been no such charge in the will.

The act in relation to creditors and purchasers who shall be protected against unrecorded deeds does not include creditors claiming under a devise for the payment of debts, or under the statute subjecting real estate to their payment. But the creditor who may avoid such a deed must have some lien by judgment or otherwise, which entitles him to charge the subject conveyed specifically.

In the case of *Pierce vs. Graham*, 85 Va., 227, decided August 16, 1888, it was held: Executor, who is given no power as to the realty by the will is not authorized by the statute to maintain a suit against the heirs to sell the realty to pay the debts; nor, as next friend to the infant heirs, uniting with the widow to compel the creditors to have the realty sold to pay debts.

In the case of *Scott's Executrix vs. Ashlin et als.*, 86 Va., 581, decided January, 23, 1890, it was held: There can be no resort to decedent's real estate to pay his debts until his personalty has been exhausted. When that has been exhausted, whether by *devastavit* or distribution, the real estate in the hands of his heirs may be subjected.

In the case of *Pleasants vs. Flood's Administrator et als.*, 89

Va., 96, decided June 16, 1892. A farm encumbered by trust and other liens was granted by husband to wife's use. She enjoined sale under trust deed, alledging it had been satisfied, and that before becoming aware of its satisfaction she had made payments, and prayed for account of liens and payments. Report showed the first lien to be the trust debt, and the second her own for moneys paid by her. Sale was decreed. She purchased the land and paid the cash, and gave her bonds for the deferred payment and then died. Her heirs petitioned the court to require her bonds to be paid out of her personal estate, to the exoneration of the land which descended on them. Held: Under the circumstances, the land, and not the personalty is primarily bound for the payment of those bonds, as the purchase was only a mode of getting rid of the liens paramount to those owned by her, and was a personal undertaking that was merely collateral, and did not release the land from its primary liability under the trust deed. But this is material only as between her heirs and her distributees.

In the case of *Deering & Co. vs. Kerfoot's Executor et als.*, 89 Va., 491, decided December 15, 1892, it was held: Code, Section 2665, makes decedent's real property assets for payment of his debts in the order in which his personal estate is directed to be applied; but it recognizes his right to charge his land, but not his personalty, for such of his debts as he may prefer.

SECTION 2666.

In the case of *Blow vs. Maynard*, *Lawrence vs. Blow*, 2 Leigh, 30, decided March, 1830, it was held: A father makes a voluntary and fraudulent conveyance of real estate to his children, and dies, leaving other real estate which descends; upon a bill by a creditor against the donees and heirs at law, to subject the land conveyed and land descended to debt of the donor and ancestor, chancellor may decree a sale of both, out and out, to satisfy the creditor's demand.

In the case of *Mann's vs. Plinn's Administrator*, 10 Leigh, 93 (2d edition, 97), decided February, 1839. An interlocutory decree directs a sale of lands to satisfy a debt in a case where it might have been proper to decree satisfaction out of the rents and profits; but this was not a point controverted in the court below, or in any way brought to the notice of the court, and though the party had ample opportunity to apply to the court to alter the decree in that particular, he did not apply for such alteration; upon appeal to this court, held: The decree shall not be reversed for such cause, but affirmed, and the cause remanded with direction to alter the decree, and direct satisfaction out of the rents and profits, if such alteration be asked,

and if the debt can be satisfied out of the rents and profits at a reasonable time.

In the case of *Ryan's Administrator vs. McLeod et als.*, 32 Grat., 367 and 375, decided November, 1879. Where real estate in the hands of heirs is sought to be subjected to the payment of the decedent ancestor's debts, and that portion assigned to one of the heirs before the commencement of the suit has been aliened to a *bona fide* purchaser, whether absolutely or in trust to pay his debts, and that heir has become insolvent, the rest of the real estate in the hands of those heirs who have not aliened it is liable, not only for the proportionate share which each heir would at once have borne, but for the whole debts of the decedent, to be contributed by each one in proportion to the value and extent of the land descended to him.

In March, 1875, the circuit court rendered a decree that the heirs of a decedent, who had not aliened the land of their father, were liable only for each of his or her proportion of the decedent's debts; fixed the amount to be paid by each of them, and in default of such payment directed commissioners named to sell so much of the real estate of each as was necessary to pay his or her proportion of the debts, the sale to be upon a credit of one, two, and three years; the purchase-money to be secured by bonds and deed of trust on the land, and the commissioners to report their proceedings to the court at the next term. On a petition filed in March, 1879, by a creditor of a decedent for a rehearing of said decree, held: The decree of March, 1875, was not a final but an interlocutory decree, and, being erroneous, should be reheard and reversed.

SECTION 2667.

In the case of *Easley et als. vs. Barksdale et als.*, 75 Va., 274, decided February 10, 1881. There is a creditor's bill against the administrator and heirs of an intestate to subject his estate to the payment of his debts. Pending the suit one of the heirs sells and conveys the land received from the estate to a *bona fide* purchaser for value, having no actual notice of the pendency of the suit. Held: That no *lis pendens* having been docketed, the land is not liable to satisfy the grantor's proposition of the intestate's debts.

The acts in relation to the liability of real estate in the hands of the heirs for the debts of the ancestor, and the necessity and effect of a *lis pendens*, must be construed together; and they require a *lis pendens* to be docketed to affect a purchaser without actual notice of the pending suit. The notice which under the statute will affect such a purchaser is actual notice; constructive notice is not sufficient.

If a report of the accounts of a personal representative, and

of the debts and demands against the decedent's estate has been filed in the office of the court wherein the order conferring his authority was made, as required by the statute, a subsequent purchaser may reasonably be required to take notice of it.

Lands sold and conveyed by an heir or devisee after such report filed, will be held liable in the hands of a purchaser for the debts of the decedent; while lands sold and conveyed to a *pendente lite* purchaser, without actual notice of the *lis pendens*, will not be bound by such *lis pendens* unless the provisions of the statute are complied with.

There is a creditor's suit pending against the administrator and heirs of A. to subject his real estate to the payment of his debts. In the same court there is a suit pending by another party to subject the lands of W., a son of A., to the payment of the debts of W.; and in this suit there is a sale, under a decree, of the lands of W., which he had inherited from A., and J., another son of A., is the purchaser. Held: Upon a bill by J., so much of the purchase-money as was necessary to pay W.'s portion of A.'s debts will be applied to that purpose.

SECTION 2668.

In the case of *Brewis et als. vs. Lawson et als.*, 76 Va., 36, decided December 8, 1881, it was held: Judgment by default against personal representative in suit to which heir or devisee is not a party, does not affect heir or devisee, and is not evidence against them in suit to subject the decedent's real estate.

In the case of *Watt's et als. vs. Taylor's Administrator et als.*, 80 Va., 627, decided June 25, 1885, it was held: Judgment against the personal representative in suit to which the heirs were not parties, affects not the heirs for want of privity, and is not evidence against them in suit to subject the decedent's real estate, and does not alter the rule.

Yet, suit against personal representatives, jointly with heirs, etc.; by creditor of decedent to collect out of real estate or otherwise, bond debt whereupon judgment existed against personal representatives, is maintained by evidence other than said judgment, though said judgment be set forth in the bill, the heirs, etc., having as full opportunity to defend against the debt as though no judgment existed.

In the case of *Daingerfield vs. Smith*, 83 Va., 81, decided March 31, 1887, it was held: Judgment by default against the personal representative, in suit wherein the heirs are not parties, affects not the heirs, and is not evidence against them in suit to subject decedent's real estate, and this section does not alter the rule.

This is the case cited from 11 Va. Law Journal, 588.

In the case of *Staple's Executor vs. Staples*, 85 Va., 76, de-

cided July 26, 1888, it was held: Only judgments rendered since February 19, 1884, against personal representatives are *prima facie* evidence against decedent's heirs and devisees.

TITLE XXXVI.

CHAPTER CXXI.

SECTION 2676.

Reference to 3 Munf., 198. This case is too vague to be used as an authority for anything connected with this section.

In the case of *Carter's Executor vs. Cutting et ux.*, 5 Munf., 223, decided November 19, 1816, it was held: When a commissioner stating accounts between executors and the estate of their testator, if one of them, who had for collection the evidences of debts due the estate which might have been collected by him, be dead, his representatives cannot object to his estate being charged with those debts, unless the means be furnished of charging the surviving executor therewith.

An executor ought not to be allowed a credit for paying a debt of his testator, appearing on the face of the written instrument intended to secure it, to have been money won at unlawful gambling.

In the case of *Rootes vs. Stone*, 2 Leigh, 650, decided April, 1831. An attorney at law is employed to collect debts, and some of them are lost to his client through his negligence. Held: The attorney is chargeable for the principal of the debts lost, but not with interest thereon.

In the case of *Tunstall vs. Pollard's Administrators*, 11 Leigh, 1, decided March, 1840, it was held: An executor, having taken probate of testator's will and letters testamentary in England, and collected the assets of testator's estate there and brought them with him to Virginia, but having never qualified as executor in Virginia, is liable to be sued by the legatees in the court of chancery of Virginia for an account of his administration, and for the legacies that remain unpaid.

An English executor collects the assets of testator's estate in England, brings them with him to Virginia, and dies here in 1807, indebted to testator's estate, without having qualified in Virginia. Held: The debt he owed his testator's estate is entitled, in the administration of his own estate, to priority over all other debts.

In the case of *Nelson's Executor vs. Page et als.*, 7 Grat., 160, decided November 18, 1850, it was held: Under the circumstances, the executor held not responsible for a debt due the estate, and

lost by the insolvency of the debtor occurring after the testator's death.

In the case of *Zetelle vs. Myers*, 19 Grat., 62, decided February 23, 1869, it was held: When an agency is of a fiduciary character, the principle may sue his agent in equity for an account of his agency. An agent to manage, lease and sell property, and pay expenses upon it, to collect debts and pay over the moneys received to the principal, is of a fiduciary character.

Z., being about to leave the country, executes a power of attorney, by which he gives to M. and C. the amplest power to manage and dispose of all his property here for his benefit. On the same day Z. and his wife convey to M. and C. a house and lot, in trust to lease or sell the same, and pay over the proceeds as received to Z. The deed of trust and power of attorney being designed to effect one common object, Z. cannot file a bill against M. and C. for an account of the trust subject under the deed, and bring an action at law for the moneys received from the personal property and debts, under the power of attorney, but if he chooses to proceed in equity, he must embrace the whole in that suit. The court should have required the plaintiff to elect whether he would amend his bill, so as to embrace the whole of the transactions, and dismiss his action at law, or whether he would prosecute that action; and upon his failure to elect, or electing to prosecute his action at law, should have dismissed his bill.

In the case of *Bernhard vs. Maury & Co.*, 20 Grat., 434, decided March, 1871. N., living in the country, employs M., a broker in Richmond, to invest his money in Missouri bonds. In November, 1862, M. invests at \$112.50, and February, 1863, he invests at \$125. In March, N. sends a claim upon the Confederate Government to M. for collection, and tells of other funds which will be paid in to M. in May, and directs him to invest in Missouri bonds. M. collects the claim and invests it at \$160, and so writes to N. The 23d May the funds spoken of by N. are received by M., and then Missouri bonds have advanced seventy or eighty per cent. above the last investment, and are difficult to be gotten. On the 29th of June M. writes to N. acknowledging the receipt of this fund, stating that Missouri bonds were then at 220 to 235, and asks whether he shall invest at the advanced price when to be had. M. receives no answer to this inquiry, and therefore does not invest the money in his hands, the Missouri bonds continuing to advance on price. Held: M. was justified in waiting for further instructions, and is not liable to N. for the loss.

In the case of *Davis (Commissioner) vs. Harman et als.*, 21 Grat., 194, decided June, 1871, it was held: A commissioner

who, under the direction of the court, collects and disburses Confederate money, and, by order of the court, retains the balance, which is in controversy between disputing lien holders, until the rights of the parties are litigated, cannot be held personally liable for any loss that may be incurred in consequence of the fund perishing on his hand by the result of the late civil war.

In the case of *Meyer's Executor vs. Zetelle*, 21 Grat., 733, decided March, 1872. Z., a foreigner, who had lived some years in Richmond, was an owner of a house and lot in the city, and some furniture, and he held some debts due to him, and among them the bond of P. for five thousand dollars, bearing interest, and due in November, 1865, secured upon a house and lot. Z. having determined to leave the country with his family for an indefinite time; on the 9th September, 1861, executed a power of attorney to M. & C., by which he conferred on them the most ample powers and the largest discretion for the management of his business and his property. On the same day Z. and his wife conveyed to M. & C. his house and lot, in trust to rent or sell it at their discretion, and pay him the proceeds. He then left the country, and M. & C. received no communication from him, and had no knowledge of his residence until 1865, when he returned to Richmond. In the meantime they received payment of the debts due Z., and also of the debt of F. before it fell due, and they sold the house and lot; and in 1863 invested all the funds in their hands in Confederate bonds for Z. There was no question of the *bona fides* of M. & C. in all that they did. Held: They are not responsible to Z. for the loss which occurred by the investment in Confederate bonds, nor is P. liable to him for his debt.

An agent or trustee acting within his power, and acting in good faith, in the exercise of fair discretion, and in the same manner in which he would probably have acted if the subject had been his own, ought not to be held responsible for any loss accruing in the management of the trust fund. Pre-eminent knowledge and uncommon foresight are not required in a trustee. Ordinary men are to be compared and judged by the standard of ordinary men. Common skill, common prudence, and common caution are all that courts have required. It would be unreasonable to judge of the conduct of an agent or trustee from subsequent events. His conduct ought not to be condemned if it flowed from an honest, though uninformed and mistaken judgment.

In the case of *Chapman's Administrators vs. Shepherd's Administrator et als.*, 24 Grat., 377, decided January, 1874, it was held: Executors who fail by their negligence to collect a debt due to their testator by bond under a penalty, the debtor being

good for the money at the death of the testator, and continuing good for it for fourteen years, when he fails, are chargeable with the principal and the interest thereon up to the time of the failure of the debtor; but they are not chargeable with interest since that time.

In the case of *Douglass vs. Stephenson's Executor et als.*, 75 Va., 747, decided October 14, 1880. The inquiry in every case where a fiduciary is called to account, and a liability is sought to be fixed upon him is, did he act in the particular transaction which is questioned within the scope of his powers, with good faith and ordinary prudence? If he did so act, he is not responsible for the consequences of his act, even though it resulted unexpectedly in the loss of the trust-subject, or any part of it.

The cases in which this court has held it a breach of duty in a fiduciary to receive Confederate currency in discharge of ante-war obligations, were all cases in which the depreciation had become so great as of itself, when not attended with circumstances of justification, to be evidence either of bad faith or lack of common prudence—cases generally in which money was collected either in 1863 or 1864. But the same cases show that even when the currency was greatly depreciated, the fiduciary might be well justified in receiving it, on account of the necessities of the estate he represented, the condition of the debt, or by reason of other special circumstances making the collection proper.

In the case of *Lovett vs. Thomas's Administrator et als.*, 81 Va., 245, decided December 17, 1885, it was held: Court of equity will not hold fiduciaries liable for losses incurred in managing a trust where they acted in good faith, in the exercise of reasonable discretion, and as they would probably have done in their own matters.

Administrator is not bound to sue for debt due the estate, when it is apparent that the debtor is unable to pay it.

In the case of *Smith vs. Pattie*, 81 Va., 654, decided April 15, 1886, it was held: Where administrator is sole heir and distributee of his intestate, and there are judgments against him individually which attached to the intestate's estate as soon as it descended upon his said heir and distributee, and there are debts against the intestate which are barred by the statute of limitations, the administrator cannot revive those debts and repel the bar by any promise in writing, or otherwise; but is bound to plead the statute against those debts, and if he refuses or fails to do so, it is the right of the judgment-creditor, by reason of his interest in the fund, to interpose the plea.

In the case of *Turpin et als. vs. Chesterfield C. & I. M. Co.*, 82 Va., 74, decided June 17, 1886. An administrator acting in

good faith, in 1863 compromised at fifty cents on the dollar in the currency of the country, an unestablished, unadmitted claim, not a lien, dated December, 1840, of his intestate's estate, which, though it had been asserted for more than twenty years, and been reported by a commissioner that length of time before, yet had met with some adverse decision in the circuit court, and was affected by all the uncertainties of flagrant war. Suit by the distributees charging the administrator and the debtor with collusive *devastavit* nearly twenty years later was dismissed by the circuit court. On appeal, held: The compromise was valid, and no *devastavit* was committed, and the suit was properly dismissed.

In the case of *Mill's Administrators et als. vs. Talley's Administrators*, 83 Va., 361, decided March, 1887, it was held: T.'s administrator qualified in 1870, and soon after entrusted for collection to C., an attorney of competence and good standing, a note due to the estate. C. collected the greater part and handed it over to the estate, but allowed the note to run out of date without bringing suit. The administrator learned this fact in 1887, whilst C. was still solvent, but wholly failed to take steps against C. to make the money out of him, and the balance of the debt became lost to the estate. In suit against the administrator for his laches, he became liable for the debt, not for entrusting the note to C. for collection, but for his failure to proceed during C.'s solvency to make the money out of him.

In the case of *Radford vs. Fowlkes*, 85 Va., 820, decided February 21, 1889, it was held: This section provides that administrator shall have no credit for a claim which he pays, knowing the facts whereby recovery could be prevented, and does not require him to plead the statute of limitations to a claim apparently barred, where he knows facts making the statute inapplicable.

In the case of *Turner's Administrator vs. Thom (Trustee)*, 89 Va., 745, decided March 16, 1893, it was held: To entitle one joint obligor to recover from his co-obligor money paid by him in excess of his proportion, the payment must have been made upon a debt for which the latter was legally liable at the time of the payment, and which the obligor paying was compellable to pay, and not upon a debt that was barred as to the obligor sought to be charged, and who may be as in case here, a personal representative, forbidden to pay under Code, Section 2676, without making himself personally liable to extent of such payment.

SECTION 2678.

In the case of *Robertson et als. vs. Archer (Administrator)*, etc., 5 Rand., 319, decided June, 1827, it was held: The rule that where a party relies on an account furnished by the other

party, and claims the benefit of credits, he is bound to take all together and admit the debits also, unless he can surcharge and falsify it by proofs, is not applicable to an executor's account, nor to any other case where there is a trust or confidence.

In the case of *Ward vs. Funsten*, 86 Va., 359, decided November 14, 1889, it was held: A trustee who failed to make annual settlements, or any statement to the beneficiaries, as directed by Code 1887, this section, whose only excuse was that he did not deem it necessary, as he had annually paid the interest. Held: Not entitled to commissions, and his right to future commissions will depend upon his future conduct.

In the case of *Perdue's Administrator vs. Dillon*, 89 Va., 182, decided June 30, 1892, it was held: Where intestate in her lifetime by deed of gift disposed of her entire personal property so that there was nothing to go or that did go at her death into the hands of her administrator. Held: A bill against him for an accounting should have been dismissed.

In the case of *Picklin's Administrator vs. Rixey*, 89 Va., 832, decided April, 6, 1893, it was held: Wife's right of dower, whether inchoate or consummate, is an existing lien, and a covenant against encumbrances is broken by its existence. This lien is inferior to all which attached prior to the marriage, but superior to those acquired after marriage without her consent.

Such settlements on a wife for value are valid in equity, though void at common law, and relinquishment of her right of dower is a good consideration to the extent of its value as against the husband's creditors.

In the case here, as the value of the dower relinquished exceeded that of the land settled on the wife, she and her heirs at law after her death were entitled to the land free from all liability for her husband's debts.

SECTION 2679.

In the case of *Wood (Executor) vs. Garnett*, 6 Leigh, 271, decided April, 1835, it was held: An executor, however meritorious his administration, is not entitled to commission if he fails to settle and return his accounts of administration, according to the statute of 1824-'25.

In the case of *Boyd's Executor vs. Boyd's Heirs*, 3 Grat., 113, decided July, 1846, it was held (p. 115): Executors living more than two years after the passage of the act, and not settling their accounts, are not to be allowed commissions.

Trustees are not embraced in the act of February 16, 1825, and do not forfeit their commissions by failing to settle their accounts.

In the case of *Strother et als. vs. Hull et als.*, 23 Grat., 652, decided June, 1873, it was held: In 1851 H. dies, leaving sev-

eral infant children and a considerable estate, real and personal. He directs by his will that on the marriage of his eldest daughter, Ann, she shall have possession of the home place if she will keep the younger children with her and take good care of them; and this she does. He directs his executor to manage his estate until January 1, 1861, when it is all to be equally divided amongst his children. S., the husband of Ann, becomes administrator c. t. a., takes possession of the estate and does not invest the money, nor does he settle his administration account. S. not having settled his accounts as administrator, and showing no sufficient reason for his failure to do so, is not to be allowed commissions except upon receipts after January 1, 1860.

In the case of *Moses et als vs. Hart's Administrators*, 25 Grat., 795, decided February 4, 1875, it was held: A personal representative will be entitled to his commissions upon moneys received by him during the war, though he did not settle his accounts till after the war.

In the case of *Lovett vs. Thomas' Administrator et als.*, 81 Va., 245, decided December 17, 1885, it was held: Failure of personal representative to settle his account does not necessarily work forfeiture of commissions. To refuse or to allow them rests with the court under the circumstances of each case. And where under Code 1873, Chapter 128, Section 7, he yearly laid his accounts before the commissioner of accounts, the failure of that officer to audit, state, and report them cannot lose him his commission.

In the case of *Trevelyan's Administrators vs. Lofft*, 83 Va., 141, decided April 14, 1887, it was held: Since March 1, 1867, the allowance of fiduciary commissions is discretionary with the court, they are not absolutely forfeited. This is the case cited as 11 Va. Law Journal, 610.

See the case of *Ward vs. Funsten*, 86 Va., 359, quoted *supra*, Section 2678.

SECTION 2687.

In the case of *The Bank of Virginia vs. Craig*, 6 Leigh, 399, decided May, 1835, it was held: If a guardian unnecessarily sell bank stock belonging to his ward, and appropriate the proceeds, he and his sureties shall be held to replace the stock, or account for and pay its present value, and the amount of dividends thereon accrued since the sale was made; and, in such case, there shall be no commissions allowed on the value of the stock, even in favor of the guardian's sureties, but commissions shall be allowed on the dividends.

In the case of *Greenville Justices at the Relation of Robinson's Administrator vs. Williamson et als.*, 12 Leigh, 93, decided March, 1841. In debt on an administration bond against the administrator and his sureties, defendant plead in bar, that upon

petition of G., one of the sureties to the county court, setting forth that he was bound as one of the sureties of the administrator, and conceived himself in danger of suffering thereby, and praying the court for relief, the administrator was required by the order of court to give a new bond, and did so accordingly with another person as his surety, which new bond was executed in open court on the same day of the order requiring such bond, was in a penalty equal to that of the first bond, was made payable to the justices then sitting, and was duly executed and conditioned as the law directs; whereby, and by force of the statute, all the sureties in former bond were discharged. Plaintiff's reply *nul tiel* record. And defendants show an entry on the minute-book of the county court, stating that on motion of G. against the administrator for county surety, the defendant appeared in court, acknowledged summons, and rendered J. M. as security, whereupon it was ordered that said G. be dismissed from further suretyship; and show also a new bond, executed by the administrator and J. M., his surety, bearing even date with the entry on the minute-book, made payable to justices then sitting, in proper penalty and with proper condition required by the statute in a new bond in such case, with an endorsement thereon made by the clerk that it was acknowledged on the day of the date. Held: The plea not conforming to the record in the minute book there is no such record.

In the case of *Sayers vs. Cassell et als.*, 23 Grat., 525, decided June, 1873, it was held: A guardian of an infant having, when he was appointed, given a bond with sureties, afterwards, without a rule upon him, or an order of the court requiring it, comes into court and gives another bond with other sureties. The last bond is valid, and relates back to his appointment as guardian, and the sureties in the first bond discharged, and are not necessary or proper parties to a suit by the ward against the guardian and his sureties for the settlement of his accounts.

In the case of *Reynolds vs. Zink*, 27 Grat., 29, decided December 19, 1876, it was held: There must, of necessity, be vested in the court a very large discretion, and while it is a legal discretion, to be exercised in a proper case, an appellate court ought not to interfere, except in a case where manifest injustice has been done, or when it is plain that a proper case has not been made for the exercise of the powers which the law has specially conferred on the court from which the fiduciary derives his authority.

In the case of *Sage vs. Hammond*, 27 Grat., 651, decided August 2, 1876, it was held: In a bill by infants against their guardian for an account and payment, it being shown in the cause that the guardian is wholly unfit for the trust, the court may appoint a receiver to collect and receive the property of

the wards, and require the guardian to pay over to him the money of his wards in his hands and deliver to him the property of his wards.

The reference to 32 Grat., 474-'75, is error.

SECTION 2693.

In the case of *Whitehead's Administrator vs. Whitehead et als.*, 23 Grat., 376, decided March, 1873, it was held: The provisions of Section 16, Chapter 132, Code of 1860, prescribing what shall be done by a commissioner in settling the accounts of fiduciaries, apply to the report, regular or special, mentioned in Section 34 of the same chapter, and, therefore, under this Section 34, a county court is not authorized to make any order for investing or loaning out the money or funds therein referred to, unless the commissioner has previously conformed to the provisions of Section 16, by posting the notice as therein required.

If in such a case the order is made by the county court without the report required by the statute, the county court has jurisdiction on the motion of the parties whose money is invested upon notice to the other party to annul the order.

SECTION 2695.

In the case of *Lindsay vs. Howerton*, 2 H. & M., 9, decided September 9, 1807, it was held: An executor or administrator ought to be credited in his administration account for fees paid to counsel, notwithstanding those fees were more than the law allowed.

In the case of *Nimmo's Executor vs. The Commonwealth*, 4 H. & M., 57, decided May, 1809, it was held: Executors and administrators ought to be allowed in their accounts all reasonable charges and disbursements for the benefit of the estate they represent, and a reasonable recompense for their personal trouble, in preference to any creditor of the decedent. The Commonwealth's taxes in the property of the decedent, the expense of recovering a run-away negro whose value is credited to the estate, money paid for the hire of a slave (hired by the executor or administrator) to make a crop on the land of the decedent, under the care of the executor or administrator, the proceeds of such crop being credited to the estate, are reasonable charges and disbursements.

It seems that charges appearing to be just and legal in an *ex parte* settlement of an administration account by commissioners appointed by the court which granted the administration, and passed by such court (the commissioners having reported that vouchers were produced to justify such charges), are to be received *prima facie*, as evidence in favor of the executor or ad-

ministrator, and that the burden of proof lies on the party who would impugn them.

In the case of *Hooper vs. Royster*, 1 Munf., 119, decided April, 1810, it was held: Proof of parol declarations of a guardian that she did not intend to charge her ward for board, is admissible to repel a charge for board in her lifetime, exhibited by her personal representatives after her death. But in such case she ought not to be charged with interest on a sum of money recieved for the ward, unless such interest would exceed the amount of a reasonable compensation for board.

A guardian may be allowed for moneys paid and advanced for the clothes, schooling, and other necessary expenses of the ward, out of the principal of such ward's estate, if it appear that, from extraordinary circumstances, such disbursements were unavoidable without culpable neglect on the part of such guardian, otherwise such allowance ought to be made out of the profits only.

Money received by a guardian for a ward during the paper money times, ought to be reduced by the scale of depreciation, to be applied as on the last day of the year in which it was received.

A reasonable time ought to be allowed a guardian to put the money of a ward out at interest, and in this case six months was considered a reasonable time.

If money was received by a guardian for a ward within six months previous to the 1st day of January, 1777 (when the scale of depreciation commenced), it should be reduced according to the scale, as at the end of six months from the time when received.

See *Hipkins vs. Bernard* (*Executor of Hipkins*), cited this Section for reference to 4 Munf., 83.

In the case of *Newton vs. Poole*, 12 Leigh, 112 (reference to 140) there is nothing definite on this point, it seems to have been used here by error from some other section.

In the case of *McCall vs. Peachey's Administrators*, 3 Munf., 288, decided January 25, 1812, it was held: Where an *ex-parte* settlement of an administration account has taken place before commissioners appointed by a court in which the executor or administrator qualified, if the legatees afterwards bring a suit in chancery for a new examination and settlement of such account, the vouchers in support thereof, if they be not ostensible, should be presumed to have existed, and the *onus probandi* is on the adverse party.

But it seems the executor, or administrator, may be required to produce the vouchers unless he declare on oath, or otherwise prove that they were deposited with the clerk of such court, at or after examination of the account by the commissioners, and have not come to his possession since.

In such case, if the vouchers, or official copies of them be produced, the plaintiffs may, nevertheless, controvert the articles intended to be justified by them. An article ought to be allowed on the oath of the defendant, if it be of such a nature that the expense, probably, must have been incurred, or that, perhaps, a voucher for it could not have been procured; for example: Mourning for the widow, midwife fees, services performed by a negro carpenter, and the like.

For reference to 12 Leigh, 140, see the case of *Newton vs. Poole*, cited *supra*, this Section.

In the case of *Granberry (Executor) vs. Josiah and James Granberry*, 1 Washington, 246, decided at the fall term, 1793, it was held: The executor is entitled to credit for five per cent. commissions on his receipts for each year before the accounts are closed, though the testator bequeathed him a specific legacy as being his nephew.

In the case of *Jones (Executor) vs. Williams*, 2 Call, 103 (2d edition, 85), decided October 17, 1799, it was held: Executors who appear to have made no advantage by it will not be denied justice for having failed to make up an account of their administration, though strictly speaking it is perhaps their duty.

Commissions are not allowed an executor where a legacy is given him.

In the case of *Jones (Executor) vs. Jones*, 1 Munf., 150, decided April 17, 1810, it was held: An executor, having delivered up the estate generally, and the management thereof, to one of the residuary legatees for his benefit and that of his co-legatee, nine years and ten months afterwards having elapsed before he was summoned to render an account, the greater part of his executorship having, moreover, been during the Revolutionary War, and the settlement taking place after his death. Held: It is unreasonable rigor to exact vouchers for many items in his account, which appeared probably just, though not supported by proof.

Where the failure to bring an executor to a settlement appears to have proceeded from neglect of the residuary legatees, without any wilful default on his part, interest ought not to be charged on the balance due from him to the estate, except from the date of the decree; neither in such case ought interest to be allowed him on payments to the legatees before the decree, though made in bonds which carried interest.

Under certain circumstances a commission of seven and one-half per cent. may be allowed an executor on all his receipts and disbursements; the real and personal estate having, in obedience to the directions of the will, been kept together and managed by him.

In the case of *Triplett's Executors vs. Jameson*, 2 Munf., 242,

decided April 23, 1811, it was held: A commission of more than five per cent. on the amount of sales and collections ought not to be allowed an executor, except upon peculiar circumstances.

In the case of *Cavendish vs. Fleming*, 3 Munf., 198, decided March 20, 1812, it was held: An executor may reasonably be allowed a commission of 10 per cent. on moneys received by him, when the debts were very small and numerous, and the debtors presumed to have been much dispersed.

In the case of *McCall vs. Peachy's Administrators*, 3 Munf., 288, decided January 26, 1812, it was held: In this case, under circumstances of extraordinary trouble attendant on the administration, the administrator was allowed a commission of 10 per cent. on all specie received by him, in full satisfaction for receiving, putting out, and paying away the same, as also for his trouble and services in the administration and management of the estate, such commission to be allowed only once on receiving the same sum of money; and as to the paper money, a commission was allowed of 5 per cent. on the value thereof when received, and the same on the value thereof when paid away, according to the legal scale of depreciation.

In the case of *Hipkins vs. Bernard (Executor of Hipkins)*, and *Bernard vs. Hipkins et als.*, 4 Munf., 83, decided January 13, 1813, it was held: An executor may be allowed a commission for turning bonds, or other debts payable to his testator, into mortgages (without any actual receipt of the money), and delivering such mortgages to the legatees.

An executor is entitled to a commission upon sales of crops made by him upon the lands of his testator, the proceeds thereof being lawfully received and accounted for by him, and also upon money found in the house, and disbursed by him for the use of the family, or invested in bank stock.

Under circumstances, an executor may be allowed expenses of administration (including clerk hire, rent of counting-room, and postages), in addition to his commission of 5 per cent.

In the case of *Carter's Executor vs. Cutting et ux.*, 5 Munf., 223, decided November 19, 1816, it was held: Although, under peculiar circumstances, an allowance may be made to executors, in addition to the commissions given to attorneys for collecting debts confided to them, such additional commissions ought not, in general, to be allowed where the debtors reside in or near the neighborhood of the executors, who consequently might collect the moneys themselves.

In the case of *Bank of Virginia vs. Craig*, 6 Leigh, 399, decided May, 1835, it was held, p. 437: If a guardian unnecessarily sell bank stock belonging to his ward and appropriate the proceeds, he and his sureties shall be held to replace the stock,

or account for and pay its present value, and the amount of dividends thereon accrued since the sale was made; and, in such case, there shall be no commissions allowed on the value of the stock, even in favor of the guardian sureties, but commissions shall be allowed on the dividends.

In the case of *Farneyhough vs. Dickerson*, 2 Rob., 582, decided December, 1843, it was held: As a general rule an executor is not entitled to commission on the amount of debt due from him to the testator, and credited to the estate in executorial account.

The commissions of an executor should not be on the amount of his disbursements. He ought generally to be allowed a commission on the amount of the credits in his account, except on a credit for a debt due from him to the testator. Though some of the credits are for bonds due the estate that were passed over by the executor to legatees, and voluntarily received by the latter, commissions will nevertheless be allowed the executor on the amount of such bonds.

In the case of *Claycomb's Legatees vs. Claycomb's Executors*, 10 Grat., 589, decided January, 1854, it was held: Where one of two executors perform all the work of the administration, he may be allowed all the compensation, and it is not for the legatees to object to this.

In the case of *Boyd's Sureties vs. Oglesby et als.*, 23 Grat., 674, decided June, 1873, it was held: The amount of commissions to be allowed to an administrator or executor, is not fixed by law, and though five per cent. on receipts is generally allowed, yet this allowance may be increased, and the court of probate is the most competent tribunal to make the allowance, and this court will be disinclined to disturb the allowance, especially after a long acquiescence in it by the distributees of the estate.

In the case of *Lovett vs. Thomas' Administrator et als.*, 81 Va., 245, decided December 17, 1885, it was held: Failure of personal representative to settle his accounts does not necessarily work forfeiture of commissions. To refuse, or allow them, rests with the court under the circumstances of each case; and where under Code 1873, Chapter 128, Section 7, he yearly laid his accounts before the commissioner of accounts, the failure of that officer to audit, state, and report them, cannot lose him his commission.

Where testator directs his executor to manage his farms and distribute the profits among his grandchildren, when of age, the executor should not be charged with compound, but only with simple interest upon the yearly balances left over in his hands, unless testator directed that those balances should be invested in interest-bearing securities.

See the references to Section 2606.

For reference to 1 Wash., 246, see the case of *Granberry (Executor) vs. Josiah and James Granberry*, cited *supra*, this section.

For reference to 2 Call, 105, 106, see the case of *Jones (Executor) vs. Williams*, quoted *supra*, this section.

For the reference to 1 Munf., 150, see the case of *Jones (Executor) vs. Jones*, cited *supra*, this section.

In the case of *Dillard vs. Tomlinson et als.*, 1 Munf., 183, decided April, 1810, it was held: An executor or administrator, hiring slaves belonging to the estate of his testator or intestate, ought not to be charged with interest on such hire from the date it became due (no proof appearing that it was then collected, or that interest from that day was received upon it); but a reasonable time to collect and apply the money should be allowed before the commencement of interest.

In the case of *Sheppard (Executor) vs. Starke et ux.*, 3 Munf., 29, decided November 22, 1811, it was held: When interest is charged against an executor or administrator (in settling his administration account) on balances due at the end of each year, it ought not to be carried to the accounts of the succeeding year so as to convert it into principal and make it bear interest, nor to be deducted from the payments made in such succeeding year.

In the case of *Cavendish vs. Fleming*, 3 Munf., 198, decided March 20, 1812, it was held: An executor is not chargeable with interest on a legacy payable to an infant before a guardian has been appointed, and he has received notice of such appointment.

In the case of *McCall vs. Peachey's Administrators*, 3 Munf., 288, decided January 25, 1812, it was held: An executor or administrator is chargeable with interest in all cases when he has received it, and also when paper money, or specie, remained in his hands more than a reasonable time (which in this case was said to be six months) without being applied to the purposes of the estate.

For the reference to 5 Munf., 223, see the case of *Carter's Executor vs. Cutting et ux.*, cited *supra*, this section.

In the case of *Burwell's Executors vs. Anderson (Administrator) etc.*, 3 Leigh, 348. Testator, after directing the sale of certain property to raise a fund to pay debts, and after giving all the residue of the estate to his wife for life, directs that at her death all his estate, real and personal, shall be turned into money, to be distributed as follows: First, he desires that his wife, by will or otherwise, may have the absolute disposal of five hundred pounds; then he bequeathes to his nephew, W. P., two hundred pounds; and after deducting these two sums, he

bequeathes two-thirds of the balance to his niece, A. S., and the other one-third to his sister, A. C.; and he directs that if the fund provided for debts prove inadequate, the sum to make up the deficiency shall be deducted in equal proportions from the sums bequeathed to his wife, nephew, niece, and sister. Held: The wife took by the will the absolute property in the five hundred pounds bequeathed to her, and not a mere power to dispose of that sum.

In the case of *Garrett (Executor of Allen) vs. Carr and Wife et als.*, 3 Leigh, 407, decided February, 1832. Testator devises that his lands shall be sold and the proceeds invested in bank stock, or in such other property as his executors shall think most advantageous to his children; the executors sell the land but do not invest the proceeds in bank stock, and afterwards account for the proceeds in money. Held: They ought to be charged with interest on the balance in their hands annually, and their disbursements for the maintenance of the children, and all other accounts ought to be defrayed out of the interest accruing on the balances.

In the case of *Wood (Executor) vs. Garnett*, 6 Leigh, 271, decided April, 1835, it was held: The propriety of charging an executor with interest on balances in his administration account depends on the particular circumstances of each case; and he ought not to be charged with interest on small annual balances when it appears that he was in no default in not paying them over to legatees, and never applied the money to his own use.

An executor, however meritorious his administration, is not entitled to commission if he fail to settle and return his accounts of administration according to the statute of 1824-'25.

In the case of *Handly vs. Snodgrass*, 9 Leigh, 484, decided July, 1838, it was held: Although a decree gives interest on a sum which, according to the mode of stating the account, is itself interest, yet if it be manifest that a settlement upon proper principles would have made the balance larger, and that such balance would have been principal, the decree will not be reversed at the instance of the debtor.

In the case of *Morris (Administrator) vs. Morris (Administrator) et als.*, 4 Grat., 294, decided January, 1848, it was held: An administrator not having settled his accounts is not entitled to commissions.

In a suit by an administrator *de bonis non* against the representative of the first administrator for the settlement of the first administrator's accounts of his administration, it is irregular to decree payment to the administrator *de bonis non*, but the distributees being party to the suit, and not complaining, so that a payment to the administrator *de bonis non* would be a valid discharge to the representative of the first administrator, he will

not be heard to complain of the irregularity in the appellate court.

At the close of an administration account, the interest due from the administrator is not to bear interest.

In the case of *Rosser (Executor of Wood) vs. Depriest et als.*, 5 Grat., 6, decided April, 1848. An executor sells a slave belonging to his testator's estate, the sale not being necessary to the payment of debts; and he re-purchases the slave, and thereafter holds him as his own. Held: The slave is the property of the estate, and the executor shall account for his annual hires, with interest thereon, though he was not in fact hired out by the executor, but was kept in his own employment.

An executor takes bonds for purchases made at a sale by him of testator's personal property, and does not appear when these bonds were paid off; he will be charged with the principal of the bonds in the year when they fell due, but with interest thereon only from the end of that year.

In the case of *Strother et als. vs. Hull et als.*, 23 Grat., 652, decided June, 1873. An administrator c. t. a. lives in the dwelling-house of his testator, and a part of the furniture is retained and used by him, until it is consumed by fire with the house. Though he had with him the younger children of the testator, for whose board he was paid, the furniture must be considered as having been taken as his own, and he must account for its value.

In 1851, H. dies, leaving several infant children, and a considerable estate, real and personal. He directs by his will that on the marriage of his eldest daughter, Ann, she shall have possession of the home-place if she will keep the younger children with her and take good care of them; and this she does. He directs his executor to manage his estate until the 1st of January, 1861, when it is all to be equally divided among his children. S., the husband of Ann, becomes administrator c. t. a., takes possession of the estate and does not invest the money, nor does he settle his administration account. Held: Ann and her husband were entitled to the home-place free of rent, and to be paid a reasonable board for the younger children whilst they lived with them. The accounts of S., as administrator c. t. a. up to January 1, 1861, were to be settled as guardian's accounts, and the interest to be compounded, and his sureties are responsible for the amount so found against him up to that time.

Though S. is responsible after the 1st of January, 1861, for compound interest upon the shares of such of the children as he continued to act for as guardian *de facto*, his sureties are not so chargeable. S. not having settled his accounts as administrator, and showing no sufficient reason for his failure to do so, is not to be allowed commissions, except upon receipts after January 1, 1861.

Prior to January 1, 1861, land left to two of the sons who were to account for the same in the division, was sold under a decree of the court by S., as commissioner, and he was decreed to hold the proceeds as part of the assets of his testator's estate. His official bond, in fact, covered only the personal assets. Held: The proceeds of the sale of the lands were not in his hands as administrator c. t. a., and should not be brought into his administration account.

But in no case are the sureties responsible for them, as their bond did not cover the real estate.

S. is entitled to his commissions as commissioner on the proceeds of the sale, viz.: five per cent. on the first \$300, and two per cent. on the balance. In settling his accounts as to the proceeds of this land, the mode stated in *Humphrey's Administrator et als. vs. Carter et als.*, is to be pursued.

The bill by the devisees not claiming damages for injury done to the fences and buildings on the land, S. cannot be subjected to the payment of such, either in his account as administrator or with the devisee.

One of the children having died in 1862, the amount found due to her by the administrator should bear interest from the date of her death.

The interest of the deceased child is divided, and the share of each of the survivors is credited to them in their accounts with the administrator. The final decree, after giving to each the amount reported by the commissioner, gives each a further decree for his and her share of the estate of the deceased child. This is an error which might have been corrected by motion to the circuit court, under the Statute Code, Chapter 181, Section 5, p. 743, and this court would therefore dismiss the appeal, or correct or affirm it, with costs to the appellees if there was no error.

In the case of *Sharp's Executor vs. Rockwood et als.*, 78 Va., 24, decided November 15, 1883, it was held: Interest is required to be paid by fiduciaries on funds kept and used by them; and if such funds are kept, they are presumed to have been used and to have been worth, or to have made interest.

For the reference to 81 Va., 245, see the case of *Lovett vs. Thomas's Administrator et als.*, cited *supra*, this section.

In the case of *Creigler's Committee vs. Alexander's Executor*, 33 Grat., 674, decided September, 1880, it was held: As a general rule the committee of a lunatic is only to be charged simple interest upon the balances found against him on a settlement of his account.

A committee of a lunatic who qualified as such in 1838, and continued to act until his death in 1875, and did not settle his accounts, is not entitled to commissions on his receipts from

1838 to 1859, and the statute of March 3, 1867, Code of 1873, Chapter 128, Section 9, is not retrospective in its operation, and therefore the court has no authority to allow said commissions under that act.

See the references to Section 2442.

In the case of *Lomax vs. Pendleton*, 3 Call, 538 (2d edition, 465), decided July 7, 1790, it was held: A trustee retaining money in his hands for an unreasonable length of time shall pay interest.

In the case of *Beverley's Administrator vs. Miller*, 6 Munf., 99, decided February 4, 1818, it was held: If a suit against an infant in the superior court of chancery be fully defended by his guardian appointed by the county court, whose answer is received on his behalf under the sanction and authority of the superior court, he must be equally bound by such defence, as if such guardian had been, in form, appointed guardian *ad litem*; but if the suit abate as to such guardian by his death before the decree, a guardian *ad litem* ought to be appointed, notwithstanding all the testimony and accounts were taken before his death. Under the particular circumstances of this case, no interest was permitted to be charged against a trustee on the moneys from time to time in his hands, and no commissions were allowed him for his trouble; but on closing his accounts interest was allowed on a balance in his favor.

In the case of *Coltrane vs. Worrell*, 30 Grat., 434, decided July, 1878, it was held: C., living in Virginia, trustee of D., a married woman separated from her husband and residing in Missouri, holds bonds on a solvent debtor, well secured on real estate, which were executed before the war; and in 1863 receives payments in part of said bonds in Confederate money and invests it for D. in a Confederate bond. The receipt of Confederate money at that time was a breach of trust, and C. will not be allowed a credit for the amount of the bond.

C. holding bonds bearing interest will be charged with the interest falling due during the war, the debtors living in Virginia, and, therefore, bound to pay the interest to him.

By the terms of the trust C. pays the interest of the trust fund, and as much of the principal as might be necessary for the support of D. Before the war he paid her some interest, and also since the war. In settling his account, whilst he will not be charged interest upon interest, his payments will not be credited upon the principal of the fund.

A trustee cannot derive profit from the trust fund without rendering an equivalent therefor. He is bound to execute the trust for the benefit of the *cestui que trust*, whether the latter live at home or abroad, or the trust is to be executed in peace or in war. If the trust fund be perfectly secure, bearing in-

terest at the beginning of the war, he cannot voluntarily change it so as to make it insecure and bear no interest.

In the case of *Cogbill vs. Boyd*, 79 Va., 1, decided January 24, 1884, it was held: Where this court fixes trustee's liability for an ascertained amount, but remands the case without fixing the rate of interest, it is competent to the court below to fix the rate of interest and restate the accounts at bar, or by aid of a master commissioner. Where trustee invests trust funds at ten per cent., but c. q. t. repudiates the investment, and the same is held to have been improper, and the trustee is held bound for the amount invested, six per cent. is the rate of interest with which he is properly charged.

SECTION 2697.

In the case of *Trevellyan vs. Lofft*, 11 Va. Law Journal, 610, decided April 14, 1887. Where administrator failed for eighteen months after qualification to settle his accounts, and then in a suit brought against him to enforce a settlement went before a commissioner for that purpose, but refused to settle because the distributees demanded that he should also settle as agent for the deceased, and two months afterwards went to England and was taken sick and remained for eighteen months. Held: These circumstances do not constitute a reasonable excuse for failing to settle, and he is not entitled to commissions.

SECTION 2699.

In the case of *Wyllie and Wife vs. Veneable's Executor*, 4 Munf., 369, decided February 1, 1815, it was held: The account of an executor having been settled by commissioners appointed by the court before which the will was proved, is not, of course, to be referred to a commissioner on a bill to surcharge and falsify; but some evidence should be exhibited to that effect, or something improper in the account should be disclosed in the answer; otherwise such order of account ought not to be made, but the bill should be dismissed.

On a bill to surcharge and falsify an executor's account, the legatees as well as the executor being defendants, if the plaintiff direct the cause to be set for hearing, after the executor has answered, but before the process against the legatees has been served, and the cause be heard on the merits, he cannot object to the want of proper parties, or that the decision was premature.

In the case of *Garrett (Executor of Allen) vs. Carr and Wife et als.*, 3 Leigh, 407, decided February, 1832. Executor's accounts are audited before commissioners of the county court, the legatees being present at such settlement thereof; these accounts are returned to the court, approved and recorded. Held:

The presence of the legatees at the settlement is no objection to a bill in chancery to surcharge and falsify the accounts so settled.

In the case of *Shuman's Administrators vs. Christian*, 9 Leigh, 571, decided December, 1838, it was held: The settlement of an administration account under an *ex parte* order of the court which granted administration, is *prima facie* evidence in favor of the administrator against creditors of decedent.

The reference to 10 Leigh, 434, is an error; no case in point.

In the case of *Newton vs. Poole; Newton and Wife vs. Same*, 12 Leigh, 112, decided March, 1841. The rule that administration accounts, audited *ex parte* by commissioners appointed by the proper court, returned to the court and recorded, are to be taken as *prima facie* correct, liable to be surcharged and falsified upon proof adduced by any party interested, rests not on the ground that such audited accounts stand on the same footing as stated accounts between parties, but mainly on the long-established practice of the country, and on the supposed integrity of the tribunal provided by law for the adjustment thereof; therefore, held:

1. That such audited accounts are only to be corrected in the particulars in which they are proved to be erroneous, unless corruption in the tribunal itself be established.

2. Though great and numerous errors appear, or even though the executor or administrator appear to have taken an unfair advantage, and though he never returned to the court, and did not exhibit to the auditors any inventory and appraisement of the estate, the audited accounts are yet to be taken as *prima facie* evidence, and to be corrected only so far as they are surcharged and falsified by proof.

In the case of *Corbin et als. vs. Mill's Executor et als.*, 19 Grat., 438, decided March 13, 1869, it was held, p. 465: The accounts of an executor which have been regularly settled in the mode prescribed by law, are to be taken as *prima facie* correct.

They are liable to be impeached on specific grounds of surcharge and falsification to be alleged in the bill, but the court will not decree an account upon the general allegation that the settled accounts are erroneous.

When an account has been ordered upon a proper bill, if an additional objection to the settled accounts is discovered in the progress of the cause, the plaintiff may raise the objection before the commissioner, with a proper specification in writing, and the defendant may meet the objection by an affidavit, which shall have the same weight as an answer would have had if the matter had been alledged in the bill.

Executors have regularly settled their accounts before a com-

missioner of the court of probate, and they have been approved and recorded. A devisee and legatee of their testator files a bill, and without specifying any errors in the settled accounts, calls upon them to render an account of all their actings and doings. The executors may object to any overhauling of their settled accounts, except so far as they may be open to objections apparent on their face.

To such a bill the executors answer, giving a full account of their administration, and there is a decree for an account. The allegations of their answer, though affirmative, must be taken as true, unless disproved, so far as they relate directly to the account which they are thus required to give.

If in such a case the plaintiff does not amend his bill, and specify errors in the account, allegations in the answer, though not explanatory of the accounts, and therefore not, perhaps, within the scope of the discovery sought by the bill, but having a relation to the subject-matter of the account, and important to a correct understanding of the motives of the executors, and of the circumstances under which they acted, unless disproved, are to be taken as true.

The references to 21 Grat., 189-'90, are errors.

In the case of *Chapman's Administrators vs. Shepherd's Administrator et als.*, 24 Grat., 377, decided February 11, 1874, it was held, pp. 389-'90: Administration accounts settled *ex parte*, returned and recorded in the proper court, are to be taken as *prima facie* correct, liable only to be surcharged and falsified by proper averment.

The inconvenience of the rule has been often felt, and in some few instances exceptions and modifications have been allowed when necessary to obtain the justice of the case.

In the case of *Carter et als. vs. Edmunds*, 80 Va., 58, decided January 15, 1885, it was held: A confirmed report of an *ex parte* settlement of a fiduciary's accounts is *prima facie* correct, and can be surcharged or falsified only by suit for the purpose within proper time, Code 1873, Chapter 128, Section 29. This is equally true *quoad* such settlements of the accounts of the committee of a lunatic.

In the case of *Rudford vs. Fowlkes*, 85 Va., 820, decided February 21, 1889, it was held: The *ex parte* settlement by a master commissioner of the accounts of a fiduciary shall be taken to be correct, except so far as the same may in a suit in proper time be surcharged and falsified, and the *onus* is on the plaintiff to show that it is not correct; and when such settlement is made in a suit *inter partes* and is duly returned and confirmed, it cannot be disturbed except for errors apparent on its face, or for after-discovered facts.

Bill to surcharge and falsify such settlement must particu-

larize errors; if answer of fiduciary discloses nothing improper, and there is no proof of the specifications, the bill must be dismissed.

If an heir, in consideration of concessions made him by the other heirs, and administratrix agree not to object to payment by her of just claims presented by another heir, though barred by the statute of limitations, he will be estopped from excepting to her accounts on the ground that she improperly paid them.

SECTION 2700.

In the case of *Whitehead's Administrator vs. Whitehead et als.*, 23 Grat., 376, decided March, 1873, it was held: The provisions of Section 16, Chapter 132, Code of 1860, prescribing what shall be done by a commissioner in settling the accounts of fiduciaries, apply to the report, regular or special, mentioned in Section 34, of the same Chapter, and, therefore, under this Section 34 a county court is not authorized to make any order for investing or loaning out the money or funds therein referred to, unless the commissioner has previously conformed to the provisions of Section 16, by posting the notice as therein required.

If in such case the order is made by the county court without the report required by the statute, the county court has jurisdiction on the motion of the parties whose money is invested, upon notice to the other party, to annul the order.

SECTION 2706.

In the case of *Moss vs. Moss's Administrator*, 4 H. & M., 293, decided October, 1809, it was held: In debt on a bond given by distributees to indemnify an administrator for dividing an estate among them, the condition being, "that they should pay him their respective proportions of all debts which he should be compelled to pay that should thereafter come against the said estate," it is sufficient assignment of a breach to say, "that the plaintiff, on a day subsequently to the date of the bond, had paid, by the consent of the defendants, a debt which was then due from the estate aforesaid, and which, as administrator, he was bound to pay, and that the defendants had not paid him their respective parts, nor any portion thereof, but the same had refused, though often requested."

In the case of *Nelson's Administrator vs. Cornwell*, 11 Grat., 724, decided October, 1854, it was held: Though an executor may have assented to a specific legacy, he does not thereby dispense with a refunding bond. If the executor has assented to a specific legacy and waived a refunding bond, the legatee may maintain an action at common law against the executor for its recovery, but the intention to waive the refunding bond must be very clear.

In the case of *Morrison et als. vs. Lovell*, 81 Va., 519, decided March 11, 1886, it was held: Administrator committed *devastavit* by turning over intestate's slaves and other personal property to the distributees without taking refunding bonds, and the fact that the slaves, if retained, might have been lost by emancipation, constitutes no defence to him or his sureties.

SECTION 2707.

In the case of *Kippen & Company vs. Carr's Executor*, 4 Munf., 119, decided January 5, 1814, it was held: An executor cannot defend himself against the suit of a creditor by showing that before he had notice of the plaintiff's demand he paid over the assets to the legatees of the testator.

In the case of *Cookus et als. vs. Peyton's Executor et als.*, 1 Grat., 432, decided March, 1845, it was held: An administrator, paying away the assets of the estate to distributees, without notice of debts or liabilities of his intestate, must account to creditors for the amount so paid away with interest.

An error appearing on the face of a report will be corrected, though no exception has been taken to it in the court below.

For the reference to 81 Va., 519, see *Morrison et als. vs. Lovell*, *supra*, Section 2706.

TITLE XXXVII.

CHAPTER CXXII.

SECTION 2713.

In the case of *Countz vs. Geiger*, 1 Call, 190 (2d edition, 165), decided October 30, 1797. A *feme sole* holding a right to lands in Lord Fairfield's boundaries married, and her husband forced her to permit a patent to issue in his own name. Held: Her heir at law shall have a conveyance.

A *feme covert* must relinquish her equitable as well as legal right separately and apart from her husband.

In the case of *McClenahan vs. Hannah*, 4 Munf., 499, decided November 21, 1815, it was held: A person having an equitable title to a tract of land executed a power of attorney to obtain a conveyance, but without authorizing a sale of right. The attorney being induced to believe the title bond defective, and finding it inconvenient to pay the balance due of the purchase-money, was persuaded, notwithstanding the land had greatly increased in value, to give up the title bond (but without assigning it) to the husband of a woman in whom the legal title was, in consideration of the husband's giving up to him

the unsatisfied bond for the purchase-money. After the death of the wife, the husband sold the land as his own, and the purchaser of him filed a bill in equity to enjoin a judgment in ejection obtained against him by the heir of the wife, and to get a conveyance of the land. It was decided that the contract between the attorney and the husband did not stand on such footing of fairness and equity that it ought to prevail over the legal title of the heir of the wife.

CHAPTER CXXIII.

SECTION 2716.

In the case of *Allen vs. Gibson*, 4 Rand., 468, decided October, 1826, it was held: In a writ of unlawful detainer, under the act of 1814, the omission to state in the complaint the estimated quantity of the land in dispute is not fatal if the complaint contains a reasonably certain description. Under this act a mortgagee may obtain possession of the mortgaged premises after forfeiture, by the mode of proceeding therein pointed out. This act gives a civil remedy for the immediate recovery of the possession in certain cases, even where no force occurred. One tenant in common may have this remedy for the whole land against any party having no right whatever, without joining his co-tenant.

In the case of *Pauley vs. Chapman*, 2 Rob., 235, decided August, 1843. On a complaint by a party under the statute that another had forcibly turned him out of possession of a tenement, the jury returned a special verdict finding the facts, and upon those facts the court considered that the entry was not with strong hand or with multitude of people, and rendered judgment that the complaint be dismissed.

In the case of *Chapman vs. Dunlap*, 4 Grat., 86, decided July, 1847, it was held: The defendant, in a proceeding of unlawful detainer, dies pending an appeal by the plaintiff below. The cause cannot be revived.

In the case of *Harman vs. Odell*, 6 Grat., 207, decided July, 1849, it was held: On a warrant of unlawful entry and detainer against two, the warrant is executed on one, but not on the other. The plaintiff may proceed against the one upon whom the warrant has been executed. No further proceedings can be had upon that warrant against the one upon whom it has not been executed before the return-day thereof.

In the case of *Adams vs. Martin*, 8 Grat., 107, decided July, 1851, it was held: Upon the trial of a writ of unlawful detainer defendant sets up title in himself. Plaintiff may prove that the defendant entered on the premises under a parol lease

from himself, though the lease proved was to continue more than one year.

The defendant claiming title under a deed made to himself and another as joint tenants, that other person is not a competent witness for him to sustain his right of possession.

In the case of *Emerick, etc., vs. Tavener*, 9 Grat., 220, decided August 17, 1852. L. leases land to E. by deed which is executed by E., and he thereby acknowledges that he is in possession under the lease, and covenants to restore it at the end of the term. E. holds over after the term expires for seven years, and whilst in possession executed a deed by which he conveys a part of the leased land to A. in fee-simple, with a covenant of warranty, and puts A. in possession of the land, and disclaims to hold under T. T. then instituted a proceeding of unlawful detainer against E. and A. Held: That E. is responsible to T. for the whole of the leased premises, though at the time of the institution of the proceeding A. was in possession of part of the land.

That T.'s recovery is not to be confined to the land in the actual occupancy of E. and A., but he is entitled to recover all the land demised, and he may show by parol testimony what constituted the demised premises.

That E. and A. were properly joined in this proceeding, though they did not hold the land jointly, but each held part of the land in severalty, and if only one of them held any part of the land, T. is entitled to a judgment against him, though there should be a judgment for the other.

Though A. was in actual possession of no part of the land claimed by the warrant at the time it was issued, he would be entitled to a verdict in his favor. Yet E., the lessee, would be responsible to T., and there should be a judgment against him, though at the time of the issue of the warrant he was not in the actual possession and occupancy of any part of the land.

A. having entered on the land, claiming in fee under the conveyance from E., was not entitled to six months notice to quit from T., though he had not expressly disclaimed to hold under the lease from T. to E., and if he held expressly as under-tenant of E., he would not be entitled to notice. When T. had determined the tenancy of E. by six months notice to quit, or E. had disclaimed to hold as tenant, and thereby deprived himself of the right to notice, it was competent for T. to proceed at once to oust both E. and A.

The lease being for a certain quantity of land, situated as therein described, and E. having executed it under his hand and seal, and thereby recognized the description and boundaries therein specified, and that he then held the same in possession, and the warrant being for the precise tenement described in the lease, neither E. nor A. claiming under him can be enter-

tained to deny that the tenement had its boundaries, or that they were within them.

E. and A. will not be permitted to introduce evidence of title to the land embraced in the lease, either in themselves or others, nor will they be permitted to introduce these title papers for the purpose of showing that they had not possession of the land claimed by T.

T., if entitled to recover, may recover according to the description of the land in the warrant or in the lease, and he must then point out, at his peril, to the sheriff the premises of which he is to give T. possession; and if he takes more than he has recovered in the action, the court will interfere in a summary way and compel him to make restitution.

E. having entered under the lease, and held over after the term expired, if T. did any act recognizing him still as his tenant, E. became thereby tenant from year to year, upon the conditions of the original lease. If T. did not recognize the continued tenancy, E. was a tenant at sufferance, and not entitled to notice to quit. E. being still in as tenant after the term has expired, he continues to hold as such as long as he remains in possession, unless he disclaims to hold as such, and asserts a right adverse to T., and such disclaimer and assertion of adverse right are brought home to the knowledge of T. by a full notice by E. of his disclaimer and assertion of title. *Quære*: If he must surrender the possession to T.?

A., by entering upon part of the land as purchaser from E., thereby became subject to the same relations held by E. towards his lessor, T., and neither could set up an adverse title unless he showed he had restored the possession to T., or had disclaimed and held adversely, with full notice to T., for the period of limitation prescribed by the statutes.

E. and A. could no more deny that the possession under which E. entered was the possession of T. than they could controvert T.'s title.

In the case of *Harrison vs. Middleton*, 11 Grat., 527, decided July, 1854, it was held: If a case of unlawful detainer has been pending in a county court for more than twelve months without a final decision, it may be removed on motion to the circuit court.

An unlawful detainer case removed to the circuit court is properly placed on the docket at the head of the civil causes in the court.

An agreement under seal by a tenant that he will surrender possession whenever a purchaser from the landlord requires it, constitutes him a tenant at will or at sufferance, and he is not entitled to six months' notice to quit.

If a tenant claims to hold adversely to his landlord he is not entitled to notice.

A landlord sells land in possession of his tenant by agreement under sale, and the tenant refuses to deliver possession, the landlord is the proper party to institute a proceeding of unlawful detainer to obtain possession.

If a deed of a defendant is introduced collaterally upon the trial as evidence, he may show that it is not his deed, without making oath to the fact; and for this purpose he may introduce a subscribing witness to it to prove that it was misread to the defendant. Proof that when the deed was read it was understood in a very material respect as different from what it is, may tend to show that it was misread, and, therefore, is incompetent evidence. But if the deed was correctly read, the misunderstanding of it by a party cannot affect its validity as a deed.

In the case of *Kinchloe vs. Tracewells*, 11 Grat., 587, decided July, 1854. A warrant for an unlawful entry, etc., is a civil action which may be removed on motion, without notice, from the county to the circuit court, if it has remained undecided for a year or upwards; and the time is to be estimated from the organization of the court summoned to try it.

To entitle the plaintiff to recover upon a warrant of unlawful detainer, he must prove that the defendant withheld the possession at the date of the warrant. But if the warrant does not state the withholding of the possession by the defendant, that may be aided by the complaint which states the fact.

Upon a motion by plaintiff to instruct the jury to disregard all the documentary evidence introduced by the defendant, of which some part is legal and some illegal, the court may properly overrule the motion without undertaking to state to the jury which is legal and which is illegal.

The boundaries of two co-terminous owners of land interlock, and the party claiming under the elder patent enters upon his land outside of the interlock, and cultivates and improves it, holding continued possession thereof. The party claiming under the junior patent enters on his land outside of the interlock, and clears and improves it and lives upon it, the land in the interlock being uncleared, and he exercises such continued acts of ownership over the whole land lying within the interlock as constitutes an adverse possession thereof, though but a part of it is cleared and enclosed; and after thus living on his land and acting for upwards of five years, he dies in possession, and his heirs continue to hold possession and claim and exercise like acts of ownership over the land within the interlock. Held: The possession of the heirs is not limited to their enclosure. The entry of the party holding under the senior patent

is tolled by the five years' possession and descent cast, and he cannot recover by a warrant of unlawful detainer.

A deed conveying land, then, and continuing to be in the actual adverse possession of another, cannot operate to pass the title to the grantee.

In 1831, and until the passage of the act of March 30, 1837, no possession short of fifteen years, unaided by a descent cast, would bar the entry of one having right or title to the land.

An entry upon land in the possession of another, in order to operate an ouster and give a possession to the party entering, must be with claim of title; but the claim of title need not be under a deed or other writing, or, if it is under a deed, it is not necessary that his possession shall be restricted to what shall prove to be within the precise boundaries of his deed.

Whatever may be the effect in ejectment, or a writ of right of the party in possession having taken that possession under a mistake as to the true boundary of his land, in a warrant of unlawful detainer the question is, whether such entry had been made and possession taken, and how long before the institution of the suit; and the mistake, if it existed, is wholly unimportant.

In the case of *Olinger vs. Shepherd*, 12 Grat., 462, decided August 21, 1855, it was held: In a case of forcible entry and detainer pending when the Code of 1849 went into effect, the subsequent proceedings must conform to the Code. It seems that under the Code of 1849 a separate complaint is not necessary in a proceeding for an unlawful detainer, that the only complaint necessary is that embodied in the summons.

In a proceeding for an unlawful entry and detainer, if the defendant has entered unlawfully, the plaintiff is entitled to recover, without any regard to the question of his right of possession; and this though the land from which he is ousted is the land of the Commonwealth or of the party who ousted him.

The possession to which the proceeding for unlawful entry will apply, is not confined to actual occupancy or enclosure, but it is any possession which is sufficient to sustain an action of trespass; and thus actual possession of a part of the tract of land under a *bona fide* claim and color of title to the whole is such a possession of the whole, or so much thereof as is not in the adverse possession of others, as will sustain this proceeding. A deed, though it may be invalid to pass the title it purports to convey, may be admissible evidence as a link in plaintiff's chain of title to show the bounds of the lands claimed by him, and the extent of his possession.

In the case of *Williamson (Trustee) vs. Paxton (Trustee)*, 18 Grat., 475, decided April, 1868, it was held: A husband, trustee for his wife, contracts for the purchase of land for her, but

the contract is in his own name. He is put into possession, but he fails to comply with the terms of the contract. In a proceeding by unlawful detainer by the vendor to recover possession, the wife is not a necessary or proper party in the action.

A vendor of land, who has put the purchaser in possession, whilst the contract remains executory, has the legal title, and unless the provisions of the Code, Chapter 135, Section 20, apply to the case, may recover possession by an action at law, at least after making demand of possession, even though the vendee may be entitled in equity to a specific execution of the contract.

P., trustee for B., a *feme covert*, with power to sell and re-invest at his discretion, sells to W., on conditions which W. fails to comply with, and thus forfeits the contract. No authorized dealing of B. with W. can entitle W. to hold the land against his vendor, P., after forfeiting his right to the possession by violating the contract of sale.

The contract provides for the payment by W. in cash of a sum of money, and that if W. fails by a certain day within the year to do a certain act, that he shall hold for a year, and the sum paid shall be for the year. W. having failed to do the act, and holding as tenant for the year, and then holding over, does not thereby become tenant from year to year, and so entitled to the legal notice to quit. And though during the second year the purchaser paid rent for that year, it would not of itself constitute him tenant from year to year, so as to entitle him to notice to quit.

It is a mere presumption of law, in the absence of evidence to the contrary, that a tenant who holds over after the expiration of his term, by permission of the lessor, is a tenant from year to year; and this presumption may be repelled by evidence which may show that the holding over, though by permission of the lessor, is not as tenant from year to year, but in some other character, or for some other purpose.

One who is put into possession upon an agreement to purchase land cannot be ousted by ejectment or unlawful detainer before his lawful possession is determined by demand of possession or otherwise.

In the case of *Corbett vs. Nutt (Trustee)*, 18 Grat., 624, decided April, 1868, it was held: Plaintiff in unlawful detainer proves he deposited the original will of his testatrix with the clerk of the Circuit Court of Richmond in 1864. He also proved that the witness had inquired for said paper of the said clerk at his office in the city of Richmond, in whose custody the said original paper had been left; that said clerk, at his request, made search for said paper, and reported it had been lost out of his possession, and destroyed at the time of the fire in April,

1865. In the absence of all suspicion of fair dealing, this testimony is sufficient to let in a copy of the will, of the accuracy of which copy there is no question.

Upon proof that the will had been regularly admitted to probate in the Circuit Court of the City of Richmond, such proof of the loss and destruction of the record will authorize the admission of an official copy of the record, certified by the clerk. And this official copy having been admitted to probate in the Orphan's Court of the District of Columbia, an official copy from that office is admissible.

Where the copy of a paper has been properly introduced in evidence, the admission of another copy of the same paper, if improper, cannot possibly do injury to the other party, and is, therefore, no cause for reversing the judgment.

A proceeding of unlawful detainer may be maintained against a party in unlawful possession of land, where such unlawful possession has not been continued for more than three years, though the legal title to the land is the only question involved in the cause.

In the case of *Dobson vs. Culpeper and Wife*, 23 Grat., 352, decided March, 1873. C. and wife sell her land to D., but do not convey it to him. D. fails to comply with his contract, and C. and wife convey the land to G., the son of C.'s wife, and then C. and wife bring unlawful detainer against D. to recover the land. Held: If D. had complied with his contract so that he was entitled to a conveyance, he might have set up the defence under the statute in this proceeding. Though D. cannot question the title of C. and wife, as at the time of the sale, he may show in his defence that they have since conveyed the land to G. By their conveyance to G., C. and wife lost their right to recover the land from D., and the action should have been in the name of G., and D. could not question the title of G.

In the case of *Allen et als. vs. Paul et als.*, 24 Grat., 332, decided January, 1874. By two deeds a lot of ground was conveyed to certain persons by name and their successors, to be held in trust for the Methodist Episcopal Church of Petersburg. A house of worship, called the Union Street Methodist Church, was built upon this lot, in which this church worshipped until 1842, when they built a house of worship on Washington street in the same city, and in 1844 they resolved that the Union Street Church should be appropriated to the use of the colored congregation which was constituted by persons who were members of the Methodist Episcopal Church of Petersburg. These continued to worship there, and to be represented at the quarterly conference held at the Washington Street Church, until 1865, when they connected themselves with the African Methodist Episcopal Zion Church. After this change was made, in the

year 1866, the then trustees of the Methodist Episcopal Church property, who were the regularly constituted successors of the original trustees, agreed with the persons who, according to the rules and discipline of Zion Church, were then the trustees and official authorities of said congregation as part of Zion Church, that until the said property should be required for the use of the Methodist Episcopal Church, South, the said first trustees should permit said trustees and congregation to occupy the same as a place of worship without rent, they paying insurance and repairs, and to this the said trustees and congregation agreed; and they held the said property on these terms until 1871, without claiming any other right thereto. In 1871 the trustees of the colored congregation resigned, and others were elected, and then the judge of the Circuit Court of Petersburg made an order appointing the persons elected trustees of said church, in whom the legal title to the land owned by said congregation should be vested. And these trustees from that time claimed the premises and the legal title thereto. The trustees of the property thereupon demanded possession of it, which was refused, and they brought this proceeding of unlawful detainer. Held: The defendants, or their predecessors, having been put into possession of the premises by the plaintiffs, or their predecessors, and having acknowledged the title of the latter, the possession of the former is the possession of the latter, until the former as such tenants by some act disclaim to hold of the latter as their landlords.

The defendants cannot set up any right, or title, adverse to the plaintiffs, unless they proved that they disclaimed to hold them, or *bona fide* abandoned possession of the premises with notice thereof to the plaintiffs, or their predecessors three years before the institution of the suit. *Quære*: If the mere disclaiming the landlord's title, and claiming to hold in fee for three years is sufficient to defeat the plaintiffs recovery?

The defendants having disclaimed to hold as tenants of the plaintiffs, and claimed to hold the premises in fee, no notice to quit was necessary to entitle the plaintiffs to proceed immediately to recover the property.

The plaintiffs, as the regularly appointed successors of the original trustees in the deeds conveying the property, may maintain the action to recover the possession of the church building against the defendants, who claim to be the trustees of the African Methodist Episcopal Zion Church in Petersburg, and to be vested with the title to the property belonging to said church; and as such to be in possession of the property in controversy.

It is immaterial as to the support of the action whether the plaintiffs acquired any personal ownership in the property by

the deeds, it not being competent for the defendants, who claim to hold as successors of the plaintiff's tenants, to deny the plaintiff's title.

Although the order of the court was legal and was binding so far as it constituted the defendants trustees, and the regularity and validity of this order, or the appointment of the defendants as trustees, cannot be inquired into in this suit, yet the said order does not vest in them the legal title to the property for the time being, or for an instant, unless the congregation which they represent are the owners of it; and the predecessors of the defendants having acknowledged the title of the plaintiffs, and held under them, the defendants claiming through them as their successors cannot deny the plaintiff's title.

That the defendants and those under whom they claim have held possession of the premises for more than three years will not defeat the plaintiff's action unless such possession was adversary.

The resolution of 1844 implies that the title and ownership of the property is retained by the Methodist Episcopal Church, and the use of it only given to the colored congregation, which the owners had at any time the right to recall.

In the case of *Power & Kellog vs. Tazewells*, 25 Grat., 786, decided February 4, 1875, it was held: T., having under the act of April 1, 1873, obtained an assignment of certain oyster beds for the planting and sowing of oysters for one year, and having paid the tax and had the beds staked off as required before the 1st of May, 1874, has such an exclusive interest in them that he may maintain an action of unlawful detainer against a party who enters upon said beds and holds them against him.

Though the act of April 18, 1874, repealed the act of April 1, 1873, the repeal could not defeat the interest which had been vested in T., and on which he had paid the tax before the repealing act was passed, though the beds were not staked off till after its passage.

In the case of *Norfolk City vs. Cooke*, 27 Grat., 430, decided April 13, 1876, it was held: The city of Norfolk is the owner of the ground which she has not disposed of, covered by water, lying between Parker street and the port-warden's lines, both as riparian owner and as having had long possession thereof; and the city may maintain an action of unlawful entry and detainer against any intruder upon said water lots.

In the case of *Bartley vs. McKinney*, 28 Grat., 750, decided July, 1877. In an action of unlawful detainer the defendant appears; but though the case is continued for four years he does not file any plea. The cause is proceeded in precisely as if there was a plea filed—the jury are sworn to try the issue joined, and the defendant makes full defence. There having

been a verdict and a judgment in favor of the plaintiff, the defendant cannot set up the want of the plea and issue thereon in the appellate court. In this case the jury by their verdict gave to the plaintiff the land claimed in her summons, which included an half-acre which probably did not belong to her, and it was plainly laid down on the plat; and the judgment was according to the verdict. The defendant moved the court to set aside the verdict and the judgment, and the plaintiff by her counsel in court, released the said half-acre. The court thereupon overruled the defendant's motion, set aside the judgment, but not the verdict, and rendered a judgment for the land claimed, except the half-acre. Held: It was competent for the counsel to release the half-acre of the land for the plaintiff, and it was proper for the court to set aside the first judgment and enter a judgment for the land included in the verdict, except the half-acre. In this case the plaintiff claimed under the will of her husband, which gave her in lieu of her dower all his real estate during her life, except certain portions bequeathed to his children. The defendant claimed under the son, to whom testator gave a parcel of the land. Evidence for the defendant that the plaintiff had been in possession and enjoyed the benefits of one-half of the cleared lands of her late husband, from the time of his death to the time of the trial, is irrelevant and inadmissible. Instructions asked for, which are not founded on the evidence in the case, are properly refused.

The testimony of a witness for the plaintiff is objected to by the defendant, because the witness had sold to and rented from the landlord of the defendant the land in dispute by deed under seal; and he cannot, therefore, disparage the title which the witness had so acknowledged. Held: Though that would be ground for not permitting him to deny the title of his landlord in an action against him for rent or possession, it is certainly not ground for his incompetency to deny the fact in a controversy between other parties, and in which he has no interest. A witness intended to state the facts according to the best of his knowledge or understanding and belief, it will be so presumed in the absence of evidence to the contrary.

A deposition is taken to be read in a case in which Franklin Bartley is defendant, and that is the name given in the summons and to which he appeared, but the name in which the action is carried on is William F. Bartley. The person is obviously the same, and Franklin is a part of the defendant's name. The deposition cannot be objected to on this ground. There having been oral evidence in the cause expressly proving that the land in controversy is part of the land devised to the plaintiff, and the jury having so found, though there may be documentary evidence tending to show it was not embraced in the tract of

the plaintiff's husband, yet the exceptions of the defendant to the ruling of the court refusing a trial, containing the evidence and not the facts proved, the court certifying its inability to certify the facts because of conflict of evidence, the appellate court cannot reverse the judgment, but must take it to be correct.

In the case of *Hope vs. Norfolk & Western Railroad Company*, 79 Va., 283, decided August 7, 1884. C., in 1851, conveyed to Norfolk and Western Railroad Company "all right, title, interest and estate of, in, and to so much of her land in W. county as may be laid out for the construction of its railroad," to-wit: A strip eighty feet wide, and containing nine acres of said land. C. was only tenant for life, with remainder in fee in H. In 1881 C. died. No steps were taken by said company to acquire said right of way, except taking conveyance from C. Within three years after C.'s death, H. brought unlawful detainer against said company for this land. Held: H. is entitled to judgment for the land.

H.'s right of action did not accrue till C.'s death. Statute prescribes how such companies may have land condemned for their purposes, but if they proceed by negotiations *in pais* with the life tenant only, they can acquire only such life-tenant rights.

In the case of *Locke vs. Frasher's Administrators*, 79 Va., 409, decided September 25, 1884, it was held: In this action, as well as in ejectment, under plea of not guilty, defendant can avail himself of defence provided in Section 2741, but only where there is a writing stating the purchase and the terms thereof, signed by the vendor or his agent.

The general rule that tenant cannot deny landlord's title is not raised when tenant is in actual possession at the time he accepts the lease. Person possessing and claiming title to land by mistake, supposes another to have a better title, and takes a lease from him. In action by lessor to recover possession, tenant may set up such mistake and show he had good title to the land, provided such mistake was induced by the lessor through misrepresentations amounting to fraud.

One in possession under agreement to purchase cannot be ousted before his lawful possession is determined by demand or otherwise. Yet such possession may be determined by the acceptance of a lease.

In the case of *Frazier vs. Military Institute*, 81 Va., 59, decided October 8, 1885. In unlawful detainer by corporation against its ex-treasurer for possession of house and lot allowed him as residence whilst in office, as part of emoluments, the records of the corporation are admissible as evidence to show the arrangements made between the parties.

In such action, though the defendant does not put in the pre-

scribed plea of "not guilty," yet a jury is impaneled to try whether he unlawfully withholds the premises in controversy.

Virginia Military Institute Board of Visitors, on the 30th of July, 1884, ordered that the treasurer's salary be \$1,000 per annum, and \$100 for fuel and lights, and that he have the use of the hospital building, and appointed F. such treasurer for the term of one year from that day. The new board on the 16th of December, 1884, vacated the office; but F. withheld the building, claiming that the old board had rented it to him for one year at \$180, deducted in advance from his salary of \$1,280. On unlawful detainer for its possession. Held: F.'s right to possess the building, being part of the emoluments of the office, ceased at his removal.

In the case of *Farley et als. vs. Tillar*, 81 Va., 275, decided January 7, 1886, it was held: At trial of unlawful detainer against a married woman, under the act, her husband being joined, it is not error for the court to instruct the jury that no verdict or judgment can be rendered against him in the action; nor that, if they believe from the evidence that she as such sole trader had rented and taken possession of the property, and unlawfully withholds it from the plaintiff, they shall find for the plaintiff, but that the burden is on the plaintiff to prove these facts. Nor is it error to reject an instruction that under said act every contract of married women is invalid, unless joined in by her husband; nor instruction as to husband's being in possession of the property before suit, and holding on up to trial, lawfully or unlawfully, and as to the defendant's right to a verdict because husband was not allowed to testify and prove his own possession; nor instructions not relating to any evidence in the case.

In the case of *Pannill vs. Coles*, 81 Va., 380, decided January 21, 1886, it was held: State Constitution Article VI., Section 2, gives this court appellate jurisdiction in controversies concerning the title or boundaries of land, whatever the amount and whatever the element of title involved in the controversy; and, consequently, such jurisdiction extends to cases of unlawful entry and detainer.

In the case of *Davis et als. (Trustee) vs. Mayo et als.*, 82 Va., 97, decided June 17, 1886, it was held: In ejectment, title or right of possession is always involved. The design of unlawful detainer is to protect the actual possession, whether rightful or wrongful, and to afford summary redress and restitution. Forcible entry of owner is unlawful. Entry of stranger is unlawful, whether forcible or not. Judgment only restores the *status quo*, but settles nothing as to the title or right of possession.

This is the case cited from 10 Va. Law Journal, 554.

In the case of *Fore vs. Campbell*, 82 Va., 808, decided Jan-

uary 27, 1887, it was held: If one enter upon land of another unlawfully, the latter is entitled to recover the possession of the land by this action without regard to right of possession. Possession under claim of title is all that is necessary to maintain it.

This is the case cited from 11 Va. Law Journal, 366.

In the case of *Pettit vs. Cowherd*, 83 Va., 20, decided March, 1887, it was held: Where in unlawful detainer plaintiff fails to prove that defendant has not unlawfully held possession of the land for three years or more before the commencement of the action, he cannot recover.

This is the case cited from 11 Va. Law Journal, 431.

SECTION 2718.

In the case of *Rosenberger vs. Bowen*, 84 Va., 675, decided March 29, 1888. It was shown in evidence at the trial that defendant was in possession of a tract of land, under written contract with plaintiff, to convey by deed with general warranty; that there were at the time vendors and judgment liens on the land, that nearly the whole contract price and part of the vendor's lien had been paid to avoid a sale therefore; that defendant being able and willing to pay the balance, demanded a deed, which plaintiff failed to give, himself not having the title, but that the plaintiff afterwards demanded possession. Held: The plaintiff cannot maintain his action.

SECTION 2719.

In the case of *Johnson vs. Hargrove*, 81 Va., 118 and 123, decided December 3, 1885. By an ancient rule of the common law, before lessor can exercise a stipulated right of re-entry for breach of covenant to pay rent, he must make an actual demand upon the tenant for the payment thereof, unless by special agreement the requirements of demand have been dispensed with. The rules as respects the necessity for demand remain unaltered here by statute

H., tenant of J., of premises in the city of R., for five years for rent, payable first day of each month, under a lease with clause of re-entry for ten days default in paying any instalment of rent, was, April 12, 1883, in default for rent for preceding month, and J. notified H. that unless he quit the premises in five days he would proceed against him for the unlawful detainer thereof. Next day H. tendered the rent to G., who had been acting as J.'s agent in the matter, but G. refused to receive it. Seven days after the notice J. brought unlawful detainer for the premises. Held:

1. As J. had made no demand for the rent in arrear, his action was not maintainable, either at common law or under the statute.

2. Service of notice on H. to quit did not revoke G.'s agency, and the tender of the rent in the arrear within the statutory period of five days would, even had there been a demand for the rent, have defeated the action under the statute.

SECTION 2720.

See the references given to Section 3455.

CHAPTER CXXIV.

SECTION 2722.

In the case of *Hopkins & Watkins vs. Ward et als.*, 6 Munf., 38, decided December 11, 1817, it was held: The Commonwealth, by patent granted "a tract of land containing seventy thousand two hundred and two acres" (within specified metes and bounds,) by a survey containing a surplus of forty-two thousand acres, held by titles having legal preference to the warrants and rights upon which the grant was founded. A reservation was therefore made in favor of those titles in general terms. It was decided that under the terms of this patent the grantee was entitled to recover in ejectment all the land within the metes and bounds thereof, except such as the defendants might show themselves entitled to under the said reservation.

A deed of bargain and sale and release of land from a person not in possession to another in the same predicament (the land being at the time held by a third person with adverse title), passes nothing, and therefore does not divest the bargainor of his right to recover in ejectment. A *cestui que trust*, after the purposes of the deed have been satisfied, may maintain ejectment upon a demise in his own name, although the legal estate is still in the trustee. A plaintiff in ejectment may recover under one or the other of two demises of the same land from different persons.

In the case of *Ferguson vs. Franklins*, 6 Munf., 305, decided February 20, 1819, it was held: A sale and conveyance of land by a trustee cannot be set aside on the ground that he was an alien when the deed was made to him, and when he conveyed the land to the purchaser.

In the case of *Moore & McClung vs. Fitzwater*, 2 Rand., 442, decided May 20, 1824, it was held: Where two parties claim title to lands, and they compromise the dispute by one party paying a sum of money, and the other conveying the land with warranty, such agreement will be binding, if there be no fraud or imposition in obtaining the judgment.

In the case of *Davis et als. (Trustee) vs. Mayo et als.*, 82 Va., 97, decided June 17, 1886, it was held: In ejectment title

or right of possession is always involved. The design of unlawful detainer is to protect the actual possession, whether rightful or wrongful, and to afford summary redress and restitution. Forceful entry of owner is unlawful. Entry of stranger is unlawful, whether forcible or not. Judgment only restores the *status quo*, but settles nothing as to the title or right of possession.

In the case of *Dooley vs. Baynes*, 86 Va., 644, decided March 13, 1890, it was held: Declarations accompanying the act of possession, in disparagement of claimant's title or otherwise qualifying his possession, are admissible in evidence, not only against declarant, but those claiming under him.

SECTION 2723.

In the case of *Bolling vs. The Mayor, etc., of Petersburg*, 3 Rand., 563, decided December, 1825, it was held: A disseisor may maintain a writ of right against a stranger who cannot protect himself under the better right of the disseisee.

In the case of *Taylor's Devisees vs. Rightmire*, 8 Leigh, 468, decided August, 1836, it was held: In Virginia a writ of right may be maintained by a devisee upon the possession or seisin of his testator.

If the demandant in a writ of right die pending the suit, his devisees may, in Virginia, have the cause revived in their names.

In the case of *Tapscott vs. Cobbs et als.*, 11 Grat., 172, decided April, 1854, it was held: A party in peaceable possession of land is entered upon and ousted by one not having title to, or authority to enter upon the land. The party ousted may recover the premises in ejectment upon his possession merely, and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under the title.

Where an ancestor dies in possession of land, the presumption of law is, that the heir is in possession after the death of the ancestor, and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession against one who has entered upon the land without title or authority to enter under the title outstanding in another.

In the case of *Mitchell vs. Baratta*, 17 Grat., 445, decided May 14, 1867, it was held: If the plaintiff in ejectment would have been entitled at the time the Code of 1849 went into effect, and at the time of the institution of his suit, to recover in a writ of right, he is entitled to recover in the present action in ejectment.

In the case of *Alvey vs. Cahoon et als.*, 86 Va., 173, decided

June 13, 1889, it was held: Under this section an amendment of a judgment for plaintiffs in ejectment, "for their term yet to come in the lands," etc., so as to conform with the plaintiffs' claim and the requirements of the Code of 1849, whereby ejectment was adopted to try titles to, as well as to get possession of land, was not erroneous.

SECTION 2725.

In the case of *Butts vs. Blunt et als.*, 1 Rand., 255, decided December, 1822, it was held: In ejectment, where the lessor is a fictitious person instead of the lessee, evidence on the part of the plaintiff not going to show a title in the lessor ought to be excluded.

Although the act of *joefails* cures any objection of form or substance to the declaration in ejectment after issue joined, yet it does not dispense with the rule that the evidence must be relevant to the issue.

Depositions ought not to be admitted in a suit at law, unless it appears by the record in what suit and by what authority they were taken, and that the witness could not attend at the trial.

In the case of *Bolling vs. Leel*, 76 Va., 487 and 495, decided July 13, 1882. Several plaintiffs, after suit brought, aliened their interest in the land. Held: Such alienation cannot prevent their recovery for benefit of the alienee. Right to recover at commencement of suit is all that is required by the Code.

SECTION 2726.

In the case of *Camden et als. vs. Haskill*, 3 Rand., 462, decided October, 1825, it was held: Several tenants claiming severally parts of the land sued for may be sued in one action of ejectment.

In the case of *Stuart's Heirs, etc. vs. Coalter*, 4 Rand., 74, decided February, 1826, it was held: An ejectment may be brought against several persons in possession of any part of the tract of land claimed by the lessor of the plaintiff.

In the case of *Mitchell vs. Baratta*, 17 Grat., 445, decided May 14, 1867, it was held: If a tenant is sued in ejectment for the land so held by him, his landlord is entitled, under the act, to be made a party defendant to defend the action.

In the case of *Carrol vs. Brown*, 28 Grat., 791, decided August 2, 1877, it was held, p. 794: A court of equity has jurisdiction of a suit brought by the owner in possession to set aside a deed which has been put upon record, whereby the complainant's land has been wrongfully conveyed to a purchaser at a tax sale.

In the case of *Hanks, etc. vs. Price, etc.*, 32 Grat., 107, de-

cided July, 1879, it was held: In an action of ejectment brought against the person in possession, the landlord of such person may come in and be allowed to defend the action under Section 5, Chapter 131, Code of 1873, whether the actual relation of lessor and lessee exists between them or not, and this will be permitted even where the plaintiff and defendant in possession having submitted the matters between them to arbitration, an award made is in favor of the plaintiff, and a rule awarded against the defendant in possession to show cause why the award should not be entered as the judgment of the court against him. In general the law will imply a tenancy whenever there is an ownership of the land on one hand, and an occupation by possession on the other.

The reference to 76 Va., 488, is an error.

In the case of *Stearns vs. Harman*, 80 Va., 48, decided January 8, 1885, it was held: On the principle of *quia timet*, a court of equity will execute a suit by the owner in possession of land to remove a cloud from his title, by annulling a deed that, by mistake or fraud, conveys the land to another, who makes adverse claim thereto, but brings no suit. But under Code 1873, Chapter 131, Sections 4 and 5, the proper remedy is by an ejectment where the owner holds the legal title, but has not actual possession, and another asserts an adverse claim to the land, but has not actual possession of it. In such case equity has no jurisdiction.

In the case of *Reynolds vs. Cook*, 83 Va., 817, decided November, 1887, it was held: A right to quarry and remove limestone from a tract of land is an interest in, or a right arising out of land, and as such constitutes a foundation for an action of ejectment.

SECTION 2727.

In the case of *Kinney vs. Beverly*, 1 H. & M., 531, decided November 5, 1807, it was held: An ejectment does not abate by the death of the lessor of the plaintiff.

In the case of *Mooberry et als. vs. Marye*, 2 Munf., 453, decided April 13, 1811, it was held: Where the lessor of the plaintiff in ejectment dies pending the suit, judgment is to be rendered as if he were still living, and possession is to be given under control of the court.

A case agreed in ejectment, finding the lease, entry and ouster in the declaration mentioned, sufficiently admits that all the defendants, who agreed to the case, are in possession of the land in controversy, unless there be an express finding to the contrary.

In the case of *Medley vs. Medley*, 3 Munf., 191, decided October 9, 1811, it was held: An appeal from a judgment in ejectment does not abate by the death of the lessor of the plaintiff, notwithstanding such lessor claimed the land for life only.

SECTION 2728.

In the case of *Duvall et als. vs. Bibb*, 3 Call, 362, (2d edition), 313, decided May 7, 1803, it was held: If in ejectment the demise and ouster be laid precedent to the plaintiff's title, it is cured by the act of *jeofails*.

In the case of *Twyman (Trustee) vs. Hawley*, 24 Grat., 512, decided March, 1874, it was held: T. sells land to H. and puts him into possession of it, but does not convey it to him. H. having failed to pay any part of the purchase-money, T. brings ejectment against him to recover the land without giving T. notice to surrender it. The notice was essential to sustain the action, and T. must therefore fail in his action.

In the case of *Benn vs. Hatcher et als.*, 81 Va., 25, decided April 30, 1885, it was held, p. 31: Declaration describes the land in controversy as lying north of a road, and the verdict as south of that road. In other particulars the description is the same. Such variance is immaterial, and the description in the declaration must be presumed to be mistaken.

In the case of *Messick vs. Thomas*, 84 Va., 891, decided May 10, 1888. Where the declaration avers that plaintiff was possessed of an estate in fee, and defendant entered upon this estate and unlawfully withholds possession thereof from the plaintiff, and defendant pleads "not guilty," verdict is, "We, the jury, find for the plaintiff that he is entitled in fee to the whole of the premises in his declaration described, and that all the defendants were in possession of a part thereof, or claimed title to such part at the commencement of this suit." Held: The verdict responds to the issue when the premises are described in the declaration with "convenient certainty," and verdict is that plaintiff is entitled in fee to "the whole of the premises in the declaration described," such verdict is not defective for uncertainty.

Where defendant at trial proves that he is in possession of and claiming title to only a part, verdict and judgment for plaintiff for the whole land described in the declaration is not erroneous, or at least not one whereby defendant is injured.

SECTION 2729.

In the case of *Beverley vs. Fogg*, 1 Call, 485 (2d edition, 421), decided May 7, 1799, it was held: Where the demandant in a writ of right omits to set forth the boundaries in his declaration, it will be error, after verdict.

In the case of *Tuberville vs. Long*, 3 H. & M., 309, decided March, 1809, it was held: If the original writ be lost, so that it cannot be made part of the record, the court will intend after verdict that it was a good writ, though some of the subsequent process be erroneous. Appearance and pleading to the action cures all errors in the process.

It was not necessary in actions in the district courts to aver in the declaration that the cause of action arose within the jurisdiction of the court; but it seems that such averment is necessary in actions in corporation courts only.

A count on a writ of right, referring to boundaries, as by a survey made in the cause, sufficiently describes the boundaries of the land in dispute.

If the record of proceedings on a writ of right state that the demandant "replied" generally, the court will intend, after verdict, that a general replication was filed in writing.

The statute of *jeofails* extends to writs of right; therefore if the verdict and judgment be substantially right, though not in the words of the law, they ought not to be disturbed.

In the case of *Urquhart et als. vs. Clarke et als.*, 2 Rand., 549, here referred to, this point is so indefinitely treated as to be utterly useless as an authority in point.

In the case of *Koiner vs. Rankin's Heirs*, 11 Grat., 420, decided July, 1854, it was held: The quantities and boundaries of the land described in the count and in the verdict vary from each other; but the verdict finds that the land therein described is the tenement mentioned in the count. It is to be presumed that the description given in the count is a mistaken description, and that the land recovered is the land demanded.

In the case of *Hitchcock vs. Rawson*, 14 Grat., 526, decided August 23, 1858, it was held: A declaration in ejectment, which describes the land as a part of a larger tract owned by plaintiff near certain creeks which have no public notoriety, is defective and may be demurred to. In such a case a verdict which finds for the plaintiff the land in the declaration mentioned is too vague to enable the officer to deliver possession, and there must be a *venire de novo*.

In the case of *Stinchcomb vs. Marsh*, 15 Grat., 202, decided July, 1858, it was held: In an action of ejectment, the record of another action of ejectment between other parties is not competent evidence upon a question of boundaries or location of the land in controversy.

In the case of *Elliot vs. Horton*, 28 Grat., 766, decided July 17, 1877, it was held: In an action of ejectment parol evidence is admissible to prove that the calls for courses and distances in a deed are mistaken, and do not designate the true boundary of the land intended to be conveyed.

For the reference to 81 Va., 25 and 30, see the case of *Benn vs. Hatcher et als.*, cited *supra*, Section 2728.

In the case of *Hunter vs. Hume*, 88 Va., 24, decided June 18, 1891, it was held: Quantity is regarded as the least certain mode of describing land, and hence must yield to description by boundaries and distances.

SECTION 2730.

In the case of *Roach vs. Blakey* 89 Va., 767, decided March 23, 1893. Where a declaration in ejectment alleges that on a certain day before bringing the action plaintiffs were possessed, "each in a fee-simple absolute of an undivided share or interest in" the land, and the action "is for the whole land so claimed, and not for any parcel" thereof. Held: The declaration is sufficient under Code 1887, Section 2730.

SECTION 2734.

In the case of *James River & Kanawha Company vs. Robinson*, 16 Grat., 434, decided January 26, 1864, it was held: A plea in abatement is admissible in an action of ejectment. The act refers only to pleas in bar of the action. *Quære*: If a defendant may not plead in abatement and in bar at the same time, the pleas being filed at the proper time? A defendant may waive his plea in abatement and plead in bar to the action. A defendant in ejectment, admitting that he was mistaken as to the matter pleaded in abatement, and upon this admission, submitting the issue upon the plea to the court, at the same time asking leave to file his plea of not guilty. This was in effect a waiver of the plea in abatement, and he should have been permitted to file the plea of not guilty.

In the case of *Reynolds vs. Cook*, 83 Va., 817, decided November, 1887, it was held: In ejectment, the only plea in bar of action, in whole or in part, is the plea of "not guilty"; a paper called a "disclaimer," but actually in the nature of a special plea, should be rejected.

SECTION 2735.

In the case of *Moody et als. vs. McKim*, 5 Munf., 374, decided February 1, 1817, it was held: In ejectment, if it appears from the evidence that the land in controversy was vacant when the defendant came to the possession of it, peaceably and quietly, without any privity between him and the lessors of the plaintiff or those under whom they claim, the plaintiff cannot recover upon the ground of the prior possession of the lessors without proving twenty years uninterrupted adverse possession on their part, or on the part of those under whom they claim, or showing a right to the possession by the death and seisin in the manner prescribed by the act of Assembly of some person under whom they claim.

In the case of *Butts vs. Blunt et als.*, 1 Rand., 255, decided December, 1822, it was held: In ejectment, where the lessor is a fictitious person instead of the lessee, evidence on the part of the plaintiff not going to show a title in the lessor ought to be excluded.

Although the act of *jeofails* cures any objection of form or substance to the declaration in ejectment after issue joined, yet it does not dispense with the rule that the evidence must be relevant to the issue. Depositions ought not to be admitted to a suit at law unless it appears by the record in what suit and by what authority they were taken, and that the witnesses could not attend at the trial.

In the case of *Bolling vs. The Mayor, etc., of Petersburg*, 3 Rand., 563, decided December, 1825, it was held: In a writ of right, where the demandant proves an actual seisin in deed or *pedis* positive, the defendant cannot defend himself by showing a better outstanding title in another; but where the demandant relies upon a constructive seisin the tenant may show an elder patent, or better title in another. Where the mise is joined on the mere right it is not competent for the tenant to give in evidence non-tenure, or any other matter in abatement; but such matters must be specially pleaded as at common law.

In the case of *Taylor's Devises vs. Burnside*, 1 Grat., 165, decided September, 1844. On the trial of a writ of right, the demandants, as a foundation for proof of an entry made upon the lands in controversy by their agent, offered in evidence a power of attorney executed by them and properly authenticated, giving authority over the lands in controversy to their said agent, which was objected to by the tenant. Held: It was proper evidence.

In order to trace the title from the original patentee to themselves, the demandants offered as evidence an office copy of the will of their testator. The will appears to have three attesting witnesses, who were not examined on its probate, but it was admitted to probate in the proper court upon proof of two other witnesses that it was wholly written by the testator. Held: The copy was legal evidence.

The demandants in a writ of right, claiming title to the land in controversy under a patent from the Commonwealth, are entitled to recover the land, though neither they nor those under whom they claim have entered and held actual possession under their grant, in the absence of a sufficient legal defence on the part of the tenant.

If the tenant in a writ of right would protect himself by the plea of the statute of limitations, he must show that he entered on the land in controversy, claiming the same under his junior grant when the demandants had not actual possession thereof under their elder patent, and took and held actual possession thereof by residence, improvement, cultivation, or other open, notorious and habitual acts of ownership, and so continued the same under his said claim for more than twenty-five years before the commencement of the demandants' suit.

If the tenants, or those under whom he claims, have abandoned their possession within the twenty-five years, the statute of limitations is no bar to the demandants' title under his elder patent.

The tenant cannot sustain his defence of continued adversary possession so as to make the statute a bar, if the demandants or those under whom they claim, have within the period of twenty-five years before bringing the action entered upon the land in controversy, and taken actual possession thereof by residence, improvement, cultivation, or other open and notorious and habitual acts of ownership.

The entry of the demandant, or those under whom he claims, upon, and possession of the land within his elder grant, not embraced by the junior grant of the tenant, cannot oust the tenant if at the time of the entry of the demandant the tenant had actual possession of the land embraced by his grant. *Quære*: If, in this last case, the possession of the tenant is limited by the entry and possession of the demandant to his close, or if it extends to the boundaries of his patent?

In the case of *Overton's Heirs vs. Davisson*, 1 Grat., 211, decided September, 1844, it was held: In a controversy concerning the boundary or locality of a tract of land granted by the Commonwealth pursuant to a survey, the calls and descriptions of a survey made by the same surveyor, about the same time, or recently thereafter, of a co-terminious or neighboring tract, upon which last-mentioned survey a grant has also issued from the Commonwealth, whether to a party to the controversy or a stranger, is proper evidence upon such question of boundary or locality, unless plainly irrelevant.

In a controversy concerning the boundary or locality of a tract of land granted by the Commonwealth upon a survey made by a duly authorized surveyor, declarations by such surveyor, or by chain-carriers who assisted him in making such survey, or by other persons who were present at such survey, of the acts done by, or under, the authority of such surveyor, in making such survey, are admissible evidence, unless clearly irrelevant, provided that such declarations are not made *post litam motem*, and are not in contradiction of such surveyor's official report of such survey, and that the persons who made the declarations are dead at the time of the trial.

On a trial of the writ of right upon the mise joined on the mere right, the tenant is entitled to the opening and conclusion of the case before the jury.

When land which is the subject of controversy is embraced by conflicting grants from the Commonwealth to different persons, and the junior patentee enters thereupon and takes and holds actual possession of any part thereof, claiming title to the

whole under his grant, such adversary possession of part of the land in controversy is an adversary possession of the whole, to the extent of the limits of the junior patentee, and to that extent is an ouster of the seisin or possession of the older patentee, if the latter has had no actual possession of any part of the land within the limits of his grant.

In the case above stated, if the older patentee is in the actual possession of any part of the land in controversy at the time of the entry thereon by the junior patentee, then the latter can give no adversary possession beyond the limits of his mere enclosure without an actual ouster of the older patentee from the whole of the land in controversy.

Upon the question of adversary possession, whether the land in controversy is embraced by one or several co-terminous grants of the older or younger patentee, in either case the land granted to the same person by several patents is to be regarded as forming one entire tract. *Quære*: Whether the possession of the junior patentee will be limited to his enclosure by the actual possession of the elder patentee of a part of the land embraced in his grant and not embraced within the limits of the grant to the junior patentee?

To constitute an adversary possession of land, there must be an actual occupation of some part of the land in controversy, or the use or enjoyment of some parts thereof, by acts of ownership equivalent to such actual occupation, and such adversary possession cannot be acquired by the open exercise of acts of ownership over the same falling short of such actual occupation, use or enjoyment. While patented lands remain completely in a state of nature, they are not susceptible of a disseisin or ouster of, or adversary possession against, the older patentee, unless by acts of ownership effecting a change in their condition.

A possession of land not held under a grant from the commonwealth prior to the emanation of any patent therefore to a third person cannot constitute an adversary possession thereof.

The elder patent of the Commonwealth confers seisin of the land embraced in therein, though at the time of its emanation there was an actual occupation of the land by another person.

In a controversy between parties claiming land under the elder and junior patentee, the party claiming under the latter, to protect his interest by the defence of the statute of limitations, must show an actual possession of the lands in controversy, since the emanation of the elder patent, for the time of limitation fixed by the statute. If the possession of the tenant in possession was sufficient to bar the action of the ancestor of the demandants at the time of his death, it is sufficient to bar the action of his heirs.

The beginning corner of a survey or of several dependant surveys being fixed, in the absence of proof of any other corners or boundaries, and of any calls for natural objects conflicting with the calls for courses and distances in the patents issued on said surveys, the identity of the land embraced therein is to be ascertained by the courses and distances of the patents beginning at the fixed corner.

A mistake in a patent calling for an object where the same is not found, does not effect its validity.

In the case of *Tapscott vs. Cobbs et als.*, 11 Grat., 172, decided April, 1854, it was held: A party in a peaceable possession of land is entered upon and ousted by one not having title to, or authority to enter upon the land. The party ousted may recover the premises in ejectment upon his possession merely, and his right to recover cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under the title.

Where an ancestor dies in possession of land, the presumption of law is, that the heir is in possession after the death of the ancestor; and in the absence of all evidence on the point, the heir may maintain ejectment upon the strength of his possession against one who has entered upon the land without title, or authority to enter under the title outstanding in another.

SECTION 2736.

In the case of *Doe (Lessee of Taylor et als.) vs. Hill*, 10 Leigh, 457 (2d edition, 477), decided July, 1839, it was held: In ejectment against a tenant in common by a co-tenant, if the jury return a special verdict, actual ouster must be found therein to entitle the plaintiff to judgment.

The necessity of finding this fact is not dispensed with by the entry made in Virginia, when the tenant in possession is admitted defendant, that he "confesses the lease, entry and ouster in the declaration supposed, and agrees to insist on the title only at the trial." The confession that Richard Doe ousted John Doe is not a confession that the real defendant ousted the real plaintiff; and when this latter ouster forms a part of the plaintiff's title to recover (as it does between tenants in common) the fact of such ouster must be proved.

In the case of *Purcell and Wife et als. vs. Wilson*, 4 Grat., 16, decided April, 1847, it was held: The possession of one co-parcener or tenant in common being the possession of all, none in possession of the whole subject can avail themselves of such possession as a defence under the statute of limitation against the rest, without an actual *disseisin* or ouster of their co-parceners or co-tenants.

A special verdict in a writ of right, where the defence is the statute of limitations, must find either an actual *disseisin* or ouster of the demandants, or those under whom they claim, or facts in which law constitutes such actual *disseisin* or ouster.

Though a great lapse of time, with other circumstances, may warrant the presumption of a *disseisin* or ouster by one co-parcener or tenant in common of another not laboring under disabilities, this presumption is a matter of evidence for the consideration of the jury, and not a question of law for the decision of the court upon a special verdict.

In the case of *Stonestreet et als. vs. Doyle et als.*, 75 Va., 356, decided March 10, 1881, it was held: The possession of one joint tenant, tenant in common, or co-parcener, is *prima facie* the possession of all the other co-tenants; and the mere possession of the one will be taken to be adverse to the title and possession of the other. Yet if the defendants prove actual ouster or other notorious acts, amounting to a total denial of the plaintiffs' rights as co-tenants, and of such a character as to afford direct or presumptive proof that the other co-tenants or plaintiffs had had knowledge of the claim of exclusive ownership thus set up and held by the defendants, or those under whom they claim, such possession of the land in suit held continuously and uninterruptedly under such circumstances under color of title for the length of time prescribed by law, constitutes adverse possession, and will ripen into a good and sufficient title in the defendants. *Quære*: If a mere claim of title, as distinguished from color, would be sufficient?

SECTION 2738.

In the case of *Camden et als vs. Haskill*, 3 Rand., 462, decided October, 1825, it was held: If several demises are laid in the declaration from several lessors, and the court give judgment for the plaintiff to recover "his terms yet to come," the judgment will be sustained, and the plaintiff can only have one execution.

In the case of *Stuart's Heirs, etc., vs. Coalter*, 4 Rand., 74, decided February, 1826, it was held: An ejectment may be brought against several persons in possession of any part of the tract of land claimed by the lessor of the plaintiff.

SECTION 2740.

The reference to 1 Grat., 24, is an error.

In the case of *Taylor's Devisees vs. Burnside*, 1 Grat., 165, decided September, 1844, it was held: The entry of the demandant, or those under whom he claims, upon, and possession of the land within his elder grant, not embraced by the junior grant of the tenant, cannot oust the tenant, if at the time of the

entry of the demandant the tenant had actual possession of the land embraced by his grant. *Quære*: If in this last case the possession of the tenant is limited by the entry possession of the demandant to his close, or if it extends to the boundaries of his patent?

In the case of *Koiner vs. Rankin's Heirs*, 11 Grat., 420, decided July, 1854, it was held: The effect of a patent issued upon an inclusive survey, and the right of the tenant claiming under it to show possession under a color of title, is the same as in other grants. He may give in evidence the entries for the different tracts embraced in the inclusive survey, the order of the court authorizing the survey, and the survey made in pursuance of the order. But he cannot show possession further back than the senior grant. To protect himself under the statute of limitations, the tenant must show continued adversary possession for the time of limitation for some part of the land in controversy. Actual possession of a part of his land outside of the boundaries of the demandant's elder patent is not sufficient.

SECTION 2741.

In the case of *Davis vs. Teays et als.*, 3 Grat., 283 (2d ed. 270), decided July, 1846, it was held: The equitable defence under the statute is also limited to mortgages and deeds of trust, where the mortgage money has been fully paid, or the trust completely performed; or to sales, where the vendee has paid all the purchase-money, and performed everything incumbent on him, so as to entitle him to a specific execution of the contract in equity, and a conveyance of the legal title, without any condition proper in equity to be on him imposed.

It must be a sale, and not a partnership in the acquisition of lands, and the terms of the contract must be plain.

In the case of *Dobson vs. Culpeper and Wife*, 23 Grat., 352, decided March, 1873. C. and wife sell her land to D., but do not convey it to him. D. fails to comply with his contract, and C. and wife convey the land to G., the son of C.'s wife, and then C. and wife bring unlawful detainer against D. to recover the land. Held: If D. had complied with his contract so that he was entitled to a conveyance, he might have set up the defence under the statute in this proceeding.

Though D. cannot question the title of C. and wife, as at the time of the sale, he may show in his defence that they have since conveyed the land to G. By their conveyance to G., C. and wife lost their right to recover the land from D., and the action should have been in the name of G., and D. could not question the title of G.

In the case of *Suttle vs. R. F. & P. R. R. Co.*, 76 Va., 284 and 290.

1. Ejectment.—Legal Title.—The doctrine generally understood in Virginia is, that in ejectment the plaintiff must show a legal title in himself, and a present right of possession under it at the time of the commencement of the action.

2. Idem.—Exceptions to this doctrine. Some exceptions exist; *e. g.*, one in peaceable possession, and ousted by a stranger without title, may recover in ejectment on the strength of his mere previous possession; a tenant is estopped to deny the title of his landlord, etc.

3. Law and Equity Courts.—In no State is the distinction between these courts and the principles governing them more rigidly adhered to than in this.

4. Ejectment.—Equitable Defences.—The doctrine that in ejectment the title in fee must prevail over a mere equitable interest led to the statutes (Code of 1873, Chapter 131, Sections 20, 21) allowing equitable defence of the contract, and vendee has fully complied with all the terms, so as to entitle him in equity to conveyance, without condition.

In the case of *Nelson vs. Triplett (Trustee) et als.*, 81 Va., 236, it was held: The doctrine in this State is, that in ejectment the plaintiff must show a legal title in himself, and a present right of possession under it at the time of the commencement of the action.

A decree requiring the execution of a conveyance to complainant, does not of itself vest any legal title in him; and such decree should not be received as evidence of legal title in an action of ejectment.

SECTION 2742.

In the case of *Faulkner's Administrator vs. Brockenborough*, 4 Rand., 245, decided May, 1826, it was held: Where it is stipulated in a mortgage that the money shall be paid on or before a given day, and it is paid after that day, the mortgagee is not deprived of his right of action at law on the mortgage. The acceptance of the money by the mortgagee, after the day appointed for payment, does not change the rights of the parties at law.

The case of *Davis et als. vs. Teays*, 3 Grat., 283, referred to here, is to be found *supra*, Section 2741.

In the case of *Hale vs. Horne et als.*, 21 Grat., 112, decided June, 1871. The equity of redemption in land conveyed in trust to secure debts is subject to the lien of judgments subsequently obtained, in the order of their priority in date.

M. conveys land in trust to pay specified debts, and afterwards sells and conveys it to G. G. has good title to the land subject to the trust, and when the trust is discharged, he is, by operation of the statute (Code 1873, Chapter 135, Section 31, p.

612) entitled to hold the land at law and in equity though the trust has not conveyed it to him.

M. conveys land to H. in trust to secure certain debt. After the deed is recorded, C. and D. recover judgment against M., and then M. and H., and the principal creditor in the trust deed unite to convey and sell the land to G., and G. pays one-half cash and gives his notes in one and two years for the balance of the purchase-money; all of them having notice of the judgments. H. proceeds at once to pay off the debts secured by the deed, and pays the whole balance of the purchase-money to M. before the notes of the purchaser are due. Held: The payment by H. to M. was in his own wrong, and C. and D. are entitled to have their judgments satisfied out of the purchase-money due from G.

C. and D. having filed their bill to have their judgments satisfied out of the land, to which the vendors and purchasers are parties, G. may enjoin the collection of the money from him by H. and pay it to the court.

The judgments of D. being in his name for the benefit of J., he sues in his own name and without making J. a party, but there is no objection to this in the circuit court, and the decree is in favor of D. This is not error, but for conformity it may be amended by the appellate court and be affirmed.

Though the bill seeks to set aside the deed for fraud, yet, as it makes a case entitling C. and D. to be paid out of the purchase-money of the land, and asks for general relief, though the fraud is not proved, they may have the purchase-money applied to the payment of their judgments.

For the reference to 76 Va., 284 and 290, see the case of *Suttle vs. R. F. & P. R. R. Co.*, cited *supra*, Section 2741.

SECTION 2744.

In the case of *Garrard vs. Henry*, 6 Rand., 110, decided February, 1828, it was held: In a writ of right brought by several demandants, the mise is joined on the mere right, and the jury find for the demandants, with the addition of this fact, that one of the demandants was dead before the institution of the suit, leaving children. This latter clause shall be rejected as surplusage, and the remainder of the verdict received. So if the jury add that one of the demandants was tenant in common with the others (and therefore could not maintain this writ jointly with them), this, like the other finding, being matter of abatement, cannot be given in evidence nor found by the jury on the mise joined, but must be pleaded in abatement.

In the case of *Callis et als. vs. Kemp et als.*, 11 Grat., 78, decided April, 1854, it was held: In ejectment the jury set out

the wills of a grandfather and father, and if the son who is dead took under his father's will they find for the plaintiff. If he took under the grandfather's will they find for the defendants. The verdict is sufficiently certain, and submits the single question upon the construction of the wills to the court.

Though in ejectment the plaintiffs in their declaration claim the whole of a tract of land, the jury may find for the plaintiffs for an undivided interest in it.

Though where less land is recovered than is demanded, the boundaries of the land recovered should be designated, yet where an undivided interest in it is recovered, it is impossible to set out the boundaries, but the interest being certain that is sufficient.

In the case of *Reynolds vs. Cook*, 83 Va., 817, decided November, 1887. Declaration charged that defendant unlawfully withheld possession of whole limestone tract. The evidence showed that defendant claimed no other right than to quarry and remove limestone from the land. Verdict: We, the jury, find the defendant not guilty. Held: The verdict was contrary to the evidence. It should have been for the plaintiff, except as to the right to quarry and remove limestone.

In the case of *Messick vs. Thomas*, 84 Va., 891, decided May 10, 1888. Where the declaration averred that plaintiff was possessed of an estate in fee, and defendant enters upon this estate and unlawfully withholds possession thereof from the plaintiff, and defendant pleads not guilty, verdict is: We, the jury, find for the plaintiff that he is entitled in fee to the whole of the premises in his declaration described, and that all the defendants were in possession of a part thereof, or claimed title to a part, at the commencement of his suit. Held: The verdict responds to the issue.

Where the premises are described in declaration with "convenient certainty," and verdict is that plaintiff is entitled in fee to "the whole of the premises in the declaration described," such verdict is not defective for uncertainty.

When defendant at trial proves that he is in possession of and claiming title to only part, verdict and judgment for plaintiff for the whole land claimed in the declaration is not erroneous, or at least not one whereby defendant is injured.

SECTION 2746.

In the case of *McMurray vs. Oneal*, 1 Call, 246 (2d edition, 216), decided April 26, 1798, it was held: If in ejectment the jury find "for the plaintiff one cent damages," the court may extend the verdict and make it read, "We of the jury find for the plaintiff the lands in the declaration mentioned and one cent damages."

In the case of *Clay vs. White et als.*, 1 Munf., 162, decided April 26, 1810, it was held: The plaintiff in ejectment may recover less land than the quantity stated in his declaration. But if the jury find a special verdict, showing the plaintiff entitled to a certain number of acres, part of the tract sued for, and do not specify boundaries of such part with so much precision as that possession thereof may with certainty be delivered, a *venire de novo* ought to be awarded.

In the case of *Gregory vs. Jackson*, 6 Munf., 25, decided November 8, 1817, it was held: A verdict in ejectment, finding for the plaintiff, in general terms, a certain "number of acres, part of the premises in the declaration mentioned," without designing the boundaries of such part, or referring to some certain standard to supply such defect, is too uncertain to warrant a judgment upon it.

In the case of *Norvell vs. Camm et als.*, 2 Rand., 68, decided December 5, 1823, it was held: If any portion of the land described in a writ of right is included in the patent under which the demandant claims, it is sufficiently identified.

In the case of *Callis et als. vs. Kemp et als.*, 11 Grat., 78, decided April, 1854, it was held: In ejectment the jury set out the wills of a grandfather and father; and if the son who is dead took under his father's will, they find for the plaintiff; if he took under the grandfather's will, they find for the defendants. The verdict is sufficiently certain, and submits the single question upon the construction of the wills to the court.

Though in ejectment the plaintiffs in their declaration claim the whole of a tract of land, the jury may find for the plaintiffs for an undivided interest in it.

Though where less land is recovered than is demanded, the boundaries of the land recovered should be designated, yet where an undivided interest in it is recovered, it is impossible to set out the boundaries, but the interest being certain that is sufficient.

SECTION 2749.

In the case of *Bolling vs. Teel et als.*, 76 Va., 487 and 495.

* 6. *Pendente Lite*.—Several plaintiffs, after suit brought, aliened their interest in the land. Held: Such alienation cannot prevent their recovery for benefit of the alienee. Right to recover at commencement of suit is all required by Code 1873, Chapter 131.

SECTION 2750.

In the case of *Camden et als. vs. Haskill*, 3 Rand., 462, decided October, 1825, it was held: If several demises are laid in the declaration from several lessors, and the court give judgment for the plaintiff to recover "his terms yet to come," the

judgment will be sustained, and the plaintiff can have only one execution.

SECTION 2751.

In the case of *Alexander vs. Herbert*, 2 Call, 508 (2d edition, 427), decided October 15, 1800, it was held: After judgment for the plaintiff in ejectment, trespass does not lie against one who was no party to the suit, without proving an actual trespass.

In the case of *Purcell and Wife et als. vs. Wilson*, 4 Grat., 16, decided April, 1847, it was held: The act, 1 Rev. Code, Chapter 118, Section 1, p. 468, authorizes the recovery of damages as may be recovered in actions of trespass for mesne profits. And as from the form of the pleading the statute of limitations applicable to the mesne profits cannot be pleaded, the tenant may give it in evidence upon the trial, and the demandant's recovery of mesne profits will be for five years next before bringing the writ of right down to the recovery of possession.

In the case of *Goodwin et als. vs. Myers*, 16 Grat., 336, decided November 20, 1862, it was held: In actions of ejectment, if there is a claim by the plaintiff for mesne profits and damages for waste, and by defendant for improvements, both claims must be passed upon by the same jury.

Where the statements are filed with the declaration and plea, the jury sworn to try the issue in ejectment may make all the inquiries required at the same time that they try the issue, or the inquiries may, if the court should so order, be made by the same jury after the verdict on the title is recorded, or by a new jury to be empaneled.

If defendant claims for improvements on the land, the plaintiff may at any time before a judgment is rendered on the assessment of the value of the improvements, though after the jury which tried the issue, or passed upon the defendant's claim for improvements has been discharged, require that the value of his estate in the premises, without the improvements, shall also be ascertained, and this inquiry is to be made by another jury.

The value of the plaintiff's estate in the premises, without the improvements, is to be ascertained as at the time when the assessment of the value of the improvements was made.

SECTION 2752.

In the case of *James River and Kanawa Co. vs. Lee*, 16 Grat., 424, decided November 23, 1863, it was held: An office judgment in an action of ejectment does not become final without the intervention of the court or jury, but there ought in every such case to be an order for an inquiry for damages.

In the case of *Smithson vs. Briggs et ux.*, 33 Grat., 180, decided April 15, 1880, it was held: An office judgment in an

action of ejectment does not become final without the intervention of a court or jury.

SECTION 2754.

In the case of *Goodwin vs. Myers*, 16 Grat., 336, decided November 20, 1862, it was held: In actions of ejectment, if there is a claim by the plaintiff for mesne profits and damages for waste, and by defendant for improvements, both claims must be acted upon by the same jury.

Where the statements are filed with the declaration and plea, the jury sworn to try the issue in ejectment may make all the inquiries required at the same time that they try the issue, or the inquiries may, if the court should so order, be made by the same jury, after the verdict on the title is recorded, or by a new jury to be empaneled.

If defendant claims for improvements on the land, the plaintiff may at any time before a judgment is rendered on the assessment of the value of the improvements, though after the jury which tried the issue or passed upon the defendant's claim for improvements has been discharged, require that the value of his estate in the premises, without the improvements, shall also be ascertained, and this inquiry is to be made by another jury.

The value of the plaintiff's estate in the premises, without the improvements, is to be ascertained at the time when the assessment of the improvements was made.

SECTION 2756.

In the case of *Chapman vs. Armistead*, 4 Munf., 382, decided March 18, 1815, it was held: If a debtor having taken the oath of insolvency, afterwards buy a tract of land of commissioners, under a decree of chancery, and convey it by deed of bargain and sale, the purchaser from him is entitled to recover in ejectment against the defendant in chancery withholding the possession, whatever the claims of such vendor's creditors may be.

The whole effect of a judgment for the plaintiff in ejectment is to put the lessor of the plaintiff into possession of the land, and the only point decided is, that he has a better title to the possession than the defendant.

In the case of *Poliard vs. Baylors et als.*, 6 Munf., 433, decided November 27, 1819, it was held: No verdict and judgment in ejectment can be relied on as a bar to a subsequent ejectment, though for the same land, and between the same defendants and lessors of the plaintiffs, the fictitious plaintiffs being not the same; hence the statute changing the law.

SECTION 2757.

In the case of *Leonard vs. Henderson*, 23 Grat., 331, decided March, 1873, it was held: The saving in favor of infants, married

women, or insane persons, in Section 36, Chapter 135, of the Code, in relation to actions of ejectment, does not apply to actions of ejectment brought by the lessee to recover possession of the leased premises which had been recovered by the landlord under Section 16, Chapter 138, of the Code of Virginia.

CHAPTER CXXV.

In the case of *Hollingsworth vs. Funkhouser*, 85 Va., 448, decided November 8, 1888, it was held: The Virginia statute, altering the common law rule, allows as a set-off to the plaintiff's claim for rent and damages compensation for permanent improvements made by defendant at a time when there was reason to believe the title good under which he was holding the premises, not exceeding, however, the increase in value to the same.

SECTION 2760.

In the case of *Southall vs. McKeand, Mayo, et als.*, 1 Wash., 336, decided at the fall term, 1794, it was held: Where tenant, without notice, proceeds to improve lands, and the adverse claimant, knowing his right to the premises, allows him to proceed with the improvements without asserting his claim, the improvements will not be lost by the tenant.

In the case of *McKim vs. Moody et als.*, 1 Rand., 58, decided March, 1822, it was held: Where land has been recovered in ejectment, and the defendant goes into chancery to obtain compensation for improvements, he will not succeed if he had notice of the plaintiff's title at the time of making the improvement.

In the case of *Moriss et als. vs. Terrell*, 2 Rand., 6, decided November 22, 1823, it was held: A purchaser who is evicted is not entitled to compensation for improvements, unless the owner has been guilty of fraud by permitting such improvements without giving notice to the possessor, or in gross *laches* in asserting his claim after he is apprised of it.

The reference to 23 Grat., 266, is to a treatise more in the line of the text-writer than useful in determining the authority of decisions.

In the case of *Wood's Executor et als. vs. Krebbs*, 33 Grat., 685, decided September, 1880, it was held: On a bill by a creditor, secured by a deed of trust to subject real estate to the satisfaction of his debt, the party in possession claims to be a purchaser for value without knowledge of the deed. The lien being enforced, the party in possession may be allowed for his permanent improvements upon the land, but he must account for the rents and profits as an off-set to his claim.

In the case of *Burton vs. Mill et als.*, 78 Va., 468, decided March 13, 1884, it was held, p. 483: No allowance is made for improvements erected by one who is not a *bona fide* purchaser.

In the case of *Hurn vs. Keller*, 79 Va., 415, decided September 25, 1884, it was held: Statute providing allowance for improvements by defendant, against whom decree or judgment is rendered for land held by him under title believed by him to be good, applies not to the case of an heir, who, after suit to which he is a party to settle his ancestor's estate, and after decree to sell the real estate, but before it is all sold, buys, under *bona fide* belief that it would be unnecessary to sell all in order to pay the debts, the shares of his co-heirs in a part of the unsold real estate and erects thereon permanent improvements.

In the case of *Effinger vs. Hull*, 81 Va., 94, decided November 19, 1885, it was held: Persons who occupy lands under defective titles, and make thereon permanent and beneficial improvements with notice, actual or constructive, of the infirmity of their titles cannot, upon the recovery of said lands by the rightful owners, obtain compensation for said improvements. Means of notice, with the duty of using those means, is equivalent to actual notice.

Code 1873, Chapters 131 and 132, provides for the allowance of compensation for improvements made by defendants on the premises "at a time when there was reason to believe the title good under which he was holding said premises."

SECTION 2770.

In the case of *Goodwin vs. Meyers*, 16 Grat., 336 and 350, decided November 20, 1862, it was held: The value of the plaintiff's estate in the premises, without the improvements, is to be ascertained, as at the time when the assessment of the value of the improvements was made.

SECTION 2771.

In the case of *Corr vs. Porter et als.*, 33 Grat., 278, decided July, 1880, it was held, p. 287-'88: The same jury which tried the case on its merits was allowed without objection from either side to fix the value of the land, the rents and profits thereof, and the value of the improvements claimed by the defendant. It is too late after verdict to object to this action of the court.

CHAPTER CXXVI.

In the case of *Findaly vs. Smith and Wife et als.*, 6 Munf., 134, decided February 24, 1818, it was held: A devise of certain salt works to the testator's wife and two near relations of his during her lifetime, subject to the payment of sundry legacies to a large amount, was construed, in this case, as authorizing the devisees to make unlimited use of the salt mineral, and of the woodland of the deviser, from which fuel was supplied in his lifetime for carrying on the works.

The law of waste, in its application here, must be varied and accommodated to the circumstances of our new and unsettled country.

In the case of *Crouch vs. Puryear, etc.*, 1 Rand., 258, decided December, 1822, it was held: It is not waste in a tenant in dower of coal lands to take coal to any extent from a mine already opened, or to sink new shafts into the same veins of coal. The tenant may penetrate through a seam already opened, and dig into a new seam that lies under the first.

In the case of *McCauley's Executor vs. The Dismal Swamp Land Company*, 2 Rob., 507, decided December, 1843. A husband dies seised of lands incapable of cultivation, and not otherwise productive or valuable than by working the timber and making sale thereof when converted into shingles. It appears that previous to, as well as after husband's death, the timber was worked and large profits derived from the sale of shingles. Parties coming into possession after husband's death, under a deed of trust made by him in his lifetime, admit his widow's right as doweress to one-third of the timber worked, and for several years pay her one-third of the proceeds of the same. Payment is afterwards stopped. Held: Those in possession of the land after the husband's death shall account to the widow or her administrator for one-third of the profits received by them during her life, subject to credit for the payments made by them to the widow.

In the case of *Harris vs. Thomas*, 1 H. & M., 17, decided October 2, 1806, it was held: An injunction to stay waste is generally a proper subject for the jurisdiction of a court of equity notwithstanding the act of Assembly gives a remedy at law.

In the case of *Scott vs. Wharton*, 2 H. & M., 25, decided June 1808, it was held: An injunction to stay waste ought not to be granted to a vendor against a vendee to whom he has sold a tract of land in fee-simple, retaining the title as a security for the purchase-money, unless he brings his suit to subject the land to the payment of the purchase-money, and charges the defendant with cutting and selling timber in a manner calculated to render the land an incompetent security, in which case such injunction to stay waste pending the suit may be awarded.

In the case of *Cutting vs. Carter*, 4 H. & M., 424, decided spring vacation by the Superior Court of Chancery for Richmond District, 1809, it was held: Injunction to stay waste denied, there appearing no impediment to the action of waste at law.

In the case of *Clarke vs. Curtis*, 11 Leigh, 559 (2d ed., p. 585), decided February, 1841. Upon an agreement to sell to three joint purchasers land and certain personal chattels then upon it.

for a sum in gross, to be paid when the vendor shall have made a deed of the land and a bill of sale of the personal effects, and that the purchase-money shall be paid in equal instalments at future days appointed, vendor, without making such conveyances, delivers possession of both real and personal property to the vendees. Held: The making the conveyances by the vendor is not a condition precedent to his right to demand the purchase-money.

About the time when the first instalment falls due, two of the joint purchasers, by agreement of the other and of vendor, are discharged from the contract; and by new agreement between the vendor and the third purchaser, he becomes sole purchaser of same subject, for same price, with no other variance but that vendor gives further indulgence for the first instalment; and then vendor agrees to make conveyance of the property to the now sole purchaser whenever he shall make such payments as they shall agree upon; two months further indulgence is given for the payment of first instalment; purchaser continues in possession of the real and personal property, but vendor makes no conveyance. Held: A bill in equity lies for vendor against vendee for specific performance of the whole contract, in respect as well of the personal property as of the real property. To preserve the security of the vendor's lien unimpaired, the court may properly enjoin the purchaser and his agent from committing waste on the land, and from selling or removing the personal property.

In the case of *Garrison vs. Hall et als.*, 75 Va., 150, decided January 13, 1881, it was held: A party claiming title to land to which he has a legal title to one-third and an equitable title to the other two-thirds, may go into equity to restrain waste upon the land, and to set aside a conveyance from the Board of Public Works of Virginia to a purchaser of the land, the same having been previously legally granted by a valid grant.

SECTION 2775.

In the case of *Ross vs. Gill*, 4 Call, 250, decided April, 1794, it was held: In an action for waste defendant must be shown to be the lessee, and that can only be made to appear by a valid demise.

In the case of *Dejarnette vs. Allen and Wife*, 5 Grat., 499, decided January, 1849, it was held: Husband during the life of his wife takes the benefit of the act for the relief of insolvent debtors, and surrenders and conveys to the sheriff his interest in his wife's real estate. The sheriff sells and conveys the said interest to the purchaser. The purchaser is a tenant for life, and may be sued in an action of waste by the husband and wife.

In an action of waste by husband and wife against the alienee of the husband's interest in the wife's land, the declaration alleges that the reversion in fee is in his wife. This is, in effect, to allege that the reversion in fee is in the husband and wife; and if it is not sufficient on demurrer, it is cured by the statute of *jeofails*.

The verdict finds the defendant guilty of the waste as charged in the declaration, and the plaintiff waives a recovery of the place wasted, the verdict proceeds to assess the damages for particular parts of the waste charged, but does not set out the *locus in quo*, or find any part of the issue for the defendant. The verdict is sufficient.

In an action of waste, the verdict finds for the plaintiff and assesses damages, but subject to the opinion of the court, whether upon certain facts stated the plaintiff can maintain the action. This is a general verdict.

SECTION 2776.

In the case of *Graham et als. vs. Pierce*, 19 Grat., 28, decided January 29, 1869, it was held: A tenant in common occupying and using the common property separately, will be responsible to his co-tenants if he wilfully or by gross negligence has destroyed or wasted the common property.

But he cannot be held responsible for such destruction or waste in a case in which the bill does not charge it.

TITLE XXXVIII.

CHAPTER CXXVII.

SECTION 2782.

In the case of *The Farmers Bank vs. The Mutual Assurance Society, etc., et als.*, 4 Leigh, 69, decided December, 1832, it was held: In general, the assignee for a term of years is not liable for breaches of the covenants in the lease before the assignment, but if the assignee, by express covenant with his assignor, bind himself to pay the debts and perform all the covenants in the lease contained and required to be done and performed on the part of the lessee, such a covenant not only binds the assignee to fulfil the covenants during his own time, but makes him liable for breaches before his time.

SECTION 2783.

In the case of *Graham vs. Woodson*, 2 Call, 249 (2d ed., p. 209), decided April 24, 1800. A. leased to B. for twenty years,

with liberty to B. of surrendering the lease at any time before the expiration of the term on payment of five shillings.

A. devised the rents during the lease to his five daughters, and the fee-simple to his son, P., who sold to B., who surrendered the lease. Held: This surrender shall not disappoint the daughters' legacies, but B. will be decreed to pay the rents.

The reference to 15 Grat., 213-221, is an error.

SECTION 2785.

In the case of *Crawford vs. Morris*, 5 Grat., 90 and 107, decided July, 1848. The agreement between S. and M. provided as follows: M. is to get the house at the price therein stated, for one year after his present year expires, and is to have the preference each succeeding year thereafter. Held: This did not create a tenancy from year to year, and so entitle the tenant to the legal notice to quit.

In the case of *Harrison vs. Middleton*, 11 Grat., 527, decided July, 1854, it was held: An agreement under seal by a tenant that he will surrender possession whenever a purchaser from the landlord requires it, constitutes him a tenant at will, or at sufferance; and he is not entitled to six months' notice to quit. If a tenant claims to hold adversely to his landlord he is not entitled to notice.

SECTION 2787.

In the case of *Cooke vs. Wise*, 3 H. & M., 463, decided April, 1809, it was held, p. 470: Interest is recoverable, by way of damages, in an action of debt for rent-arrear.

In the case of *Eppes's Executors vs. Cole and Wife*, 4 H. & M., 161, decided October, 1809, it was held: Assumpsit for use and occupation of land, by permission and assent of the plaintiff, on an express promise to pay the plaintiff a certain sum, or, in general terms, to pay him to his satisfaction, for such use and occupation, lies at common law, independently of the statute 11 Geo. I., c. 19.

In the case of *Dow vs. Adams' Administrators*, 5 Munf., 21, decided December 4, 1815, it was held: Though interest ought not to be given as of course in actions for the recovery of rent in arrear, it may, nevertheless, be given under circumstances to be judged of by the jury; and in case of a general verdict allowing interest, it shall be intended that sufficient circumstances existed to justify the allowance thereof. But if the jury state the circumstances in a special verdict, the court should disallow the interest, if, under those circumstances, it ought not to be allowed.

Interest on rents in arrear ought not to be allowed, the circumstances being that there always were effects on the premises

liable to distress, sufficient to have satisfied the rents, which were not paid, though demanded by the landlord.

In the case of *Mickie vs. Lawrence (Executor of Wood)*, 5 Rand., 571, decided August, 1827, it was held: No set form of words is necessary to constitute a lease, and a contract between two persons that one should have, during the life of the other, land, negroes, etc., he paying therefor a stipulated annual sum, is not a sale but a rent.

Interest cannot be recovered as of course in actions for the recovery of rent, but may be given under circumstances to be judged of by the jury.

In the case of *Briggs vs. Hall*, 4 Leigh, 484, decided May, 1833. In assumpsit for the use and occupation of a farm for a year, it appears that the landlord entered on a meadow parcel of the premises, within the year, mowed and carried away the hay, without the consent and against the will of the tenant, who, nevertheless, continued to occupy the farm during the residue of the year. Held: The landlord, by such disturbance of the tenant, lost the benefit of the entire contract, and is not entitled to recover any part of the rent.

In the case of *Commonwealth vs. Ricks et als.*, 1 Grat., 416, decided March, 1845, it was held: Tenants holding property which is the subject of controversy in a pending suit are bound to pay interest upon the rents, though it is not ascertained who is the party entitled to receive them.

In the case of *Brooks vs. Wilcox*, 11 Grat., 411, decided July, 1854, it was held: A landlord having distrained for rent in arrear reserved in salt has the affidavit and warrant of distress returned to the circuit court; and the defendant appears there, and a jury is impaneled to ascertain the value of the rent in arrear, which, not being able to agree, is discharged, and the landlord dismisses the case in that court. He may then apply to the county court to have the value of the rent ascertained, basing his application on the same affidavit and warrant of distress. If the officer levying the distress thinks that he has not taken sufficient effects, he may make a second levy.

The defendant having elected to have the value of the rent reserved ascertained by a jury, it is not error to swear them to ascertain the rent said to be due.

The only object of a proceeding before a jury in the case of a distress for rent is to ascertain the value in money of the rent in arrear. It is not necessary for the landlord to prove to the jury that a distress-warrant has been levied for rent in something other than money, and that it is due and in arrear.

The jury having ascertained the value of the rent in arrear, the court makes an order directing the officer to sell the property distrained as is directed by law, and after satisfying the rent due,

with interest and cost, to pay over the balance to the tenant. This is substantially in accordance with the statute.

Under the act of March 2, 1827, the landlord was entitled to interest on rent in arrear from the time it was due.

In the case of *Parrish vs. The Commonwealth*, 81 Va., 1, decided November 28, 1884, it was held, pp. 7 and 8: Where land-owner contracts with one to crop his land and to give him part of the crop after paying all advances, and the crop has not been divided, such cropper is not a tenant, but a mere employee, and the ownership of the entire crop is in the land-owner, and if cropper forcibly or against consent of land-owner takes the crop from the possession of the latter, such taking is larceny, robbery, or other offence, according to the circumstances of the case.

SECTION 2791.

In the case of *Mosby vs. Leeds*, 3 Call, 439 (2d edition, 380), decided November 5, 1803, it was held: Distress for rent cannot be made of the demised premises (except within the time limited by statute after the removal); therefore an attachment served on the same property has priority.

In the case of *Davis vs. Payne's Administrator*, 4 Rand., 332, decided June, 1826, it was held: The property of a third person never was liable to distress unless it were found upon the premises, and even where it is found there, the distress is taken away by the act of 1818.

In the case of *Jones et als. vs. Phelan & Collander*, 20 Grat., 229, decided January, 1871. G. is a tenant of a house and lot leased of S., and he gives a deed of trust on part of the personal property in the house to secure a debt to P. which is recorded. He afterwards gave another deed of trust on all the property in the house to secure a debt to J. S. distrains for a year's rent upon the property embraced in the deed to secure P. By consent of all the parties, all the property conveyed in the deeds is sold, and after paying the rent there is a balance left. Held: S. is entitled to be paid first his year's rent out of the proceeds of the whole property if necessary; but the proceeds of the property not embraced in P.'s deed, is to be applied first to pay G.

After S. is satisfied, P. is entitled to have the balance of the proceeds of the property embraced in the deed applied to pay *pro tanto* his debt.

In the case of *City of Richmond for, etc., vs. Duesberry et als.*, 27 Grat., 210, decided January, 1875. N. leased of D. a house for one year, commencing January 1, and ending December 31, 1871. In March, M., without the assent of D., took N.'s lease and purchased his furniture on the leased premises, and having borrowed the money to pay for it from C., conveyed it

in trust to secure his debt to C. M. paid the rent to D., and at the end of the year held over, and in March, 1872, he, without D.'s assent, turned over the house and furniture to P., who paid the rent to D. until July or August. In the latter part of the year P. failed to pay the rent, whereupon D. sued out a warrant of distress, which was levied upon the property conveyed to secure C. Held: The holding over by M. in 1872, was under a new lease, and the lien in favor of C. having been upon it when that lease commenced, C.'s lien is valid against D.'s lien for the rent of 1872. See Code of 1860, Chapter 138, Sections 11 and 12.

In the case of *Wades vs. Figgatt et als.*, 75 Va., 575, decided September, 1881. Real estate is leased to a firm for the term of three years, to commence on the 1st of January, 1876; the lessees purchase from the lessors, and take possession of the furniture on the leased premises. On the 19th day of June, 1876, before the rent of the year becomes due, one of the firm executes a deed of trust on the furniture to secure to the lessors the payment of two certain notes, and to indemnify the endorser on a certain other note given for the furniture. The rent for the year 1876 was paid. The rent for 1877 was assigned to a third party, who levied a distress warrant upon the furniture on the leased premises for that year's rent which was in the arrear. The endorser of the note aforesaid, on which judgment had been obtained against the maker and himself, paid off the said note, and filed his bill against the assignee of the note, the trustee, in the deed of trust and others, claiming, among other things, that the trust deed constituted a prior lien on the property to the rent for the year 1877, and praying an injunction to stop the sale of the property, levied on until the rights of the parties could be determined, and for the appointment of the receiver, which was awarded. Held:

1. That the lien of the deed of trust was created after the commencement of the tenancy under which the distress was made; that the tenancy of the two years (1876 and 1877) was the same.

2. That the payment of the rent for the year 1876 was no discharge of the prior right of the lessors or their assignee to one year's rent within the meaning of the statute.

The goods carried on the leased premises and incumbered "after the commencement of the tenancy," are charged with a definite portion of the rent under the tenancy during the term, and not with the specific rent of any particular year or period of time. "One year's rent" and "a year's rent," are used in the statute to denote the amount of rent to be distrained for in the one case, and to be paid or secured in the other; and it matters not for what year it accrued, or whether it was before or after the creation of the lien, or whether or not other rents may

have accrued after the lien was created and had been paid by the tenants. As long as any rent arising under the tenancy remains unpaid by the persons liable therefor, as soon as it becomes due the persons entitled to it may distrain the goods for an amount not exceeding the rent for a year.

In the case of *Upper Appomattox Co. vs. Hamilton & Man*, 83 Va., 319, decided May 12, 1887. Tenant under lease for a term containing no agreement for renewal executed trust deed on personalty on the premises. Afterwards landlord and tenant agreed on a renewal different in terms from original lease. Held: Effect of renewal was a new tenancy commencing after execution and record of trust-deed, which had priority over lien for rent.

SECTION 2792.

The reference to 6 Leigh, 336, is an error. No case there affecting this point.

In the case of *Greiger's Administrators vs. Harman*, 3 Grat., 130, decided July, 1846, it was held: The landlord's lien for a year's rent on the goods and chattels of his tenant does not extend to protect them from being taken by virtue of any execution, except in cases where the said goods and chattels shall be in, or upon the demised premises.

For the references to 27 Grat., 210, and 75 Va., 575, see the cases of *City of Richmond vs. Duesberry*, and *Wades vs. Figgat* respectively, cited *supra*, Section 2791.

SECTION 2795.

See *Brooks vs. Wilcox*, 11 Grat., 411, *supra*, Section 2787.

See *Parrish vs. Commonwealth*, 81 Va., 1, *ante*, Section 2787.

SECTION 2796.

In the case of *Johnston vs. Hargrove*, 81 Va., 118, decided December 3, 1885, it was held: By an ancient rule of the common law, before lessor can exercise a stipulated right of re-entry for breach of covenant to pay rent, he must make an actual demand upon the tenant for the payment thereof; unless by special agreement the requirement of demand has been dispensed with. The rules as respect the necessity for demand remain unaltered by statute, Code 1873, Chapter 113.

SECTION 2797.

In the case of *Leonard vs. Henderson*, 23 Grat., 331, decided March, 1873. The saving in favor of infants, married woman, or insane persons in Section 36, Chapter 135, of the Code of Virginia, in relation to actions of ejectment, does not apply to actions of ejectment brought by the lessee to recover possession of the leased premises, which had been recovered by the landlord under Section 16, Chapter 138, of the Code.

H., the owner of a ground rent in fee secured upon a lot of ground in fee by L., brought ejectment against V., the tenant in possession, to recover the lot for the failure of L. to pay the rent, and there was a judgment by default in favor of H., who proved by his own testimony that the rent was due, and there was no sufficient distress upon the premises, and H. was put into possession of the premises. At this time L. was an infant under twenty-one years of age. After one year from the time H. was put into possession, but within five years after H. became of age, he brought ejectment against H. to recover the lot. Held: L. is barred by the statute, Chapter 138, Section 17, and cannot recover. Though L. was not a party to the action of H., yet V., the tenant in possession was, and that under Section 16, Chapter 138, is sufficient; and the proof by H. was sufficient.

SECTION 2800.

See the case of *Johnston vs. Hargrove*, 81 Va., 118, *ante*, Section 2719.

See *Leonard vs. Henderson*, 23 Grat., 331, *ante*, Section 2797.

CHAPTER CXXVIII.

CHAPTER CXXIX.

TITLE XXXIX.

CHAPTER CXXX.

In the case of *Sneed vs. Smith*, 1 P. & H, 46, decided January, 1855. A. filed a bill against B. to enjoin a judgment on the ground of usury. The allegations of the bill are denied in the answer and unsustained by proof. Held: Such a bill should be dismissed, and whatever ground there may be on the face of the bill and answer to suspect usury, in the absence of proof relief should be denied.

In the case of *Terry vs. Dickinson et als.*, 5 Va. Law Journal, 393, decided June, 1881, it was held: A bill to set aside a judgment on the ground of usury simply says the debt was usurious, without stating the usurious interest taken; the defendant denies the charge of usury, which is not sustained by two witnesses; the court will not after long delay set aside the judgment and grant a new trial.

In the case of *McGuire vs. Parker's Executor*, 1 Wash., 368, decided at the fall term, 1794, it was held: The court will never presume usury unless it be proved.

Upon a contract payable in Pennsylvania currency, reserving interest generally, if a decree be entered by consent for six per cent., it will be considered as a Pennsylvania contract, and not usurious. Otherwise, if the decree were entered for six per cent. in consideration of indulgence as to the time of payment.

In the case of *Gibson vs. Fristoe et als.*, 1 Call, 63 (2d edition, 54), decided November 8, 1797, it was held: An agreement by which a man secures to himself, directly or indirectly, a higher premium than legal interest for the loan of money or the forbearance of a debt due, is usury.

In the case of *Price et als. vs. Campbell*, 2 Call, 111 (2d edition, 92), decided November 15, 1799, it was held: In order to constitute usury, both parties must be consenting to the unlawful interest; that is to say, the lender to ask and the borrower to give.

There must be proof of a lending and borrowing to constitute usury. Therefore, if a bill of exchange be drawn upon an obscure man in Scotland, although the payee may expect it will be protested, yet, if there was no agreement between him and the drawer that it should be protested, the transaction is not usurious.

In the case of *Robertson vs. Campbell & Wheeler*, 2 Call, 421, (2d edition, 354), decided October 24, 1800, it was held: An agreement to set the profits of the mortgaged subject against the interest of the money lent is usurious if they exceed the legal rate of interest.

In the case of *Brown vs. Brent*, 1 H. & M., 4, decided September 22, 1806, it was held: It is not usurious upon a settlements of accounts to take a bond or note for the balance due, including interest, and to receive interest on such bond or note.

In the case of *Kenner vs. Hord*, 2 H. & M., 14, decided by the superior court of chancery for the Richmond district during the fall vacation, 1807, it was held: A bond may be sold for much less than its nominal amount, and such sale will be enforced in a court of equity, as well as of law, if no fraud or usury appear in the transaction.

In the case of *Hamlin's Executor vs. Harriss*, 2 H. and M., 550, decided May 20, 1808. A bond given in 1782 in the penalty of fifty thousand pounds, conditioned for the payment of one thousand pounds, or such further sum as shall be equal to the said one thousand pounds in 1774, that is to say, to purchase "as much land and as many negroes as it might have done at that time," was held not to be an usurious contract.

In the case of *Pollard vs. Baylor's Devisees*, 4 H. & M., 223, decided October, 1809, it was held: J. B. being indebted to certain British merchants, conveyed a certain tract of land and sundry slaves, in trust, to secure the payment of the debt, in

three equal annual instalments, with interest from the date of the deed of trust; the payments to be made in tobacco, to be delivered at, and addressed to them at London, at which they were to draw the usual and accustomed mercantile commission of twenty-one shillings sterling for each hogshead actually shipped; and it was further provided, in case of non-shipment of the tobacco, a further sum, equivalent to, and in lieu of the usual mercantile commission thereon, at the rate of twenty-one shillings sterling per hogshead, estimating each hogshead to be worth ten pounds sterling, was to be added to each payment. Held: That the transaction was usurious, and the deed was void.

In the case of *Marks vs. Morris*, 4 H. & M., 463, decided by the superior court of chancery for Richmond district, October, 1809, it was held: In cases of usury, the borrower filing his bill in equity is entitled to relief, not against the contract entirely, but to the amount of all but the principal money, the lender being entitled to receive his principal without any interest.

In such cases, though relief be given against the interest, the usurious assurances remain as a security for the principal, and the court will direct them to be enforced to that extent, if it be not paid to a given day.

In the case of *Skipwith vs. Gibson & Jefferson*, 4 H. & M., 490, decided by the superior court of chancery for Richmond, February, 1810, it was held: It is not usury to sell bank stock at a very high price; since, to constitute usury, there must be a treaty for the loan or forbearance of money.

In the case of *Lane vs. Ellzey*, 4 H. & M., 504, decided by the superior court of chancery for Richmond, February, 1810, it was held: A defendant may plead to a *scire facias* brought to revive a decree which was obtained against him by default, that the original contract was usurious.

In the case of *Hansborough vs. Baylor*, 2 Munf., 36, decided March 12, 1811, it was held: If a bond be given without any consideration but to be used as an article of traffic to raise money, the *bona fide* purchaser (though at a large discount) of such bond, without notice of the purpose for which it was executed, is entitled to recover the full amount. A fair purchase of the bond at any discount is not usurious.

In the case of *Watkins vs. Taylor & Mewburn*, 2 Munf., 424, decided October 14, 1811, it was held: T. being indebted to H. in the sum of one thousand two hundred pounds, payable by four equal instalments in little more than three years, an agreement took place between T. and W., that W., in consideration of three hundred pounds cash paid him by T., should exonerate T. from his debt to H. This agreement is usurious and void,

notwithstanding W. might have reaped advantage from it by buying the bonds of H. at a discount, or by selling him tobacco at a price.

In the case of *Ross vs. Norvell*, 3 Munf., 170, decided March 18, 1812, it was held: A continuance ought not to be granted at law on the ground that the party a few days before that appointed for trial files a bill in equity for a discovery of usury as auxiliary to his defence at law, unless he make affidavit that the usury therein charged had recently come to his knowledge.

In the case of *Ellzey vs. Lane's Executrix*, 4 Munf., 66, decided February 22, 1813, it was held: The plea of the "statute against usury" ought to be received in a court of equity at any time before the decree is final, if there be strong reasons from the statement in the bill for believing that the matter of such plea may be true.

If the party tendering such plea has been improvidently allowed to file a bill of review, which has therefore been dismissed at his costs, it is unreasonable to require him to pay those costs in a limited time as the condition of receiving his plea.

In the case of *Fox vs. Taliaferro*, 4 Munf., 243, decided February 13, 1812, it was held: If a bond for usurious interest be taken in consideration of forbearance to bring suit on a previous bond, which in its origin was free from objection, it is competent for the obligor to obtain relief in equity against the obligee, by having such usurious bond cancelled or credit given him for the amount of the principal and interest due thereon against the original bond. And this right is not lost by the assignment of either of the bonds.

On a bill of injunction against the assignee in such case, the obligee, being also a defendant, the court ought not to decree that the injunction be dissolved and the bill dismissed as to the assignee, and that the obligee pay to the complainant the amount of such usurious bond; but should appoint a reasonable time for the obligee to produce to the complainant the bond for the usurious interest, or a satisfactory acquittance therefor; and in that event should dissolve the injunction, or (if he does not produce such bond or acquittance) should make it perpetual as to so much; and, in the last event, a further decree should be made, that the obligee pay to the assignee the sum for which the injunction is made perpetual. And if a decree dismissing the bill be reversed, and the injunction ordered to be reinstated, the court reversing such decree should moreover direct that, if it shall appear that the whole amount of the judgment has been coerced from the complainant by the assignee, such further decree shall not be entered in favor of the assignee, but of the complainant.

In the case of *Bull vs. Douglas (Administrator of Turnbull)*,

4 Munf., 303, decided March 21, 1814, it was held: A contract for the sale of six thousand dollars United States eight per cent. stock, to be delivered and regularly transferred on a future day, for six thousand dollars current money in hand paid is not usurious.

In such case, if the certificate of stock be not delivered and transferred according to contract, the proper measure of compensation is not the nominal amount of the stock, with eight per cent. interest from the day when it should have been delivered, but its true value on that day (including the interest then due), with lawful interest on such value until payment.

In the case of *West vs. Belches*, 5 Munf., 187, decided October 30, 1816, it was held: That slaves sold on a credit for more than a sum which the seller had previously offered to take for them in cash, with interest thereon during the term of credit, and that the seller was accustomed to loan money on usurious interest, is not sufficient evidence that such sale was intended as a cover for usury, there being no proof that a loan of money was intended by the parties.

In the case of *Pollard vs. Baylor et als.*, 6 Munf., 433, decided November 27, 1819, it was held: The question whether a contract is usurious or not is to be decided with reference to the time when it was entered into; for a contract legal at such time cannot be made usurious by subsequent events.

In the case of *Greenhow's Administratrix and Heirs vs. Harris et als.*, 6 Munf., 472, decided January 25, 1820, it was held: A sale of bank stock at whatever price is not usurious, unless the object be to borrow money at more than lawful interest, and not to purchase stock, and the price of the stock be graduated as a device to effect that object; or there be a combination between the seller of the stock on credit and a person to whom the buyer sells it for cash; in either of which cases the transaction becomes usurious.

If it be alleged in a bill of injunction to prevent a sale under certain deeds of trust, that a previous loan was usuriously made upon a note at twelve months, secured by another deed, and that one of the deeds aforesaid was made only as a kind of indulgence on that note, and to close some other transactions of the like nature, and the defendant, by his answer, deny all charges of usury, and aver that he made no loan, but bought the note fairly in the market, without knowing the consideration for which it was given (setting forth at what price), upon condition that the holder would get it secured, which was done; that it had long since been discharged, and had no connection with the deeds of trust enjoined; it seems that the injunction, being unsupported by evidence on the part of the plaintiff, ought to be dissolved, notwithstanding the defendant evades

disclosing the name of the holder of whom he bought the note at a large discount.

A charge of usury being explicitly denied by the defendant's answer, the plaintiff has not a right to an order requiring him to produce his books and papers for the purpose of establishing such charge.

In the case of *Douglas vs. McChesney*, 2 Rand., 109, decided December 10, 1823, it was held: A tacit understanding between borrower and lender founded on a known practice of the latter, to lend money at legal interest, if the borrower purchased of him a horse at an unreasonable price, is a shift to evade the statute against usury. When a court of chancery has doubt, whether the sale of the horse or other property is really intended as a shift to evade the statute against usury, it ought to direct an issue to be tried upon *viva voce* testimony, if to be had.

In the case of *Young vs. Scott, etc.*, 4 Rand., 415, decided August, 1826, it was held: In all cases where a party applies to a court of equity for relief against an usurious contract, whether he alleges in his bill that he is able to prove the usury without the defendant's confession or not, he can only be relieved upon payment of principal, without interest, under Section 3, of our act of Assembly. Decided by two judges out of three.

In the case of *Stribblings vs. The Bank of the Valley*, 5 Rand., 132, decided May, 1827, it was held: Taking interest in advance upon the whole amount of a note discounted at bank is lawful.

In the case of *Whitworth & Yancey vs. Adams*, 5 Rand., 333, decided June, 1827, it was held: A note is made and endorsed for the accommodation of the payee, and afterwards put into the hands of a broker by the payee to be sold in the market. It is purchased of the broker by a third person, who has no knowledge that it is accommodation paper, or for whose benefit it is sold. This transaction is not usurious.

An intermediate endorsement of a valid note for an usurious consideration, as between endorser and endorsee, will not vitiate the note in the hands of a subsequent *bona fide* holder without notice of such usury.

A note valid in its inception is endorsed afterwards by a party to whom it has regularly come to a third person, at a greater discount than legal interest. Such transaction is usurious.

In the case of *Lane's Executrix vs. Ellzey*, 6 Rand., 661, decided December, 1828, it was held; If to a bill brought to foreclose a mortgage the defendant pleads usury, and the bill itself on its face, and the documents filed with it present a case of usury, such as is pleaded, it is not necessary for the defendant to take depositions to support his plea; his adversary's bill supports his plea.

In the case of *Holloway (Administrator) vs. Bruce*, 1 Va. (Gilmer), 42, decided June 5, 1820, it was held: Negotiable notes made by H. & H., endorsed by A. for the accommodation of H. & H., to be sold in market, purchased by B. from a broker who sells them for H. & H. at a greater discount than six per cent., are not usurious in the hands of B. without proof that B. knew the facts.

In the case of *Martin vs. Lindsay's Administrators et als.*, 1 Leigh, 499, decided November, 1829, it was held: M. borrows money of L. on usury, and by deed of trust conveys land to a trustee, with power to sell the subject when required after debt should fall due and raise money to pay it. The lender dies. His administrators require trustee to sell trust subject; the borrower exhibits a bill in chancery, charging the usury, requiring defendants to answer the charge, insisting that the deed of trust is null and void, and praying injunction to restrain trustee from selling. The administrators of the lender and the trustee disclaim all knowledge of the usury, but the usury is proved by one witness. Held: That in such a case the court of chancery should enjoin the trustee from selling the trust subject till the creditors claiming under it should establish its legal validity in some proper forum where the debtor may have an opportunity to contest it.

In the case of *Toole vs. Stephen*, 4 Leigh, 581, decided November, 1833, T. and N. being indebted to the F. and M. Bank, and the bank having recovered judgments against them for the debts, and the debtors then applying to the bank for indulgence, the bank agrees to give them a long indulgence upon their agreeing to give real security for the debt, and, moreover, to pay the attorney of the bank all the costs of the suits, and the commission which the bank had agreed to pay him for collecting and securing the debt; the debtors give real security for the debt, and one of them pays the costs and part of the commission to the attorney, and his executor gives his attorney his note for the balance of the commission, the attorney having full notice of the terms of the agreement between the bank and the debtors. Held: The agreement between the bank and the debtors, and therefore the note for the commission to the attorney were usurious. Decree between co-defendants refused under the particular circumstances of the case.

In the case of *Crumpp vs. Nickolas*, 5 Leigh, 251, decided April, 1834. The Farmers Bank of Virginia discounted a note for six thousand dollars, payable on its face sixty days after date, for accommodation of the maker; it was understood that this accommodation would be continued indefinitely, till it should suit the interest or convenience of the bank, or of the party to discontinue it; the bank reserving a right to discontinue it at

its own discretion or pleasure, and that party also having a right to discontinue it at pleasure, and that for the purpose of so continuing it, the note should be renewed from time to time; the accommodation was, in fact, continued upon such renewed notes from the 21st April, 1825, to the 4th May, 1826; the bank in discounting the first note deducted and retained to itself the interest for sixty-four days, *i. e.*, for the time the note had to run, including the days of grace, counting the interest from the day of the date to the last day of grace, both inclusive; and in discounting the second note, made on the last day of grace of the first, deducted and retained to itself the interest for sixty-four days, counting from the day of the date of the second and last day of grace of the first note to the last day of grace on the second note, both inclusive, and so on upon each renewed note successively to the end of the transaction, so that the bank, in fact, received double interest for each sixty-fourth day, and this was in conformity with the known usage of the Farmers Bank and of all the banks of Virginia. Held: The transaction is nowise usurious.

In the case of *Campbell vs. Shields*, 6 Leigh, 517, decided July, 1835. A debtor owing a debt presently due, agrees to give the creditor his bond for it, payable at a future day, and to add to the debt, and insert in the bond a sum equal to 5 per cent. on the debt, to cover commission which the creditor might be compelled to pay an agent for collection; and the bond is given, accordingly, for the aggregate, including the commission, with a verbal agreement that if the debtor should pay the debt punctually, he should be exempted from the payment of the sum inserted in the bond for commission for collection in debt on the bond and issue joined on the plea of usury. Held:

1. Parol evidence is admissible to prove the verbal agreement as to the sum allowed for commission.

2. The contract is not usurious, since the debtor might by punctual payment of the debt relieve himself from the payment of the sum he contracted to pay for commission.

3. The creditor stipulating that the debtor should pay the commission which would be incurred in the collection in default of punctual payment, if made in good faith to cover such commission, and not as a device to evade the statute of usury, was in point of law not usurious, and the court ought so to direct the jury, leaving to the jury the question of fact, whether the contract for the commission was made in good faith or was an evasion of the statute.

In the case of *The Bank of the Valley vs. Stribblings's Executor*, 7 Leigh, 26, decided January, 1836. A proposition is made by S. to the directors of a bank that he would purchase one hundred shares of the stock of the bank (of one hundred dollars

each) at par, and that the bank should discount for him a note of eight thousand dollars, on a pledge of the stock at eighty dollars the share, upon the faith of the expectation that if the proposition should be acceded to the bank would discount for him another note of two thousand dollars on the personal security of endorsers, so as to make up the sum of ten thousand dollars, which, he said, he was desirous to raise for his present exigencies, and upon condition that the bank should not call upon him for the money for eighteen months, to which the directors of the bank answer, that they will sell him one hundred shares of stock at par, for the price whereof they will receive and discount his note for ten thousand dollars, secured not by a pledge of the stock, but by other persons joining him in the note as makers and as endorsers; the note to be regularly renewed every sixty days, and the discounts paid according to the custom of the bank for and during the term of eighteen months, and also that S. should have a loan of two thousand five hundred dollars for the same term of eighteen months on the same terms, and to these terms of the bank, S. assents, and the notes are accordingly made and discounted, S. and the directors both knowing that the utmost value of the stock in the market at the time was but eighty dollars a share. Held: This was a sale of stock at an exorbitant price, coupled with a loan of money arising out of a proposition to borrow money, the sale and loan one entire contract, inseparably connected with one another, and the one made dependent on the other, and the transaction and S.'s notes made and discounted by the bank in pursuance of the agreement, were usurious.

In the case of *Steptoe's Administrators vs. Harvey's Executors*, 7 Leigh, 501, decided May, 1836. A contract to take for the loan of one hundred and forty-two shares of bank stock for a year thirty additional shares, is not void under the statute against usury, for the one hundred and seventy-two shares to be returned may not at the time of returning them be of any greater value than the one hundred and forty-two shares received at the time of receiving them, with the dividends or interest added.

If covenant on an obligation to pay one hundred and seventy-two shares of bank stock twelve months after date, plea alleges an agreement to lend one hundred and forty-two shares of the value of one hundred dollars each, to be returned twelve months after date with more than the value of the dividends which would accrue thereon, and though payable twelve months after date, with more than the value of six dollars for every one hundred dollars of the value of the stock so loaned, to-wit: with thirty shares of the said stock in addition to the one hundred and forty-two lent, which thirty shares were, at

the date of the agreement, of the value of one hundred dollars each, and that the obligation was executed in pursuance of this agreement. Held: The agreement set forth is not unlawful, and there being no allegation that the transaction was a shift or device to evade the statute against usury, the plea presents no bar to the action, and was properly rejected.

In the case of *State Bank of North Carolina vs. Cowan, etc.*, 8 Leigh, 238, decided April, 1837. It is settled in Virginia that the taking of the discount in advance, upon discounting a note at bank, is not usurious, and that including the day of payment of the first note in the second, whereby the bank receives under each note interest for the same day, is not usury.

The State Bank of North Carolina discounted a note made by the defendants in renewal, in which other notes were afterwards from time to time made and discounted; and it was found by a special verdict that the bank was in the habit of using in its calculations Rowlett's table of interest, which considers three hundred and sixty days as a year instead of three hundred and sixty-five, the effect of which is to make the interest for every fraction of a year somewhat more than at the rate of 6 per cent. per annum. Held: This mode of calculating interest does not make the transaction usurious.

At a time when the State Bank of North Carolina had suspended specie payments, the defendant offered to the bank a note for discount, accompanied by an offer, in case his note should be discounted, to exchange an equal amount of Northern funds for North Carolina bank notes. A bill was accordingly drawn upon a firm in Virginia at ninety days, and the same being accepted, the bill and note were both discounted, with a farther bill annexed to the note, that it should be paid in Virginia or other Northern bank notes. The bank paid for the bill and note, in its own note in part, and in part in notes of other banks of North Carolina, all of which were at the time under par in Raleigh, at from $3\frac{1}{2}$ to $4\frac{1}{2}$ per cent. At the time of the discount, suits were pending against the bank upon its notes, to coerce payment of them. The notes received by the defendant were, in the presence of the president and cashier of the bank, in their banking-house, handed over to the acceptor to meet his acceptance with them, and then pay the balance to the defendant, the president and the cashier knowing the loss to which the defendant would be subjected. The notes were sold in Virginia at a loss from $2\frac{1}{2}$ to $3\frac{1}{2}$ per cent., and the bill paid at maturity in Virginia or United States bank notes. These notes were at par at the time of the discount, and the president and directors of the North Carolina bank knew at the time that their notes were not of equal value. Held: Notwithstanding, the transaction is not usurious.

In the case of *Smith vs. Nichols, etc.*, 8 Leigh, 330, decided April, 1837. Where, upon a loan of money, the lender, besides his principal, contracts to receive in lieu of interest something which may be worth more than six per cent. per annum, though it may, perhaps, prove to be worth less, as the dividends on bank stock, the contract is usurious.

A debtor, owing a certain number of shares of bank stock, agrees with his creditor to pay him, at a future day, the market-price of the stock on that day, of one hundred and fifty dollars per share, at the creditor's option, with the dividends. Held: The contract is usurious.

In the case of *Long's Executor vs. Israel*, 9 Leigh, 556, decided December, 1838. B. represents to A. that he has been desirous of purchasing C.'s land, but had not done so from inability to advance funds as speedily as C. required, and that he wishes A. to buy the land and let him have it. Whereupon it is agreed that A. will buy the land as cheap as he can, and that B. will pay him nine hundred dollars for it. A. makes the purchase at the price of seven hundred and fifty dollars, and the land is conveyed to B. Held: The transaction between A. and B. is free from objection on the ground of usury.

In the case of *Campbell vs. Patterson*, 11 Leigh, 117, decided April, 1840. A bond is given to close a series of transactions between the obligee and the obligor, consisting of loans on one side and payments from time to time on the other, and when the bond is executed all the written evidences of the previous transactions are surrendered to the obligor; after the death of the obligee, the obligor files a bill in equity against his administrator, alleging usury in the bond, and setting forth the rate of interest reserved, but not the amount of money advanced, of which a discovery is called for from the administrator, who answers that he has no information enabling him to make such discovery; this court is of the opinion that the transactions were, in fact, usurious, and that the bond, though containing no usurious interest in it, yet, having been given for money loaned on usury, is within the statute and void as a security for money. Held: Nevertheless, under the circumstances of this case, the bond should be received as evidence of the amount advanced.

In the case of *Reynolds et als. vs. Carter (Administrator) etc.*, 12 Leigh, 166, decided April, 1841. J. advances two hundred dollars to R., and R. puts a slave of the yearly value of fifty dollars into J.'s possession, upon an agreement that J. shall hold the slave and take the profits for interest on the money till R. shall redeem the pawn by paying the principal sum of two hundred dollars. J., the pawnee, holds the slave for two years and dies; and then his administrator takes a bond with sureties from R., the pawnee, for the principal sum of two hundred dol-

lars advanced by his intestate, and restores the slave to the pawner. Held:

1. That the contract between J. and R. was usurious and void.

2. That the administrator of J. stands in the place of his intestate, and the usury of the original contract taints and avoids the bond taken by him for the debt.

In the case of *Rankin's Executors vs. Rankin's Administrators*, 1 Grat., 153, decided September, 1844. H. having obtained a judgment against the administrators of R. on the bond of their intestate, files a bill in equity to obtain satisfaction of that judgment, out of the assets in their hands. The administrators in their answer set up the defence that the bond on which the judgment was obtained was usurious; and the usury which they state is that a premium given for the forbearance of a pre-existing debt was included therein. Held: If the fact is proved that the defendants are only entitled to relief to the amount of the usurious premium, and that for the residue of the debt, H. is entitled to rank as a creditor by judgment against the administrators, on the specialty of their intestate.

In the case of *Parker vs. Cousins*, 2 Grat., 372, decided October, 1845, it was held: A private individual discounts commercial paper and deducts the interest at the time of discount. This is not usury.

On the discount of commercial paper the month is reckoned at thirty, the year at three hundred and sixty days; and interest of one-half per cent. for thirty days is taken. This is not usury.

On the discount of a note for the maker, it is agreed that it may be renewed every sixty days for a specified time, on the maker's paying the discount. It is so renewed, and upon the renewals interest is charged twice for every sixty-four days. This is not usury.

A usurious security is given for a pre-existing *bona fide* debt. Though the usurious security is void, the pre-existing debt is still a valid obligation, and may be recovered.

In the case of *Bank of Washington vs. Arthur*, 3 Grat., 173, decided July, 1846. A. executes to S. a bond for forty thousand dollars, and a deed of trust to secure it; the consideration of which bond is in part a debt due from A. to S.; in part debts of A. which S. undertook to pay; and for the balance bank and railroad stocks, at prices greatly above their then market value. S. being largely indebted to B., assigns the bond and deed of trust to B. as a collateral security for his debt; and about the same time fails, and is, in fact, insolvent. B. gives notice to A. of the assignment, and A., then, without stating anything to B. of the nature of the consideration of the bond, says it is a valid bond, and promises to pay it. Afterwards, the bond not being paid, B. directs the trustees in the deed of trust to sell; and

then A. goes into a court of equity, and disclaiming all benefit of discovery from the defendant, asks that the trustees may be enjoined from selling under the deed till B. shall establish his claim at law. Held: The bond and deed of trust is usurious and void. Though the bond and deed of trust is usurious and void, yet, as part of the consideration of the bond was a pre-existing valid debt, which continues to be a valid debt, a court of equity will not compel the obligee to establish his claim at law before proceeding to enforce his security. Though the bill is framed for the purpose of staying proceedings on the deed and compelling the creditor to establish his claim at law, yet as the facts disclosed entitle the debtor to relief upon equitable terms, the court will not dismiss the bill, but will give the relief to which, upon principles of equity, the debtor is entitled. The promise of A. made after the assignment to B., having been without consideration, created no new contract. The failure of A. to inform B. of the nature of the consideration of the bond, and his promise to pay it not having proceeded from any fraudulent intent, and having in fact operated no injury to B., cannot be treated as fraudulent, so as to forbid A. to set up the charge of usury against the bond.

In the case of *Porterfield vs. Coiner*, 4 Grat., 55, decided July, 1847. P. executed his bond to C. for five hundred dollars, payable in three years. The bond recites that it is not to bear interest for the three years, P. having that day paid C. ninety dollars, the interest thereon, in advance. In an action on the bond by C. against P., P. pleads usury, and relies upon the recital in the bond to sustain his plea. Held: C. may show that the interest was paid, not by money, but in land at an agreed price per acre; and that such price was not the estimated value of the land in cash, but its estimated value in reference to the annual interest for three years, as the same should accrue upon the debt of five hundred dollars. And moreover, to corroborate such evidence and repel the idea of a corrupt intent to take usurious interest, he may prove that the actual value of the land at the time of the contract was less than the agreed price, whether in cash or on instalments of one, two, and three years.

In the case of *Law's Executors vs. Sutherland et als.*, 5 Grat., 357, decided January, 1849. L. and C., at the request of S., each executes his bond to the other, and they sell them to *bona fide* purchasers, and pay over the proceeds to S., who executes his bond to them for the amount of their bonds. Held: The purchasers having no knowledge of the fact that the bonds were thus made, their purchase at a discount is not usurious.

The bond of S. executed to L. and C. is not usurious. A payment made by a debtor to his creditor cannot be applied by the

creditor to a debt arising subsequently without the assent of the debtor.

In the case of *Hansbarger (Administrator) vs. Kinney, Kinney vs. Hansbarger (Administrator)*, 6 Grat., 287, decided July, 1849. In a debt on a bond, on the plea of usury, the defendant offered evidence for the purpose of proving that the consideration of the bond was seven other bonds which were before the jury, the amount which was less than the first-mentioned bond; and moved the court to instruct the jury, that if they were satisfied that the amount of the seven bonds was less than the amount of the first-mentioned bond by 10 per cent. or 12 per cent., that the defendant had made out a *prima facie* case of usury, and that the *onus* was then on the plaintiff to prove a further consideration to the amount of first said bond; and if they shall believe that he failed to furnish such proof, they must find for the defendant. The court refused to give the instruction, and remarked to the jury that the party who pleads usury must prove it. Held: There was no error in refusing the instruction, or in the instruction given.

In the case of *Hopkins, etc. vs. Koonce*, 6 Grat., 387, decided October, 1849. A surety in a bond who had given a deed of trust to secure the debt, executes another deed of trust to secure another debt of his principal, due to the same parties, in consideration of the forbearance of the creditors to sell under the first deed. Held: The second deed is given upon a usurious consideration, and is, therefore, void.

In the case of *Bell et als. vs. Calhoun*, 8 Grat., 22, decided July, 1851, it was held: In December, 1842, C. assigned to B. a bond on E., who was in doubtful circumstances, for \$529.06, due on October 26, 1838, and subject to a credit of \$15 paid October 1, 1842, for which B. gave him \$494.25; and C. at the same time executed a deed of trust on property, with condition if the bond with its interest was not paid in twelve months, the trustee should sell and pay the amount to B. This was usurious.

On a bill to enjoin a sale under the deed of trust, the plaintiff says he has proof and does not wish a discovery, but that the sale may be enjoined until the validity of the deed can be tried at law. Upon an issue directed by the court, the jury find the usury, and that the usurious premium is the difference between the sum advanced by C. to B. and the bond with interest to that time, subject to the credit for \$15. Held: That the proper relief is not to perpetuate the injunction for the whole amount of the bond and its interest due, but only for the amount of the usurious premium.

In the case of *Hope vs. Smith (Sheriff)*, 10 Grat., 221, decided July, 1853, it was held: Usury in the bonds upon which the

judgments were recovered cannot be set up to the judgments, and they are valid offsets, there being no fraud in the procurement of them.

In the case of *Hansbarger's Administrators vs. Kinney*, 13 Grat., 511, decided September 5, 1856, it was held: In an action at law on a bond against a surety, he defends it on the grounds of usury, but there is a judgment against him. The surety then files a bill for relief against the judgment, on the ground of after-discovered evidence, but there was evidence to the same point before the jury. The after-discovered evidence being merely cumulative, it is not ground for relief.

In the case of *Brockenborough (Executor) vs. Spindle's Administrator*, 17 Grat., 21, decided May 11, 1866, it was held: It is the established rule of this court that to convict a person of usury, the usury must be proved beyond a rational doubt to the contrary.

S., in urgent need, asks G. where he can get money. G. applies to B., and is told by B. that he has no money to lend. Believing that Virginia State stock would relieve S., it is suggested by G. that such stock would answer in lieu of money. To this proposal B. replies that he might accommodate S., and G. informs S. of what B. said. Subsequently, B. caused the required amount of stock to be transferred in accordance with the direction of S., who executed his bond to B. for eleven thousand dollars, payable three years after date with legal interest. The sum of eleven thousand dollars was the par value of the stock, while its cash market value was at the time but ninety-one dollars in the hundred. Held: The transaction was a fair sale, and not a devise to cover an usurious loan of money.

The question of usury is a question of law and fact; and the facts being ascertained, it is for the court to determine whether they constitute usury; and the appellate court will pass upon the question either upon an instruction setting out the facts proved, and asking the court to instruct the jury that they do not constitute usury, or upon a motion for a new trial, when the court certifies the facts proved.

In the case of *Fant vs. Miller & Mayhew*, 17 Grat., 47, decided October 6, 1866, it was held: Negotiable notes made for the accommodation of F., and endorsed by him to the holders, in consideration of money previously advanced by them to him at the time of the transfer, and of notes of F. falling due at a future day, which they undertake to pay, and do pay as they fall due; all of which amount, to the full amount of the notes so endorsed to them, the holders are holders for value.

In the case of *Boulware vs. Newton*, 18 Grat., 708, decided April, 1868. N. gives his bond to B., dated January 29, 1863, by which on demand, three months after notice to pay, he prom-

ises to pay B. five thousand dollars, without interest, in current funds, the money to be punctually paid at the end of three months after demand, and if not, to bear interest from demand; B. not being required to receive the money except at his pleasure. The bond is given for five thousand dollars, Confederate notes, then delivered by B. to N., which were then worth in gold but one-third of the amount. Held: The contract is valid, and B. is entitled to recover five thousand dollars in the currency of the day when the money is demanded.

It is a contract in which the principal is at hazard, and, therefore, not usurious.

In the case of *Brunmel & Co. vs. Enders, Sutton & Co.*, 18 Grat., 873, decided June, 1868. B. & Co. make their negotiable notes blank as to the names of the payees, and put them into the hands of an agent to be sold for their benefit. The agent sells them at a greater discount than the legal rate of interest, the purchaser not being informed that they were sold for the benefit of B. & Co., and the names of the purchasers are inserted in the blanks as payees, either by the agent at the time of the sales, or by themselves afterwards. The purchasers sue upon the notes, describing themselves as payees against B. & Co. as makers, and B. & Co. plead usury. Held: It is not usury.

In the case of *Drake's Executor vs. Chandler et als.*, 18 Grat., 909, decided June, 1868, it was held: A. B. and G. execute a bond for one thousand dollars to P. for a loan of money at usurious interest. Subsequently, O. J. and W. with B., who signs himself security, execute their bond to P. for the amount, principal and interest of the first bond, and another small bond of A., in lieu of the bonds. The usury is purged by the change of the parties, and the last bond executed is valid.

In the case of *Gimmi vs. Cullen*, 20 Grat., 439, decided March, 1871, it was held: G. makes his note which is endorsed, and makes a deed of trust on land to secure it, and puts it in the hands of L., a broker and banker, to sell, and L. advances as much to him as is expected will be the net proceeds of the note. On the next day L. offers the note to C. at $1\frac{1}{4}$ per cent. per month discount. C. says he has no money, but L., who has on deposit notes for C. coming soon to maturity, proposes to advance the money for him, and C. agrees to take the note, if, after examining the title to the property, he is satisfied. L. thereupon advances to G. the whole of the net proceeds of the note. C. examines the title and is satisfied, and sixteen days afterwards he pays L. the money he had advanced for him and interest upon it for the sixteen days. C. has no knowledge of the character of the note, or for whose benefit it is sold. This is not usury.

In the case of *Town of Danville vs. Sutherlin*, 20 Grat., 555, decided March, 1871, it was held: The council of the town of

Danville has authority under its charter to contract loans and issue certificates of debt. In 1863, the council issued the bonds of the city to be sold at public auction for Confederate money and for a bond of five thousand dollars, bearing 6 per cent. interest, and payable at the end of twenty years, the purchaser gave eleven thousand and fifty dollars Confederate currency, being at the time as ten for one of gold. This is usury.

In the case of *The City of Lynchburg vs. Norvell*, 20 Grat., 601, decided March, 1871, it was held: City bonds, payable thirty days after date, and bearing 6 per cent. per annum interest from their date, sold in 1864 for Confederate money at the rate of two and one-half for one, when the Confederate money was at the rate of twenty to one for gold. This is usury.

The fact that these bonds might be paid in the currency which at the time they fell due, would be taken by the State for taxes, does not constitute such a contract for hazard as relieved it from the taint of usury.

In the case of *Moffett vs. Bickle*, 21 Grat., 280, decided August, 1871, it was held: In an action of debt by the holder of a negotiable note against the maker and four endorsers, upon the plea of usury by the endorsers the jury found that the note was endorsed by the first three endorsers for accommodation of the maker, and was sold by him to the fourth endorser at a usurious rate of interest, who afterwards, and before it became due, endorsed it to the holder for value. Upon this verdict the court should render a judgment in favor of the maker and the first three endorsers, and against the fourth endorser, under the act, Code, Chapter 177, Section 19, p. 733.

In the case of *Michie vs. Jeffries et als.*, 21 Grat., 334, decided August, 1871, it was held: J. lent to G. five thousand dollars and took his bond for the amount, dated April 17, 1862, payable five years after date with interest, and a deed of trust on land to secure the debt. The money loaned had been deposited in bank in January, 1861, to J.'s credit, and she gave G. a check upon the bank for the amount in the usual form. This was not a Confederate contract, and is not liable to be so scaled.

The bond and deed of trust are not tainted with usury; but if they were it should not be set up for the first time in argument in the appellate court; nor could M. set it up at any time, it being G.'s debt, and M. having received the money to pay it.

In the case of *Hilb (for, etc.) vs. Peyton et als.*, 21 Grat., 386, decided August, 1871, it was held: P. executes his bond to H. for five thousand dollars, dated January 9, 1863, and payable two years after date without interest "in such funds as the banks receive and pay out." Parol evidence is not admissible under Section 2 of the adjustment act of March, 1866, to prove the kind of currency in which the bond was to be paid, or with

reference to which as a standard of value it was made and entered into. Such a bond creates a contract of hazard.

In the case of *White vs. Mch. Building Fund Association*, 22 Grat., 233, decided June 12, 1872, it was held: W., a shareholder in a building fund association, having obtained an advance of money on his shares, the association thereby acquired the right of property therein; and the assignment of the association for the advances he received was not a hypothecation for a loan, but an absolute surrender of them to the association, whereby they were sunk and extinguished, and cannot entitle the said W. to participate in the final division and distribution of the funds of the association.

The assignment of his shares by W. to the association does not release him from his covenant as a party to the articles of the association to make his regular monthly payment on shares, and on account of fines; and the enforcement of his said obligation is secured by his bond and deed of trust, by which, also, he obligates himself to pay six per cent. interest on the sum received, as authorized by the statute, until the termination of the association; and the transaction between the parties is not usurious, nor within the prohibition of the statute.

In the case of *Graeme vs. Adams*, 23 Grat., 225, decided March, 1873, it was held: A. contracts to build for G. in the city of Richmond certain houses, according to a plan and specifications, for the sum of \$54,700, payable in annual instalments of \$12,000, to bear interest at the rate of \$7.30 per cent. per annum, to be secured by deed of trust on the property. If the interest was a part of the contract price of the buildings the contract is not usurious; if it was for the loan of money or other thing, or for the forbearance of a debt due, it was usurious.

A. claims that he entered into another subsequent contract with G. which was to bear six per cent. interest. If the first contract was usurious, all the usury included in it must have been excluded from the second, or it is usurious.

The price under which the work was done under the second contract was just as much greater than that provided for in the first as the difference of the interest on that sum at six and \$7.30 per cent. per annum for the whole time of the credit, viz., \$57,800; and when the work was completed, notes payable as agreed on in the contract were taken, bearing six per cent. interest from their date until their time of payment. If this addition to the first sum contracted for was for the loan of money, or other thing, or for the forbearance of a debt due, the second contract is usurious, but if it was not for such loan or forbearance, it was not usurious.

Forbearance in the sense of the statute in relation to usury is the giving a further day for the return of a loan when the

time originally agreed on is passed, and if the rate of interest agreed on for such forbearance is over six per cent. per annum, it is usurious.

If the contract for the price of the houses is payable in instalments bearing interest, that contract cannot be discharged by the tender of cash at the time when the buildings are completed. A debtor has no right to anticipate the payment of a debt payable at a future day, and bearing interest, without the consent of the creditor.

In the case of *Turpin vs. Slead's Executor*, 23 Grat., 238, decided March, 1873, it was held: T. executes his bond to S., by which on demand he promises to pay to S., in gold or silver, or the equivalent thereof, \$2,400. This is a promise to pay \$2,400 in gold or silver coin, or the equivalent thereof, and debt may be maintained upon it.

The bond was dated May, 1866, and the consideration proved was a debt due before the war of uncertain amount, and \$1,670 in United States currency advanced at the date of the bond, when the currency was at 129 1-8 for gold and 121 for silver. As it does not appear what was the amount of the ante-war debt, usury is not proved.

The reference to 25 Grat., 1, is to the case of *Town of Danville vs. Pace*, cited to Section 2821.

In the case of *Bowman vs. Miller & Co., et als.*, 25 Grat., 331, decided September, 1874. B. being in want of money in August, 1867, went to the city of Baltimore with a negotiable note for \$3,500, blank as to the State and place of payment, but signed by himself and endorsed by five persons, he and they living in Virginia. This note he sold to M., of Baltimore, at a discount of one and one-fourth per cent. per month; the proper date was inserted and the place of payment fixed at the National Exchange of Baltimore. This note was renewed with the same parties, and in April, 1868, B. made a payment on it of \$550; and another note to meet the balance was made by the same parties, payable at the same bank, and M. agreed to take this note at the same discount. The last note not being paid, M. sent it and all the previous notes and papers connected with the loan, with a statement of the amount due him, to a friend residing in Harrisonburg, with a request that he would take B.'s note for what was due, endorsed by the same parties. This was done, and the note was made payable at the National Bank of Harrisonburg. Held: The taking of the last note was not a novation of the previously existing debt, but the contract is still a Maryland contract, to be governed by the law of Maryland.

By the law of Maryland the contract was not null and void, but M. might recover upon it there the principal and the legal interest.

The last note not providing on its face for the payment in future of more than legal interest, it not being a Virginia contract, and not being void by the law of Maryland, it will be enforced as a Maryland contract in the courts of Virginia.

In the case of *Coffman & Bouffy vs. Miller & Co.*, 26 Grat., 698, decided October 9, 1875. B., of Harrisonburg, Virginia, was indebted to M., of Baltimore, Maryland, by various notes and accounts, on some of which notes usurious interest was charged. In February, 1868, B. and M. made a full settlement, by which B. transferred to M. judgments and debts to the amount of his debt; and it was agreed that M. should prosecute these claims, and if any of them proved insolvent, that M. might recover from B. any deficit that remained; and then M. delivered to B. all his notes and accounts. Some of the claims transferred to M. proved worthless, and in June, 1869, B. gave to M. his note endorsed by C., made and payable in Harrisonburg, for the amount of the deficit. Held: The note was founded on a new contract, on a new consideration, and the usury in the previous notes given by B. to M. before their settlement does not affect it.

In the case of *Backhouse (Executor) vs. Selden*, 29 Grat., 581, decided December 19, 1877. Where a bond dated in Texas, signed by the principal obligor, a resident of Texas, and by two sureties, residents of Virginia, payable to a resident of Virginia, when the drafts which were the consideration of the bond were sent to and received in Texas, and the money borrowed used in Texas by the principal obligor. Held: To be a contract governed by the laws of Texas, and not affected by the laws of usury in Virginia.

In the case of *Mosely (Trustee) vs. Brown et als.*, 76 Va., 419.

Usury.—Sale at discount greater than legal interest of negotiable notes, made and endorsed in blank for purpose of raising money, by broker for maker to purchaser ignorant of that purpose, is not usury.

2. *Idem.*—But payment of illegal interest, after maturity of notes for forbearance, is usury, and the usurious premium may be recovered back.

In the case of *Hansucker et als. vs. Walker et als.*, 76 Va., 753.

Commissioner's Report.—Usurious Interest.—From face of report, usurious interest was paid; no exception when report was adopted; afterwards exception was endorsed, but attention of court not called thereto. Held: The decree cannot be reversed on that ground, but on other grounds being remanded, the court below can disallow the usurious interest, and apply excess as a credit to the debt.

In the case of *Bailey (M. C.), who sues by, etc. vs. Hill, et als.*,

77 Va., 492, decided May 10, 1883, it was held: Where maker of negotiable note, payable to his own order, endorses it and sells it through a third person at a rate of interest greater than that allowed by law, the transaction is not usurious, provided the purchaser does not know the character of the note, or that it is sold for the benefit of the maker. If the purchaser is effected with such knowledge by the circumstances, then the transaction is usurious.

In the case of *Christian & Gunn vs. Worsham (Treasurer)*, 78 Va., 100, decided December 6, 1883, it was held: The plea of usury is a defence personal to the debtor certainly as concerns landed security, and however third persons interested in the lands may be incidentally affected by a usurious contract affecting it, they cannot take advantage of it. Section 2824 does not apply in favor of a mortgagee where a successful charge of usury has been made against a prior mortgagee in a suit brought against them both, and such usury has been purged by the court.

In the case of *Keckley vs. Union Bank of Winchester*, 79 Va., 458, decided October 2, 1884. Special plea avers that note in suit was made for balance of a note given by one not a party to the suit, for the aggregate of sundry notes, one whereof was undue, and that there was no allowance made for that fact in ascertaining such aggregate, and that hence interest having been twice exacted for the sum of the undue note. The note for the aggregate was usurious and tainted the note in the suit. Held: Failing to include the present worth only, instead of the face value of the undue note, did not constitute usury in the note for the aggregate, but if it did, the taking of the note in suit was such a change of parties as purged the transaction of usury, and the note is valid.

In the case of *White's Administrator vs. Freeman*, 79 Va., 597, decided December, 4, 1884, it was held: Though the statute of usury at date of contract declares it to be null, yet if at date of decree the statute has been changed, and only annuls contract for interest, decree should be for principal loaned, with interest from date of decree.

Though the notes be usurious and null, yet if part of their consideration was a pre-existing valid debt, which continues to be a valid debt, the decree should be for the principal of the new notes, with interest on the pre-existing debt from the time it was entitled to bear interest.

In the case of *Turner vs. Turner*, 80 Va., 379, decided April 2, 1885, it was held: Where an instrument on its face reserves more than the legal rate of interest, it is usurious in its inception, and judgment shall be rendered for the principal sum only, although the defendant may have filed no plea of usury.

In the case of *Vaught vs. Rider (Trustee) et als.*, 83 Va., 659, decided September, 1887, it was held: Though every security for a usurious debt, however often renewed, is tainted by the original illegal consideration, yet a loan of money to the debtor to pay such a debt is not affected by such illegality, notwithstanding the loaner was aware of the purpose for which it was borrowed.

In the case of *Keagy et als. vs. Trout et als.*, 85 Va., 390, decided September 20, 1888. Where one agrees to pay to another a certain sum called by them "brokerage," to negotiate and guarantee a loan for him and also to pay attorney's fees for making abstracts of title to the property whereon the loan is to be secured, though such sums exceed lawful interest. Held: They not being for loan or for forbearance of money do not constitute usury.

In the case of *Myers and Wife vs. Williams (Trustee) et als.*, 85 Va., 621, decided January 10, 1889, it was held: Where there is no loan, or forbearance to collect an existing debt, there can be no usury.

Debtor's property having been sold under decree, she agreed with R. that if he would set aside the sale, and give her a reasonable time to pay for it, she would pay him \$1,000. R. put in an upset bid and the sale was set aside. Later the liens, having been ascertained to be \$4,441.83 exclusive of interest and costs, she conveyed the property to R. "for \$6,000 cash in hand paid," but really that R. pay off the liens, etc., and the balance of \$6,000 if any to her. Same day R. agreed to resell her the property at \$7,000, with interest payable annually, in ten equal annual instalments. After R. had paid off said liens, etc., she being in default in her part, he brought his bill to enforce his lien for the unpaid price of the resale, and she pleaded usury. Held: The transaction has no characteristic of usury.

In the case of *Meem vs. Dulaney*, 88 Va., 674, decided January 28, 1892. A borrower of money in 1876 agreed, by his bond, to pay lender six per cent. per annum, and by a separate instrument to indemnify him for any state taxes that might be imposed on his bond. Held: The transaction was usurious.

In such case the borrower is entitled to be relieved from payment of all save the principal, and to have all payments made on account of interest deducted from the principal.

Neither the doctrine that money paid on an illegal contract cannot be recovered back, nor the doctrine of the application of payments applies to case of payments of money on usurious contracts.

SECTION 2816.

This reference to 1 Wash., 164, is an error.

In the case of *Strode vs. Head*, 2 Wash., 192 (1st edition,

p. 149), decided October term, 1795, in debt upon a bond in the penalty of eighteen hundred pounds Pennsylvania currency of the value of fourteen hundred and forty pounds Virginia currency. The defendant having confessed judgment, it was entered for eighteen hundred pounds Pennsylvania currency of the value of fourteen hundred and forty pounds current money of Virginia, to be discharged by the payment of seven hundred and twenty pounds current money of Virginia with interest, etc. Held: The confession of the judgment fixed the value of the money and furnished the clerk with a standard for ascertaining the value of the sum mentioned in the condition. A jury was unnecessary.

In the case of *Taylor & Co. vs. McClean*, 3 Call, 557 (2d edition, 481), decided December 4, 1790, it was held: It is necessary, on judgments for sterling money, that the court should fix the rate of exchanges.

SECTION 2818.

In the case of *Mosby vs. St. Louis Mutual Insurance Company*, 31 Grat., 629, decided March, 1879, it was held: Though the statute of usury, at the time the contract was made, declares the contract to be null and void, if at the time of the decree in the case the statute has been amended and only avoids the contract for the interest, the decree should be for the principal loaned, with interest from the date of the decree.

See the case of *Mosely (Trustee) vs. Brown*, 76 Va., 419, *supra*, Chapter 130.

See *Bailey vs. Hill et als.*, 77 Va., 492, *supra*, Section 130.

See case of *Christian & Gunn vs. Worsham (Treasurer)*, 78 Va., 100, *ante*, Chapter 130.

See case of *White's Administrator vs. Freeman*, 79 Va., 597, *ante*, Chapter 130.

SECTION 2821.

In the case of *Town of Danville vs. Pace*, 25 Grat., 1, decided April 8, 1874, it was held: The statute is retro-active in its operations, and applies to contracts made by a corporation before the passage of the act, and this, though suit has been brought upon such contract before its passage, and the act is not in violation of the Constitution of the United States or of that of Virginia.

In the case of *King vs. Buck et als.*, 30 Grat., 828, decided October 3, 1878, it was held: Under this section the judgment is to be for the principal sum ascertained to be due after deducting the usury and interest on that principal from the date of the judgment.

See case of *Turner vs. Turner*, 80 Va., 379, *ante*, Chapter 130.

SECTION 2822.

In the case of *Stone vs. Ware & Smith*, 6 Munf., 541, decided March 22, 1820, it was held: A creditor, by threatening to have execution levied, induced the debtor to allow him 15 per cent. per annum upon the debt, and to give bond as principal obligor, in which the creditor joined as security, payable at a future day to a third person, to whom the amount was *bona fide* due, and who knew nothing of such usurious agreement. The debtor was entitled to no relief in equity against such innocent third person, not even by a decree to compel the usurer to pay him the debt in discharge of the complaint.

The usurious agreement being proved, and the bill not exhibited for a discovery, the court gave relief against the usurer upon the terms of the debtor's paying him the principal justly due, with legal interest.

The reference to 1 Rand., 172, is to a mere *quære* whether upon such bill the complaint shall be relieved from the debt *in toto*, or only from the interest.

In the case of *Young vs. Scott*, 4 Rand., 415, decided August, 1826, it was held: In all cases where a party applies to a court of equity for relief against an usurious contract, whether it alleges in his bill that he is able to prove the usury without the defendant's confession or not, he can only be relieved upon payment of principal, without interest, under the third section of our act of Assembly. Decided by two judges out of three.

In the case of *Clarkson's Administrator vs. Garland et als.*, 1 Leigh, 147, decided March, 1829, it was held. C. wanting to raise two thousand three hundred and thirty-five dollars, tells J. this, and offers as many slaves as will command that sum, upon which J. pays him two thousand three hundred and thirty-five dollars, in gross, for sixteen slaves, and C. gives him a bill of sale thereof, and it is at the same time agreed that the slaves shall remain in C.'s possession on hire for one year; and if at the end of one year C. shall pay J. two thousand nine hundred and thirty-five dollars, J. shall, in consideration thereof, resell the slaves to him. If any of the slaves die during the year, C. to pay same price, and no less, for survivors; and if C. shall not pay the two thousand nine hundred and thirty-five dollars punctually, J.'s agreement to resell them to him to be void. Held: A shift to evade statute of usury and contract usurious. C. contracting usurious debts to G. gives him a deed of trust to slaves to secure it; afterwards C. voluntarily surrenders trust slaves to trustee, to be sold to satisfy the debt. At trustee's sale, in itself fair, G. buys greater part of trust slaves, and the proceeds of sales are applied to the debt. Held: Though deed of trust be usurious, yet trustee's sale of the subject of G., the usurious creditor, shall not be disturbed in equity.

Though where one resorts to equity for relief against usurious debt yet unpaid, he shall be required to pay only the principal advanced to him without even lawful interest, according to the statute of Virginia, yet where the debtor seeks in equity an account of and decreed for money already paid on usurious contract, the measure of relief is the excess paid above principal and lawful interest, and if this payment exceed lawful interest, the surplus with interest shall be decreed to him.

In the case of *Fulcher vs. Baker et als.*, 1 Leigh, 453, decided November, 1829, it was held: In a bill for relief against usury, plaintiff charges usury exacted at the rate of two and a half or three per cent. per month. Defendant in his answer admits he exacted usury, but says he does not remember the rate; and there is no proof to ascertain the rate. Held: That in this state of the case the court should consider the rate of usury two and a half per cent. per month.

In the case of *Turpin vs. Povall et als.*, 8 Leigh, 93, decided February, 1837. A borrower at usurious interest, having executed a bond and deed of trust to secure repayment of the loan, files a bill in equity against the lender and the trustee, alleging the usury, and that the trustee is about to sell the property conveyed to raise the amount of the bond, and praying that defendants may be compelled to answer all the allegations of the bill; that the sale by the trustee may be enjoined, the trust property thus re-conveyed to plaintiff, the bond delivered up on such terms and conditions as are equitable, and that such other and further relief may be granted to plaintiff as is agreeable to equity and the nature of his case. The lender by his answer denies the usury, but it is proved. Held: Though the borrower might have elected to ask merely the opportunity of trying the question of usury at law, yet, as by the terms of his bill he has sought full relief in equity, he shall only be relieved upon the terms of paying the principal money due.

On a bill in equity for relief against a usurious debt unpaid, whether the usury be confessed in the answer or proved by the evidence, the plaintiff shall be relieved on payment of the principal justly due, without interest. Dissentiente Brook, J., who held that where usury is not discovered by the answer, but proved *aliunde*, the case is not within Section 3 of the statute against usury, 1 Rev. Code, Chapter 102, and the plaintiff should therefore be compelled to pay the principal, with legal interest.

A contract entered into in another State, in violation of the usury law of that State, cannot be considered as made with reference to the law of the place of contract, but the rights of the contracting parties, if litigated in this State, must be determined by our own law.

In the case of *Campbell vs. Patterson*, 11 Leigh, 113, decided

April, 1840. The obligor, in a bond secured by a deed of trust, files a bill in equity against the obligee and the trustee, alleging that the bond was given for money borrowed at usurious interest, and that such interest (some of it compound) was included therein; calling for a discovery of the amount of money advanced, and the rate of interest reserved, and praying an injunction to stay all proceeding on the trust-deed until the matter can be fully heard in equity; that all compound, illegal, and usurious interest may be expunged; that the plaintiff may have such further relief as his case may require and justice dictate, and that all persons be released from all penalties of the statute against usury. Held: The bill is not within the statute, and the plaintiff is only entitled to relief upon the terms of paying the principal money borrowed, with legal interest thereon.

In the case of *Martin vs. Hall*, 9 Grat., 8, decided July 12, 1852, it was held: A deed of trust upon land is executed to secure an usurious debt; afterwards a new bond is executed from which all the usurious premium is excluded, and it is agreed between the parties that the deed of trust shall stand as a security for the new bond. Subsequent to the execution of the new bond and this agreement, a third party recovers a judgment against the grantor upon a bond executed before the deed of trust was executed, and files a bill to set aside the deed of trust as usurious. Held: If the usury had been expunged by the parties by their second agreement, the plaintiff coming into equity for relief could only obtain it to the extent of the usurious premium. The parties having by their second agreement done all that a court of equity would have done, and having agreed that the deed of trust should stand as security for the second bond, that agreement is valid, and the deed will be held as a security for the bond. The court having possession of the case will decree the sale of the lands and the application of the proceeds, according to the priority of the parties having liens upon it.

In the case of *Wise vs. Lamb*, 9 Grat., 294, decided August 28, 1852. S. files a bill against W. and his assignees to enjoin two judgments, one for twelve hundred dollars, the other for three hundred dollars, recovered upon bonds executed by S. to his son, and by his son assigned to W. on the ground of usury. The usury as stated in the bill amounted to three hundred dollars, for which the small bond was given. W. answered the bill, meeting and denying explicitly all its allegations in regard to the usury. The son was examined as a witness by S., and proved the usury as stated in the bill, but his testimony was excepted to by the defendants. No other witness speaks as to the usury. On filing his answer, W. gave notice that he would move for a dissolution of the injunction at the next term; and accordingly

at the next term of the court the motion was made, and the injunction was dissolved as to the principal of the judgment for twelve hundred dollars, but was continued as to the residue. At the next term of the court a motion was made to dissolve the injunction *in toto*, but the court overruled the motion, and directed an issue to try the question of usury; and upon the trial of the issue the verdict of the jury was that the bonds were, in fact, executed upon an usurious consideration as stated in the bill, and the court thereupon perpetuated the injunction. Upon appeal. Held: The testimony of the son, the obligee in the bonds, was not competent evidence to prove the usury in a controversy between the obligor and assignee.

The answer having fully and explicitly denied the allegations of the bill as to the usury, and there being no competent evidence to prove it, the court should, when the motion was first made, have dissolved the injunction *in toto*. So when the second motion to dissolve was made, it should, for the same reason, have been sustained, and if the cause was ready for a final hearing, the bill should have been dismissed, and it was error to direct an issue. The issue having been improperly directed, the injunction should have been dissolved and the bill dismissed upon the final hearing, notwithstanding the verdict of the jury finding the usury as charged in the bill.

In the case of *Belton vs. Apperson*, 26 Grat., 207, decided April 22, 1875. In June, 1868, B. filed his bill to enjoin a sale of real estate by A., the trustee in a deed given to secure the payment of a negotiable note for one thousand three hundred dollars. He says he supposed C. was the owner of the note, and charges usury in it and sets it out. He makes C. and A. defendants, and calls upon them to answer on oath. He prays that they may be required to disclose the name of the holder of the note; that A. may be enjoined from selling the property; that the note may be delivered up and cancelled, and A. required to re-convey the said real estate to the trustee, to whom the same was conveyed for the benefit of B.'s wife and children. The injunction was granted, and in June, 1869, A. and C. answered; C. said he was a broker, and the note was put into his hands for sale, and he sold it to S., and he had no interest in it. Both C. and A. say they do not believe there was usury in the transaction; it was a sale, not a loan.

The cause stood upon the docket without any move in it until December, 1871, when B. and his wife and seven infant children, by B. as their next friend, ask leave to file an amended and supplemental bill. In this bill they are plaintiffs, and S. is made a defendant with C. and A. They set out the bill and answers; state a conveyance of the property by B. to trustee for B.'s wife for life, remainder to the children. They charge usury in the

note, disclaim any discovery from defendants, ask for an issue, and if they prove the usury that the note may be declared null, the injunction perpetuated, and for general relief. Held: The rule in regard to amendments is, that they may be made when the bill is defective in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself. The plaintiff will not be permitted to abandon the entire case made by his bill and make a new and different case by way of amendment. But this rule has been much trespassed upon, especially in the States and in Virginia.

If a plaintiff is not permitted to make a new case, he may, by his amendments, so alter the frame and structure of his bill as to obtain an entirely different relief from that asked for originally.

If the lender of money is made a party to a bill filed under statute in relation to money and interest, he cannot be proceeded against under the said statute.

Upon the coming in of the answers of C. and A., B. might have dismissed his bill, and immediately thereupon have filed a new bill under the statute; and he might submit to a dismissal of his bill by the chancellor, and at once file a bill against S. C. and A. having no interest in the note, the case is virtually ended as to them; and S. not having been a party to the original bill, the answers of C. and A. cannot be read for or against him, either under the original or amended bill, and the amended bill may be filed. As S. was not a party to the original bill, and as the plaintiffs may at once file a new bill against him, the delay in tendering the amended bill cannot prejudice his interests. Courts of equity will allow amendment of the bill by the introduction of new parties, plaintiffs or defendants, when necessary, so that the ends of justice may be met or to prevent further litigation. As a general rule this is not matter of course, but discretionary with the court. B.'s wife and children having an interest in the real estate conveyed in the deed, it is proper to amend the bill and unite them as plaintiffs with B.

In the case of *Meem vs. Dulaney & Co.*, 88 Va., 674, decided January 28, 1892, it was held: Where the bill charges usury, and prays that the sale of the land whereon it is secured be enjoined, and that the usury be passed on by a jury, and the amount actually due be ascertained by the court, and no discovery is asked for, it is the duty of the court to direct the issues to be made up and tried by the jury.

In the case of *Edmund's Executor vs. Bruce*, 88 Va., 1007, decided April 7, 1892. A trust deed was executed to secure a debt usurious under Code 1873, Chapter 137, which by Section 9 thereof exempts borrower from paying any interest, and directs all payments to be deducted from the principal. Injunction was

awarded to prevent sale under the deed. Held: By Code 1887, Section 4204, the mode of procedure is changed to conform to Section 2822, which dispenses with a jury to try the issue of usury or no usury, but the measure of relief remains the same.

SECTION 2823.

In the case of *Spengler vs. Snapp*, 5 Leigh, 478, decided November, 1834, it was held: Though when one resorts to equity for relief against usurious debt not yet paid, he shall be required to pay only the principal advanced to him, without even legal interest; yet, where the debtor seeks in equity an account of, and decree for money already paid on usurious contract, the measure of relief is the excess paid above principal and legal interest, and if his payments exceed principal and legal interest, the surplus, with interest, shall be decreed to him.

See the case of *Mosely (Trustee) vs. Brown et als.*, 76 Va., 419, *ante*, Chapter 130.

See the case of *Turner vs. Turner*, 80 Va., 379, *ante*, Chapter 130.

SECTION 2824.

See the case of *Christian & Gunn, vs. Worsham (Treasurer)*, 78 Va., 100, *ante*, Chapter 130.

See the case of *Keagy et als. vs. Trout et als.*, 85 Va., 390, *ante*, Chapter 130.

In the case of *Ryan vs. Krise*, 89 Va., 728, decided March 16, 1893. Under Code, this Section, plaintiff, who was a judgment creditor of R. & Co., filed his bill against the defendant, making his allegations in accordance with the provisions of the said section, and praying that if more than legal interest had been received by the defendant from R. & Co., in their dealings during the five years next theretofore, the excess should be applied as far as necessary to the satisfaction of his judgment against R. & Co. Held: Such excess should be applied to satisfy plaintiff's judgment.

SECTION 2825.

See the case of *Town of Danville vs. Pace*, 25 Grat., 1, *ante*, Section 2821.

TITLE XL.

CHAPTER CXXXI.

SECTION 2830.

In the case of *Marshall's Administrators vs. Cheatham*, 88 Va., 31, decided June 18, 1891, it was held: A judgment can be set

aside or altered only in the manner prescribed by law, and by the court or officer invested with jurisdiction to do so by law. Under neither act approved March 3, 1866 (Sections 1 and 2, Chapter 171, Acts 1865-'66), nor Code 1873, Chapter 177, nor otherwise, is a commissioner who is appointed to take an account of judgment liens authorized to seal a judgment as a Confederate transaction. Act approved March 25, 1866, amending act approved March 3, 1866, so far as it authorizes the reopening of judgment rendered since passage of the former act is unconstitutional.

In the case of *Ratliffe vs. Anderson*, 31 Grat., 105, decided November 21, 1878, it was held: The act of March 25, 1873, amending Section 3 of the act of March 3, 1866, so far as it authorizes the reopening of a judgment rendered since said March 3, 1866, is unconstitutional and void, both because it is an infringement upon the powers of the judicial department of the government, and because it impairs the obligation of contracts.

CHAPTER CXXXII.

SECTION 2836.

In the case of *Beverley's Trustees vs. Smith, Stubblefield, Graham, and Dixon's Executors*, 1 Wash., 296, decided at the fall term 1794, it was held: Where the obligor, on a bond founded on a gaming consideration, induces one to accept an assignment for valuable consideration without disclosing the original consideration by promises of payment, the bond is good.

In the case of *Elliot's Executors vs. Smock*, 1 Wash., 389, decided at the fall term, 1794, it was held: Where the obligor, in a bond for a gaming consideration, induced one to accept an assignment of the bond for a valuable consideration and without revealing the nature of the original consideration and afterwards renewed the bond, he cannot plead the gaming laws in bar of the action.

In the case of *Woodson vs. Barret*, 2 H. & M., 80, decided March 10, 1808, it was held: M., having won money of W. at cards, and J. having won the same sum of M., the bond of W. given at the request of M. to J. for that sum is void by the act to prevent unlawful gaming.

The assignee of a bond for money won at gaming cannot recover though the assignment was for a valuable consideration, and though he had no notice of the origin of the bond unless the obligor before the assignment induced him to take the bond by promising to pay him the money.

In such case a judgment having been obtained against the obligor a writ of *elegit* issued against his lands. A suit brought by the assignee against the sheriff for an error committed in

executing such writ, and a judgment obtained; a court of equity will still relieve the obligor and the sheriff also on the ground of the turpitude of the original transaction.

In the case of *Carter's Executors vs. Cutting et ux.*, 5 Munf., 223, decided November, 19, 1816, it was held: An executor ought not to be allowed a credit for paying a debt of his testator, appearing on the face of the written instrument intended to secure it, to have been money won at unlawful gambling.

In the case of *Mackin vs. Moore*, 2 Grat., 257, decided July, 1845, it was held: Money lent to be bet on a presidential election cannot be recovered by suit.

In the case of *Nelson's Administrator vs. Armstrong et als.*, 5 Grat., 354, decided January 1849, it was held: On a bill filed to enjoin a judgment on the ground that the debt on which it was founded was for money won at cards, it being doubtful on the evidence whether such was the consideration; or if it was whether the plaintiff in the judgment, who was a transferee of the debt, had not been induced to take the transfer of the debt under the belief, induced by the concealment or misrepresentation of the debtor, that the consideration of said debt was good and lawful, the court should continue the injunction and direct an issue to ascertain the facts.

In the case of *White vs. Washington's Executor*, 5 Grat., 645, decided October, 1848, it was held: In an action at law on a promise founded on a gaming consideration, if the defendant is surprised at the trial, and there is a verdict and judgment against him, he may come into equity for relief, though he may make no effort to obtain a new trial in the common law court.

In the case of *Fletcher vs. Watson*, 7 Grat., 1, decided May 4, 1850, it was held: A court of equity will not lend its aid for the settlement and adjustment of the transactions of a partnership for gambling. Nor will it give relief to either party against the other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution, or reimbursements.

Though the pleadings do not show that the transactions sought to be settled and adjusted arose out of a partnership for gambling, yet if this appears from the evidence taken before the commissioner, who was directed to settle the accounts, it is proper for the court to recommit the accounts, and direct an inquiry into the consideration on which the claims of the parties are founded.

One of the partners qualifies as administrator of the other, and there is personal property belonging to the partnership which had been bought and used for the partnership purposes. The administrator cannot question the title of his intestate to his moiety of this property, on the ground that it was bought and used for gambling purposes.

The whole and not a moiety of the personal property belonging to the partnership must be sold, and the proceeds divided between the living partner and the estate of the deceased partner.

Two partners own real estate jointly. One of them dies, having made a will subjecting his whole estate to the payment of the debts, and having, subsequent to making the will, conveyed real and personal estate of his own to his sole devisee and legatee. The surviving partner qualifies as administrator with the will annexed, and then files a bill against the devisee and legatee, charging that his testator was largely indebted to him, and seeking to set aside the conveyance as without consideration, and void as to creditors, and to have his claims established. He then offers for sale his testator's undivided moiety of the real estate owned by them jointly. Held: That having by his bill invoked the jurisdiction of the court to establish the validity of his claims as creditor, and in the validity of the conveyances he thereby places his whole trust and authority under the control and direction of the court, and it was an abuse of his fiduciary relation to proceed to sell the real estate before an adjudication of the matters in controversy between himself and the devisee and legatee; and the sale was properly restrained by injunction at the suit of the devisee and legatee.

In the case of *Krake vs. Alexander*, 86 Va., 206, decided June 20, 1889, it was held: There was judgment against surety on note for money borrowed to be used as margins on grain and pork options. Surety obtained money to pay judgment, securing lender by trust-deed on land. Lender was not shown to have had any connection with or knowledge of the option. On creditors' bill to take an account of liens on surety's land. Held: The trust-deed to lender was not void as against other creditors, being based on a gambling consideration.

In the case of *Skipwith vs. Strother et als.*, 3 Rand., 214, decided February 24, 1825, it was held: A court of equity has jurisdiction to relieve against a judgment founded on a gaming debt, although the party failed to defend himself at law, and gives no good reason for such failure. *Quære*: If the defendant who won the money can, by his answer, impeach the contract so as to affect the interests of his assignee previous to putting in the answer?

In such case, if the defendant who won the money admits part of the original contract to have been on a gaming consideration, but asserts that the remainder is founded on a lawful consideration, a court of equity ought not to dissolve the injunction as to the part said to be good, and refuse to dissolve as to the rest, but should enjoin the whole, and leave the case to be regularly proceeded in as in other cases. Where it is proved

that part of a bond is on a gaming consideration, and other part on lawful consideration, a court of equity will relieve against the part which is vicious, and sustain that which is good, the obligor being plaintiff in equity.

CHAPTER CXXXIII.

SECTION 2840.

The reference to 3 Rand., 410, is an error.

In the case of *Page's Administrator vs. Williams et ux.*, 3 Munf., 59, decided December 20, 1811, it was held: A parol agreement of an executor to pay a legacy out of his own estate is not void under the act to prevent frauds and perjuries if a decree was previously obtained for the legacy to be satisfied out of certain property appointed by the testator; for part of which property the executor was accountable under the decree, and responsible *de bonis propriis*, and such agreement was made in consideration of forbearance to enforce the decree.

In the case of *Buck & Brander vs. Copland*, 2 Call, 218 (2d edition, 182), decided April 30, 1800. A. empowered C. to purchase lands for him. M. empowered B. to sell lands for him, with directions to give C. a refusal. A. informs B. that he and C. are the same person and offers two shillings, saying if M. will not take that price he will give more than any other person. B. promises C. and A. a refusal, but afterwards, without informing M. of their offers, purchases for himself. A court of equity will not decree the benefit of this transaction to A., but if the trust was proved would set aside the sale in favor of M., who ought to be made a party to the suit. In such a case, as the transactions between A., C., and B. were not in writing, B. may plead the act to prevent frauds and perjuries.

In the case of *Wagonner vs. Gray's Administrator*, 2 H. & M., 603, decided October 8, 1808, it was held: G. being indebted to S., and S. to W., if G., in consideration of his debt to S., verbally promise to pay the debt of S. to W., but W. does not thereupon discharge S., the promise is a collateral undertaking, which is void under the statute of frauds.

In the case of *Argenbright vs. Campbell and Wife* 3 H. & M., 144, decided October, 1808, it was held: A parol promise by a father to his daughter's husband before the marriage is a sufficient consideration to sustain a written agreement after marriage, if such written agreement be otherwise sufficient under the statute of frauds. So, also, if the marriage be had on the father's request.

Under circumstances, a written instrument was declared to be a good bond, with collateral condition, though the obligor's name was not signed opposite the seal, but between the

penal part and the condition, and the name of the obligee was signed at the foot of the condition, with the seal annexed, both signatures being attested by the same witnesses.

A mistake in a writing referring to another, may, in a court of equity, be corrected by the writing referred to.

A. being in treaty for the purchase of a tract of land, offered for sale by J. C., was informed by A. C. that he had a claim to it; A. C. also inserted in a newspaper an advertisement cautioning all persons against purchasing, and caused to be recorded a bond of J. C. binding himself not to revoke a will, in which he devised the land in question to the wife of A. C., which land was also shown to A. before he concluded the purchase. These circumstances were sufficient to constitute A. a purchaser with notice, notwithstanding, having seen the will, he had discovered a misrecital of it in the bond, and was advised that he might safely purchase.

Where husband and wife sue, in right of the wife, for a title to a tract of land, the conveyance should be decreed to be made to the wife only.

In the case of *Parker vs. Carter et als.*, 4 Munf., 273, decided November 21, 1814, it was held: A promise in writing, not under seal, by a son to pay a debt for his father, must be considered *nudum pactum*, unless some consideration moving from the creditor to the son, or some agreement binding the creditor to forbearance, or the like, in the event of the assumption by the son be proved.

In the case of *Cutler vs. Hinton*, 6 Rand., 509, decided June, 1828, it was held: If C. authorizes H. to say to a merchant, "that he, C., would pay for any goods sold to his son-in-law, S.," or to any merchant of whom S. "might purchase or might wish to purchase goods" that he would pay for S. a certain sum; this is a collateral promise, and being verbal, is void under the statute of frauds.

In such case if the merchant charge the goods to S., the person to whom they are delivered, such entry in his books is (like the admissions of a party) evidence against him, that he is dealing with S. and not with C., but *vice versa*, if the entry be against C., the promisor, such entry is not evidence for the merchant, so as to make that an original which would have been otherwise a collateral promise.

In the case of *Colgin vs. Henley*, 6 Leigh, 85, decided February, 1835, it was held: A promise of one person to pay the debt of another, though in writing, must be founded on consideration, to make it binding; but under the statute of frauds of Virginia the consideration need not be expressed in the written promise. It is not necessary to make such promise binding, that it should be made at the request of the person

whose debt the promisor assumes, or at the request of the creditor.

In the case of *Beers, Booth & St. John vs. Spooner*, 9 Leigh, 153, decided January, 1838. A., by contract in writing, not sealed, guarantees payment to B. of a debt due him from a third person; no consideration for the guaranty is expressed in the contract, and none is shown in proof. Held: A is not bound by such guaranty.

In the case of *Hopkins Bro. & Co. vs. Richardson*, 9 Grat., 485, decided November 15, 1852, it was held, p. 494: R. assigns the bond of G. to K. to enable K. to purchase goods on the credit of his assignment, and guarantees the payment of the bond, by the endorsement on the back thereof, signed with his name, and K. purchases goods of H. on the credit of that assignment and guarantee. This is not an undertaking for the debt of another to which the statute of frauds and perjuries will apply.

In the case of *Wright vs. Smith*, 81 Va., 777, decided April 29, 1886, it was held: When the promise to pay the debt of another arises out of some new and original consideration, it is not within the statute of frauds.

This is the case referred to as on page 783, which reference is evidently an error.

In the case of *Henderson vs. Hudson*, 1 Munf., 510, decided October 15, 1810, it was held: The statute to prevent frauds and perjuries applies to an agreement between a purchaser of land and a third person, that such third person should be admitted as a partner in the purchase, the proof of such agreement being only parol evidence of subsequent declarations and acknowledgments by the parties.

In the case of *Heth's Executor vs. Woolbridge's Executor*, 6 Rand., 605, decided December, 1828, it was held: There having been a written agreement, on the sale of land, that the purchaser shall search for coal, under the direction of the vendor for a limited period, and that if within that time coal could be found in a sufficient body to work, the purchaser shall pay an augmented price for the land, a parol agreement, varying the written agreement by extending the time within which the search may be continued (and consequently obliging the purchaser to pay the augmented price) is within the statute of frauds, and will not be enforced by a court of equity.

In the case of *Brent vs. Green*, 6 Leigh, 16, decided January, 1835, it was held: Sales at auction in general are within the statute of frauds.

In such sale made by a deputy sheriff, he is the agent both of the vendor and the purchaser, and is setting down the name of the purchaser and the price, on the schedule of the insol-

vent's effects, by which he makes the sales, is a sufficient memorandum in writing, according to the requisition of the statute of frauds; and in an action by the high sheriff against the purchaser, to recover the purchase-money of the lands so sold by the deputy, the deputy is a competent witness for the plaintiff to prove the facts.

In the case of *D. & W. Kyle vs. Roberts's Executor et als.*, 6 Leigh, 495, decided December, 1835. M., a partner of the mercantile house of K. & M., takes a lease from R. to K. & M. of a tenement for a term of five years, at a yearly rent of one thousand dollars; the lease is by deed, signed and sealed by M. in the name of K. & M., without authority from his copartners to execute any deed binding them; the tenement is used and occupied for the partnership purposes, for two years of the term, and the yearly rents are credited to the lessor on the books of the partnership; then M. dies, his surviving partners abandon the tenement; the executor and devisee of the lessor file a bill in equity against the surviving partners and the administratrix of the deceased partner, for specific execution of the agreement for the lease for the use of K. & M., which the deed executed by M. alone was intended to evidence, and for a decree against the surviving partners for the rents for the residue of the term, without alleging that the estate of M., the deceased partner, is insolvent. Held:

1. The case is properly relievable in equity.
2. Though the deed of lease, and covenants therein contained executed by M. alone, in the name of K. & M., was not obligatory on his partners, yet the agreement for the lease for the use of the partnership, of which the deed was intended as evidence, was binding on the partnership, and was not extinguished by the deed, and as the partnership took the benefit of the lease, the surviving partner shall execute the agreement, and pay the rents for the whole term.
3. It seems the deed, signed by M. in the name of K. & M., is a sufficient note in writing of the agreement for the lease to the partnership, to take the case out of the statute of frauds, as to them.
4. But no interest shall be allowed on the balance of rents in arrear.

In the case of *Smith vs. Jones*, 7 Leigh, 165, decided February, 1836, it was held: In sales at auction, the auctioneer is the agent both of vendor and vendee, and his note or entry on his account sales of the sale, the price, and the purchaser's name, is sufficient note in writing of the agreement, signed by a person thereto authorized by the purchaser, within the meaning of the statute of frauds.

In the case of *Yerby vs. Grigsby*, 9 Leigh, 387, decided

April, 1838, it was held: A person owning lands may by parol authorize another to make a contract for the sale thereof, and if a contract be made under such authority, the owner of the lands may be charged by virtue of the contract, provided there be a memorandum thereof in writing signed by the person authorized to make it.

The signing by the agent of his own name is sufficient. The statute does not make it indispensable that he should sign the name of the party to be charged therewith.

When the owner of land authorizes another to make a contract for the sale thereof, the authority of the agent to receive so much of the purchase-money as is to be paid in hand, is a necessary incident to the power to sell.

In the case of *Chapman vs. Ross*, 12 Leigh, 565, decided August, 1841. One Alexander devised land and mill-seat to Ross, on condition that he should pay Chapman two hundred and fifty dollars; Ross, apprehending that the mill-seat would be overflowed by a dam eleven feet six inches high, which Summers claimed right to build on the stream below, refused to accept the land and mill-seat devised to him, and to pay the two hundred and fifty dollars to Chapman, unless Chapman would indemnify him against injury to mills he proposed to build from the erection by Summers of such a dam below, and this being communicated to Chapman, he said Summers had no right to erect such a dam, and if Ross would accept the devise and pay the two hundred and fifty dollars, he would indemnify Ross against all injury he should sustain from the erection of such a dam by Summers; whereupon Ross accepts the devise, pays the two hundred and fifty dollars, and builds mills at the mill-seat to him devised, and then Summers builds his dam, and the water overflows Ross's mill-seat, whereby his works are of no value. In assumpsit by Ross against Chapman on the contract of indemnity. Held:

1. That the declaration setting out such a contract, shows sufficient consideration to support the promise to indemnify.
2. That the contract is not within the statute of frauds, and, though merely verbal, is valid and binding.
3. That it is not necessary to allege in the declaration notice to defendant of injury resulting from Summer's dam.
4. That to entitle Ross to recover, it is essential that he should prove that Summers had lawful right to erect the dam.

In the case of *Averett (Trustee) et als. vs. Lipscome*, 76 Va., 404.

Sale at Auction.—Parol Evidence.—In suit by vendors of land sold at public auction against purchaser to compel him to comply, *parol* evidence is admissible to prove that the written memorandum of contract signed by the auctioneer, does not contain the stipulation relied on as a condition.

In the case of *Brown vs. Brown*, 77 Va., 619, decided July 26, 1883. Where two persons jointly purchase land under parol contract, one of them cannot take a conveyance thereof to himself and thereby defeat the right of his co-purchaser, on the plea that the contract between them and their vendor was not in writing. The grantee holds the legal title in trust for the benefit of himself and his co-purchaser.

In 1863, J. B., Sr., conveyed to G. a tract of land, reserving ore bank, etc. In 1866, he sold, but did not convey to his sons, J. B., Jr., and A. B., an adjoining tract called "Furnace," and the ore bank, etc.; but by oversight did not include the ore bank, etc. These joint purchasers continue in joint possession of all this property—A. B. admitting the joint interest of J. B., Jr., until after their father's death in 1880, when A. B., having obtained a deed therefor in 1872 from their father, claimed to be the sole owner. Of this deed, J. B., Jr., had no notice till after his father's death. A. B. sold the ore bank, etc., to G., who sold the same to P., who took possession and proceeded to work on it. Held:

1. The statute of frauds does not apply to this case.
2. If it did, there was sufficient part performance to take the case out of that statute.
3. A. B. holds the legal title in trust for the benefit of himself and J. B., Jr.

In the case of *Reynolds vs. Necessary* 88 Va., 125, decided June 25, 1891, it was held: Specific performance is not a matter of right, but will be granted where the parol agreement is mutual, certain and definite, and the acts relied on are done in pursuance of the agreement, and when it has been so far executed that refusal of full execution will operate a fraud, and will place the party in a situation not lying in compensation.

In the case of *Anthony vs. Leftwitch's Representative*, 3 Rand., 238, decided March, 1825, it was held: A specific execution will not be decreed where its operation would be harsh on any person concerned. But if a specific execution is refused for any cause, the court will decree compensation to a party who may have expended his money on the property of another on the faith of such contract.

In the case of *Payne vs. Graves*, 5 Leigh, 561, decided December, 1834. A purchaser of land is put in possession, and pays part of the purchase-money under the contract, but being sued by the vendor for the balance of the purchase-money, he defends himself on the ground that the contract was void by the statute of frauds, and so defeats the action. Held: The purchaser, after thus disaffirming and abandoning the contract, is not entitled to specific execution thereof in equity, but he is entitled to have the money he paid refunded to him. It is

proper to direct an account to ascertain what is due to the purchaser for moneys paid by him in part of the purchase-money; it is proper also to direct an account of rents and profits of the land while in his possession; and if on such account it appear that there is a balance due to the defendant, it ought to be decreed to him.

In general, whenever a plaintiff's bill renders an account necessary, the account should be ordered for both parties, and both become actors, so that if a balance be found due the defendant, it ought to be decreed to him.

In the case of *McComas vs. Easley*, 21 Grat., 23, decided June, 1871, it was held: In a bill by the purchaser for the specific performance of a parol contract for the sale of land, the contract stated in the bill, must be sustained by the evidence, or the bill will be dismissed.

In such a case, where a different contract is stated in the answer, and is sustained by the evidence, the bill may be dismissed, or the court may in a proper case give to the plaintiff the election to have the contract as proved enforced or to have it rescinded. Where one contract is made for the sale and purchase of both real and personal property, and a lumping sum is to be paid for both, the whole sum is charged upon the real estate, and a conveyance of the real estate will only be decreed upon the payment of the whole amount.

If the purchaser elect to have the contract rescinded, he is to be charged with the value of the personal property which he has received, with interest and with rents and profits of the real estate of which he has been in possession, and is to be credited with so much of the purchase-money as he has paid with interest, and with the value of permanent improvements made upon the property.

In the case of *Walker vs. Herring*, 21 Grat., 678, decided January, 1872, it was held: The statute of fraud and perjuries applies to a contract between a purchaser of real estate and a third person for an interest in the property.

An auctioneer selling real estate at auction is the agent of both vendor and purchaser, and his writing at the time the name of the purchaser as such to the written terms of sale binds the purchaser.

An auctioneer conducting a sale of real estate writes the name of W. as the purchaser. His partner, who was not present at the sale, without communication with or authority from H., on the day after the sale writes the name of H. as a joint purchaser with W. The partner has no authority to write the name of H., and H. is not bound by it.

In the case of *Wright vs. Pucket*, 22 Grat., 370, decided July, 6, 1872, it was held: In a suit by the purchaser for the

specific performance of a parol agreement for the sale of land, it must appear, 1st. That the parol agreement relied on is certain and definite in its terms. 2d. The acts proved in the part performance must refer to, result from, or be made in pursuance of the agreement proved. 3d. The agreement must be so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation.

In the case of *Rhea vs. Jordon*, 28 Grat., 678, decided July, 1877, it was held: Where a tract of land was conveyed jointly to J. and R., and about the same time J. agreed to sell his moiety thereof to R. for certain price and under and in pursuance of said agreement, R. took and held exclusive and undisturbed possession of said land for about twenty-eight years, made valuable improvements thereon, and paid to J. the agreed price for his moiety. It was held that a bill filed by J. for partition must be dismissed, and that R. had acquired a full equitable title, which the court would enforce by compelling J. to make conveyance of the legal title also.

In the case of *J. W. Lester et als. vs. F. W. Lester et als.*, 28 Grat., 737, decided July, 1877, it was held: A parol contract between a father and his son, whereby the father agreed to give to the son a certain tract of land on the consideration that the son would support the father and his wife for their lives, is a valid contract, and will be enforced at the suit of the children of the son after his death against other children of the father who had fraudulently procured a deed for the land from the father with the knowledge of the said contract.

The principles on which the specific execution of a parol contract on the ground of part performance will be enforced are: When the parol agreement is specific and definite in its terms, the acts of part performance refer to, result from, or are done in pursuance of the agreement, and the agreement has been so far executed, that to refuse to complete its execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation, and in this case all these conditions exist.

In the case of *Bowman vs. Wolford*, 80 Va., 213, decided February 5, 1885. B. by parol contract sells W. an acre of woodland for thirty dollars, to be paid in three years in work, and puts him in possession. W. clears the land and puts on it a dwelling which with his family he continues to occupy, and in work paid B. the purchase-money. Held: W. is entitled to a conveyance in specific performance of the sale of the land.

In the case of *Jordan vs. Miller et als.*, 75 Va., 442, decided March 21, 1881, it was held, p. 450: A parol contract of part-

nership without any fixed time for its continuance, and the business of which may be completed within a year, is not void coming within the statute.

In the case of *Seldon vs. Rosenbaum*, 85 Va., 928, decided March, 28, 1889, it was held: This section contemplates such contracts as on their face have performance postponed beyond one year, and not such as may or may not chance to be performed within that period.

In the case of *Boyd & Swepson vs. Steinback*, 5 Munf., 305, decided January 17, 1817, it was held: A demand of slaves by the lender, who thereupon receives and immediately re-delivers them to the loanee, to be held on the same terms as before, such demand receipt and re-delivery being in private, is not sufficient to bar the rights of creditors.

In the case of *Land, etc. vs. Jeffries, etc.*, 5 Rand., 211, decided June, 1827, it was held: Where the grantor of personal property remains in possession after an absolute conveyance, such conveyance will be deemed *prima facie* fraudulent.

But such possession is not conclusive evidence of fraud, but is open to explanation.

Such a conveyance, though not recorded, is not void under the statute of frauds (even supposing it to be a deed of trust) against the creditor's of the husband, as the statute only applies to creditors of the grantor.

Parol declarations of a grantor previous to the execution of a deed, and at the very moment of executing it, are admissible to explain the intention with which it was made.

In the case of *Lightfoot vs. Strother*, 9 Leigh, 451, decided July, 1838, it was held: Under the act to prevent frauds and perjuries, a loan of goods and chattels made on parol to a person with whom, or those claiming under him, possession remains five years, without demand made and pursued by due process of law on the part of the lender, is taken to be fraudulent as to the creditors and purchasers of the person so remaining in possession.

If the property be sold before possession shall have remained five years with loanee or those claiming under him, the loan is not under the statute, taken to be fraudulent as to the purchaser.

When possession has not at the time of a sale remained five years with the loanee or those claiming under him, the purchaser can have no benefit of the statute of frauds, by reason of his own possession after the purchase. The circumstance that the possession by the loanee before the sale will together make five years, cannot avail to give a title to the purchaser.

In the case of *Miller vs. Fletcher et als.*, 27 Grat., 403, decided April 6, 1876, it was held: Parol evidence is inadmissible

to prove that a deed perfect on its face was delivered to the grantee on a condition.

In the case of *Elliot vs. Horton*, 28 Grat., 766, decided July 17, 1877, it was held: In an action for ejectment parol evidence is admissible to prove that the calls for course and distance in a deed are mistaken, and do not designate the true boundary of the land intended to be conveyed.

In the case of *Halsey vs. Peters' Executor et als.*, 79 Va., 60, decided May 1, 1884, it was held: Statute of frauds has no bearing on parol gift of lands, which are founded on meritorious consideration. If the promise reduced to writing, could, under the circumstances, be enforced, it may be enforced even when only parol.

In the case of *McCrowell vs. Burson*, 79 Va., 290, decided August 7, 1884. Defendant employs plaintiff by parol contract to furnish labor and materials to build a house, and agrees to pay him in money, merchandise, and land. Plaintiff incurs expense in preparing for the job, when defendant refuses to let him do it, and plaintiff brings his action, with a count on the special contract, and with common counts for labor done and materials furnished at defendant's request. Held: The special contract cannot be enforced, because not being in writing and signed by the defendant, and yet being intended to pass ownership of real estate it is void. But though the special contract be void, yet defendant is liable under a new implied contract for the work done and materials furnished.

In the case of *Barret vs. Forney*, 82 Va., 269 decided July 8, 1886, it was held: Though specific performance of parol contract for sale of land is not decreed *ex debito justitiæ* but in exercise of sound judicial discretion under the circumstances of the case; yet it will always be decreed where the contract is certain and definite in terms and clearly proven; when the part-performance was pursuant to the contract, and the contract has been so far performed that a refusal of full performance would operate a fraud upon the party and place him in a situation not admitting of compensation in damages. In such a case equity will not allow a statute made to prevent fraud to work a fraud.

In the case of *Bruce and Wife vs. Slemph et ux. et als.*, 82 Va., 352, decided September 16, 1886, it was held: Parol evidence is inadmissible to contradict, vary or add to a written instrument. But parol evidence is always admissible to show that a deed was not delivered on the day of its date but on a different day, and to show the real nature and character of the consideration.

A gift by the wife's father to the husband during coverture is deemed an advancement to the wife.

B. in his lifetime conveyed land to his daughter's husband by deed, reciting a valuable consideration. Parol evidence showed that the real nature and character of the consideration, and the design of the grantor, were to create an advancement for the daughter. Held: Parol evidence was admissible for this purpose.

In the case of *Griggsby vs. Osborn et als.*, 82 Va., 371, decided September 16, 1886, it was held: A court of equity will compel the conveyance of the legal title to land claimed under a parol gift accompanied by possession, where the donee, induced by the promise to give it, has made valuable improvements on it. But the gift must be definite in its terms and clearly proved.

In the case of *French vs. Williams*, 82 Va., 462, decided October 7, 1886, it was held: Parol evidence is not admissible to vary, contradict, add to or explain a written instrument; but in case of equivocal written instrument the circumstances under which they were made or facts collateral thereto, may be admitted to show the intention of the parties.

In the case of *Nicholas vs. Austin*, 82 Va., 817, decided January 27, 1887, it was held: Where parol dispensation, with performance of agreement under seal, is supported by consideration, it will be enforced in equity.

In the case of *Wolverton vs. Davis*, 85 Va., 64, decided May 24, 1888, it was held: Under this section a promise to answer for a debt, default, or misdoing of another must be in writing in order to be enforceable by action.

In the case of *Hubble vs. Cole*, 85 Va., 87, decided July 26, 1888, it was held: Only in cases of latent ambiguity will parol evidence be resorted to in aid of the interpretation of contracts, and then not to add or diminish what is written, but to explain the subject of the instrument.

In the case of *Hannor et als. vs. Hounihan et als.*, 85 Va., 429, decided September 20, 1888, it was held: This section embraces anti-nuptial contracts.

In the case of *Redd et als. vs. The Commonwealth*, 85 Va., 648, decided January 17, 1889, it was held: Where powers of attorney to execute bonds in grantors' names as sureties for a person as county treasurer are in no way ambiguous, parol evidence is not admissible to limit the power to the bond required of such persons elected by vote, and to exclude the bond required of him when, having failed to qualify in time after his election, he is appointed by the county judge to fill the vacancy.

In the case of *Skinker vs. Armstrong*, 86 Va., 1011, decided September 15, 1890, it was held: Whether or not promise to pay another's debt is in writing according to this section is matter of evidence, and need not be stated in the declaration.

In the case of *Fudge vs. Payne*, 86 Va., 303, decided September 17, 1889, it was held: It is settled law that in suits to reform written instruments on the ground of mutual mistake, parol evidence is always admissible to establish the fact of a mistake, and in what it consisted, and to show how the writing ought to be corrected in order to conform to the agreement which the parties actually made. But the mistake must be proved beyond a reasonable doubt.

In the case of *Thomas vs. Armstrong et als.*, 86 Va., 323, decided September 26, 1889, it was held: Promise to leave a support at death of promisor in consideration of services during the balance of her life to be performed by promisee. Held: Not within Code 1887, this section, clause 7, prohibiting an action upon a promise not to be performed within a year unless in writing.

In the case of *Dunsmore vs. Lyle*, 87 Va., 391, decided January 29, 1891, it was held: When valid contract for sale of land is made, equity considers buyer as owner, seller as trustee, and as to the money, *vice versa*. All applications for such relief are to court sound discretion regulated by its principles. Contract must be reasonably certain, legal, mutual, upon valuable or meritorious consideration, and distinctly proved; and applicant must have been ready, prompt and eager. Purchaser cannot be compelled to take defective title, but seller may be to convey what title he has, and compensate for defect. This remedy falls under statute of frauds, declaring void all contracts for land not written and signed by party sought to be charged. No such relief can be had unless contract is actually concluded. Where contract is embodied in formal document, executed by both parties, little difficulty can occur as to whether it has concluded or not. If doubtful whether concluded or not, the court will refuse specific performance, and leave parties to their rights at law.

In the case of *Edichal Bullion Company vs. Columbia Gold-Mining Company*, 87 Va., 641, decided April 9, 1891, it was held: Bills for specific performance of contracts for sale of land must show that there were concluded between the parties written and signed contracts that are reasonable, and clear, and definite, both as to terms and subject-matter, and mutual in obligation and remedy; and the same must be proved as alleged. In the case here, these essentials are lacking.

In the case of *Bonsack Machine Co. vs. Woodrun*, 88 Va., 512, decided December 10, 1891, it was held: In the absence of fraud or mistake, parol evidence cannot be admitted to show that an endorsement made on a sealed argreement in these words: "All matters and things embraced in the within contract have been fully adjusted and settled, and this contract is for

value received, declared, ended, and settled," and signed by the parties, was intended only to refer to money accounts between those parties, and not to include a covenant therein contained on the part of the party paying the consideration for the release not to engage in a certain business for a certain period.

In the case of *Brown vs. Pollard*, 89 Va., 696, decided March 9, 1893, it was held: At law no contract for the purchase of land is binding on the purchaser unless it is in writing, and signed by him or his agent. Where there is no written contract for the purchase of land, signed by the purchaser or his agent, the contract being void at law, he is entitled to maintain an action of detinue to recover back anything he may have paid to vendor on account of such purchase.

SECTION 2841.

In the case of *Clegg vs. Lemessurier*, 15 Grat., 108, decided April, 1859, it was held: A writing for the payment of money or other purpose, which is not required to be by deed, having a scroll at the foot thereof with the word seal written therein, but which is not recognized in the body of the instrument as a seal, is not a sealed instrument.

Evidence *aliunde* is not admissible to prove that a scroll at the foot of a writing was intended as a seal.

In the case of *Rankin vs. Roler et als.*, 8 Grat., 63, decided July 1851. An instrument binding the parties to pay a sum of money, purports to be under their hands and seals, but it is signed by the parties with but one seal to their names. Held: Upon a demurrer that one action of debt may be brought against all the parties.

In the case of *Lewis's Executor vs. Overby (Administrator)*, 28 Grat., 627, decided May, 1, 1877, it was held: A paper which in the body of it says, "As witness my hand and seal," has the word "seal" affixed to the signature of the maker. It is a sealed instrument within the meaning of the statute.

CHAPTER CXXXIV.

SECTION 2842.

In the case of *Watkins vs. Crouch & Co.*, 5 Leigh, 522, decided December, 1834, it was held: In an action against maker and endorser of a note negotiable and payable at the Farmers Bank of Virginia, it is not necessary to aver and prove the presentation of the note, and demand payment at that bank, in order to entitle plaintiffs to recover of the maker, but it is necessary in order to entitle them to recover against the endorser.

The maker of such note, before it comes to maturity, assigns all his effects for indemnity of the endorser, as to part of the contents of the note, and it does not appear that the effects assigned are adequate to such indemnity, the indorsers acceptance of this assignment does not exempt the holders from the duty of making due presentation of the note and demand payment at the place appointed, in respect to the indorser. Such note is in fact negotiated at the Bank of the United States, with the knowledge and assent of maker and endorser, and the note is presented for payment there. This is not due presentation to charge the endorser, though he consented to the negotiation of the note there, nor can any usage of the Bank of the United States dispense with due presentation at the Farmers Bank when it was made payable.

In the case of *Armistead vs. Armistead*, 10 Leigh, 512 (2d edition, 536), decided December, 1839. In debt against the makers of a promissory note (made in Virginia) negotiable and payable at the United States branch bank at Washington city, the first count of the declaration, after describing the note, averred that the same was duly presented at the bank and payment there required. At the trial there being no proof of the presentment at the bank, the circuit court instructed the jury that the plaintiff could not recover on this count. The second count of the same declaration merely set forth the note without any averment of presentment at the place, and the defendants having demurred thereto, the circuit court sustained the demurrer. Held: The circuit court erred in sustaining the demurrer, and so in its instruction to the jury. This decision does not embrace the case of a note or obligation payable, in terms on demand at a particular place, without specification of time, or payable, in terms on demand at a particular place, after the lapse of a specified time. In such cases it would probably be held that there is no default of the maker or acceptor until such demand be made, and consequently that no action would accrue to the payee until such demand should be made.

In the case of *Branch vs. Commissioners of Sinking Fund*, 80 Va., 427, decided April 9, 1885. Note payable to bearer has been delivered, stolen from the owner and comes to *bona fide* holder for value. Latter may recover on it against the maker. *Secus*, where the note has not been delivered, or if delivered has been returned to maker and stolen from him. Two coupon bonds issued by the State of Virginia, payable to bearer, are redeemed by the State, and other bonds issued in their stead, later the bonds were stolen from the State treasury, came into the hands of B., a *bona fide* holder for value, without notice of the theft, and by B. were presented to the commissioners of the sinking fund, to be funded into other bonds of the State. The

commissions refused, on the grounds that the bonds had been stolen from the State treasury. B. applied for a *mandamus*. Held: *Mandamus* denied.

SECTION 2845.

In the case of *Walker vs. Laverty & Gantley*, 6 Munf., 487, decided January 31, 1820, it was held: If the drawer of a protested bill of exchange, being applied to in behalf of the holder, for payment, acknowledges the debt to be just, and promises to pay it, saying nothing about his having received notice, the holder in an action of debt upon the bill against such drawer is not bound to prove that notice was given him of the protest.

In the case of *Pute vs. McClure, etc.*, 4 Rand., 164, decided March, 1826, it was held: When a bill of exchange returns protested, and the drawer, on payment being demanded, promises to pay, he cannot afterwards refuse to pay, on the ground that due notice was not given of the protest.

In the case of *Farmers Bank, etc. vs. Vanmeter*, 4 Rand., 553, decided November, 1826, it was held: Where a bill of exchange is presented to the drawee, who refuses to accept or pay, notice may not be given to the endorsers, if the bill was drawn and endorsed for the accommodation of the drawer, with the knowledge of the endorser, and there was no expectation that the bill would be paid by the drawee.

In the case of *Brown & Sons vs. Ferguson*, 4 Leigh, 37, decided November, 1832. Every party upon a bill of exchange, even (it seems) a party who is a mere agent for collection, endorsing the bill, though only for the purpose of collection, is entitled to one full day to give notice to the party next before him in succession. But the over-diligence of one party to a bill shall not supply the under-diligence of others; and though the drawer and endorser sought to be charged, in fact received notice as early as he would have been regularly entitled to it, yet the holder in order to charge him is bound to show due diligence in each and every party through whose hands the bill has passed; the *onus probandi*, in such case, lying on the plaintiff to prove due diligence, not on the defendant to prove negligence.

A bill of exchange is drawn by a creditor on his debtor payable sixty days after date; the drawee being advised thereof, before acceptance, writes to the drawer that he will be unable to pay the bill at its maturity, whereupon the drawer, by letter to the drawee, authorizes him, when the bill approaches maturity, to redraw on himself, in order to raise funds to honor the bill; the drawee redraws accordingly, and then the drawer refuses to accept his bill, but no credit is given by the holder or any other person to the drawee, on the faith of the drawer's

authority to him so to redraw. Held: The drawer has not, by this authority to the drawee to redraw, waived notice of dishonor of his own bill, nor do the facts constitute any excuse for neglect to give such notice, nor is there any *assumpsit* to the holder, but only a promise to the drawee, which being without consideration is not binding.

In the case of *Nelson vs. Fotterall*, 7 Leigh, 179, decided February, 1836. In *assumpsit* by endorsee against drawers, on a foreign bill of exchange drawn by merchants in Virginia on a merchant in Liverpool, it appears that the bill was presented to drawee at Liverpool and acceptance refused on 27th March, and that the bill was put into a notary's hands for the purpose of protest on the 28th. Held: It was properly left to jury to decide upon the evidence whether the refusal of the drawee to accept was within or after business hours of the 27th; so that the bill could be put into the notary's hands on that day, or not until the next day.

In the case of *May vs. Boisseau*; 8 Leigh, 164, decided March, 1837. A negotiable note is endorsed by the defendant first, and by the plaintiff after him, and discounted at bank for the accommodation of the maker. At its maturity a like note, made and endorsed as before, for the purpose of continuing the accommodation, is offered for discount at the same bank, and by the board of directors is ordered to be discounted, but the maker having made no provision to pay the discount, the proceeds are not carried to the credit of the maker. The first note is thereupon protested for non-payment, and notice is given the second endorser, but there is a failure to give due notice to the first endorser. The second note, though it remains in bank, is treated as though it had never been discounted; it is never protested, nor is any notice of its non-payment given to any of the parties to it. Held: Upon these facts, that no satisfactory excuse is shown for the omission to give notice to the first endorser, and he is discharged.

SECTION 2848.

In the case of *Brown vs. Bank of Abingdon*, 85 Va., 95, decided July 26, 1888, it was held: When he that has to give and he that is chargeable with notice, reside within the same postoffice delivery, the general rule is that notice must be delivered to the latter, or left at his residence or place of business.

In the absence of a usage of the bank known to endorser at the time of endorsement, to send through the postoffice notices to endorsers living outside the town, but in the vicinity; post-offices are not places to deposit notices to endorsers except when the same are to be transmitted by mail to another post-office.

In the case of *Corbin vs. National Bank*, 87 Va., 661, decided April 16, 1891, it was held: Inlaid bills payable outside this State and promisory notes are not protested under this Section, and the notary's certificate is not evidence of their dishonor.

SECTION 2849.

In the case of *The Freeman's Bank vs. Ruckman*, 16 Grat., 126, decided September 4, 1860, it was held: A note made in Massachusetts, payable at either of the banking-houses at Wheeling, Virginia, is to have its character determined by the law of Virginia, and is not a negotiable note. The declaration avers that the payee of a note endorsed and delivered it to the plaintiff, the note not being negotiable but assignable, this is a sufficient averment of its assignment. The declaration averring that the note sued on was made in Boston, and on the same day and year was endorsed and delivered to the plaintiff, a banking corporation, under the laws of Massachusetts, upon demurrer, the court will consider the assignment made in Massachusetts, where it might legally be made.

In the case of *McVeigh vs. Bank of the Old Dominion*, 26 Grat., 785, decided November 18, 1875, it was held: A note made in June, 1861, by a person resident within the Confederate lines, and discounted by a bank within the Union lines, is illegal and void, unless it was given in renewal of a note made before the war, and by an agent acting under authority conferred before the war.

In the case of *Slaughter's vs. Farland's Executor*, 31 Grat., 134, decided November 28, 1878, it was held: The certificate of the notary that he gave notice of protest of note for non-payment sent by mail to the place of residence of endorser, whilst there was a mail communication between the place of starting and the residence, though not by the direct route. Held: To be sufficient evidence of notice.

In the case of *Brown vs. Hull*, 33 Grat., 23, decided March, 1880. B., the payee of a negotiable note of N., payable at the E. bank, endorsed his name on it and put it in the bank for collection. It was not paid at maturity, and B. withdrew the note, and after holding it for some years, and after the E. bank had failed to exist, he transferred it to H., writing over it the words, "protest waived." H. failing to obtain payment of the note from N., brought his action against B. to hold him responsible upon his endorsement of the note. Held: When B. put his name on the back of the note it was only for its collection, and he was still the owner of it; and when he transferred the note to H., his endorsement must be considered as of that date.

The endorsement of an over-due note does not relate back to

the date of the note; but as a new and independent contract only takes effect from the time it is made, and must be determined by the laws and circumstances then existing.

The E. bank having failed to exist when B. transferred the note to H., it was not at the time of the transfer a negotiable note payable at a bank, and under the statute. B. was not responsible as endorser of the note, but only as assignor or guarantor. As assignee of the note, H., was not under any obligation to make demand upon the maker, and give notice of non-payment to B., but he was bound to exercise due diligence in suing the maker and obtaining judgment and execution against him, as a condition precedent to his recourse against B., unless the maker was notoriously insolvent; and B. had the right to show that H. had not used due diligence, and that the maker was not notoriously insolvent; and he had a right to show that at the time of the transfer of the note of H., the E. bank had ceased to exist.

SECTION 2850.

In the case of *Nelson vs. Fotteral*, 7 Leigh, 179, decided February, 1836, it was held: A protest of a foreign bill of exchange, in a foreign country, is proved by the notarial seal; but the protest is only *prima facie*, not conclusive evidence of the dishonor of the bill.

In the case of *Walker vs. Turner*, 2 Grat., 534, decided January, 1846, it was held: The affidavit of a notary made under the statute is only evidence of the truth of the facts stated in the protest. If the protest does not state that notice of dishonor of the note was given to the endorser, the affidavit of the notary stating that the notice was given, is not competent testimony.

In the case of *Stainback vs. The Bank of Virginia*, 11 Grat., 260, decided April, 1854. The notarial protest of a foreign bill of exchange states that the notary took the bill to the counting-house of the drawee, and there exhibited it to the clerk of the drawee, and demanded acceptance thereof, and that the said clerk replied that the same could not be accepted. Held: That the protest is sufficient to bind the endorser.

In the case of *Bayly (Administrator) vs. Chubb*, 16 Grat., 284, decided March 5, 1862, it was held: Notice of protest of a negotiable note is left at the dwelling-house of a member of Congress in Washington, after the adjournment of Congress, and after he has left the city; and it appears that he kept up his domicile in the district which he represented, and it was his habit to leave Washington directly Congress adjourned. The proof of notice is not sufficient.

The reference to 31 Grat., 134, is to the case cited *supra*, Section 2849.

In the case of *Corbin vs. National Bank*, 87 Va., 661, decided April 16, 1891, it was held: Inlaid bills payable outside this State and promissory notes are not protestable under this section, and the notarial certificate is not evidence of their dishonor.

SECTION 2852.

In the case of *Crawford vs. Daigh*, 2 Va. Cases, 521, decided by the General Court, it was held: An action of debt may be maintained on a note in writing for the payment of money or tobacco, and the declaration need not set out the consideration for which it was made, nor aver that it was for value received.

In the case of *Peasley vs. Boatwright*, 2 Leigh, 195, decided June, 1830. Debt on an instrument, which is in its form a promissory note for money, concluding "witness the hands" of the parties; but scrolls by way of seals are set to their signatures; this instrument is rightly described in the declaration as a promissory note.

In debt on promissory note, held: Plaintiff need not aver in declaration, or prove consideration, though defendant may go into evidence touching consideration.

The reference to 8 Leigh, 150, is an error.

In the case of *Beirne, etc., vs. Dunlap*, 8 Leigh, 514, decided July, 1837. By a writing obligatory, the obligors promise on or before a specified day, to pay the obligee \$813.79 in notes of the United States Bank, or either of the Virginia banks, and debt is brought on this writing. Held: The action cannot be maintained.

In the case of *Jackson vs. Jackson*, 10 Leigh, 448 (2d edition, 467), decided July, 1839. Whether in Virginia *assumpsit* can be maintained on a promissory note, without averring a consideration in the declaration. Per Tucker, P., and Parker, J., the action cannot be maintained.

In the case of *Butcher vs. Carlisle*, 12 Grat., 520, decided September 4, 1855. By a bond dated the 27th of March, 1840, the obligor bound himself to pay to the obligee or order, on or before the 25th of March, 1842, a certain sum of money, with interest "which sum may be discharged in notes or bonds due on good, solvent men residing in the county of R." This is a bond for the payment of money for which debt will lie, and it is not necessary to notice the provision as to the mode of payment in the declaration.

In the case of *Averett's Administrator vs. Booker*, 15 Grat., 163, decided April, 1859, it was held: The following is not a bill of exchange, nor does it import a valuable consideration, or

a promise by the drawer to the payee to pay if the money is not paid by the drawee:

LYNCHBURG, VA., *December 8, 1852.*

\$1,080.59.

The trustee of N. and A. will pay to B. the sum of one thousand and eighty dollars and fifty-nine cents, with interest from 15th March, 1850, out of money in his hands belonging to me.

W. B. A.

In the case of *Minnick vs. Williams*, 77 Va., 758, decided October 4, 1883. Obligor, by writing obligatory dated October 4, 1869, binds himself to pay obligee in monthly instalments, to commence from that day, three hundred and fifty dollars in either goods at regular prices or in current money, and at the times the amounts are payable, neither delivers the goods at regular prices, nor pays the money. Held: There is an obligation to pay money, with the privilege to the obligor to discharge the money obligation by the delivery of the goods at regular prices in equal amount on or before the time of payment, and the obligor failing within that time either to pay the money or to deliver the goods, is liable to an action of debt thereon.

SECTION 2853.

In the case of *Smith vs. Segar*, 3 H. & M., 394, decided March 22, 1809, it was held: An action of debt will not lie against the acceptor of a bill of exchange.

In the case of *Wilson vs. Crowdhill*, 2 Munf., 302, decided May 29, 1811, it was held: An action of debt will not lie against the acceptor of a bill of exchange.

In the case of *Taylor vs. Beck*, 3 Rand., 316, decided March 18, 1825. *Quære*: Must an action of debt, under the act of Assembly, be brought against all the parties to a negotiable paper, or may it be maintained against any intermediate number?

In the case of *Hollingsworth vs. Milton*, 8 Leigh, 50, decided February, 1837, it was held: An action of debt will lie for the payee against the acceptor of an order.

In the case of *Hays vs. The Northwestern Bank of Virginia*, 9 Grat., 127, decided August 2, 1852, it was held: A note for a sum certain, payable to order, and negotiable and payable at a bank out of the State of Virginia, is a note negotiable at a bank in Virginia, and therefore, is placed on the same footing as foreign bills of exchange, with the like remedy for recovery thereof against the maker and endorsers jointly, and with the like effect except as to damages.

In such case demand and notice of protest for non-payment is not necessary to subject the maker of the note.

In the case of *Archer vs. Ward*, 9 Grat., 622, decided February 21, 1853, it was held: In an action upon a protested nego-

liable note against the makers and endorsers, the accidental omission of the sum for which the note was given in the description of it in the declaration, when it appears from the other parts of the declaration, is not ground for a demurrer.

SECTION 2854.

In the case of *Turnbull (Executor), etc. vs. Claibornes*, 3 Leigh, 392, decided December, 1831. Robertson, executor of Cole, recovers judgment against Claiborne, and sues out execution thereon. Before the execution is delivered to the sheriff, Robertson dies, the execution being then delivered to the sheriff, he levies it on property of defendant, and takes a forthcoming bond payable to Robertson, executor of Cole. Held: The execution was properly levied, though Robertson was dead before it was delivered, and the forthcoming bond was rightly taken to Robertson, as executor, and was good.

SECTION 2855.

In the case of *Minge's Executor vs. Field's Executor*, 2 Wash., 175 (1st edition, p. 136), decided at October term, 1795, it was held: If a bond be made jointly, without fraud or mistake, equity will not charge the executor of the surety who was discharged at law by his death in the lifetime of the principal. Otherwise, if the lending had been to both.

In the case of *Richardson vs. Johnson*, 2 Call, 528 (2d edition, 445), decided April 20, 1801, it was held: On a joint bond anterior to the act of 1786, the death of one obligor before that act discharged his executors.

In the case of *Elliot's Executors vs. Lyell*, 3 Call, 268 (2d edition, 234), decided October 23, 1802, it was held: Where a joint bond was given before the act of 1786, and after that act went into operation, one of the obligors died, leaving the other; the obligation survived, and the executors of the deceased were exonerated.

In the case of *Watkin's Executors vs. Tate*, 3 Call, 521 (2d edition, 451), decided June 28, 1790, it was held: A joint action survived before the act of 1786.

The executors of two deceased obligors cannot be joined in the same action.

In the case of *Chandler's Executor vs. Neal's Executor*, 2 H. & M., 124, decided March 17, 1808, it was held: The surviving obligor in a joint note made before the act of 1786, is alone liable to an action at law. Nor can the note be set up in equity against the representatives of the deceased obligor, but on the ground of moral obligation antecedently existing on his part to pay the money.

In the case of *Roane's Administrators vs. Drummond's Administrators*, 6 Rand., 182, decided March, 1828, it was held: When

a joint judgment is obtained against two defendants, and one dies, an action of debt on the judgment lies against the representative of the deceased defendant, the statute being applicable to joint judgments.

In the case of *Sale vs. Dishman's Executors*, 3 Leigh, 548, decided March, 1832, it was held: Though a bond or covenant executed by one partner of a mercantile house, in the name of of the firm, for a debt of the partnership, is not binding on his co-partner who did not seal the instrument, yet the debt being originally a debt of the concern, both parties are liable for it to the creditor. And though the surviving partner of a mercantile house is alone liable at law to the creditors of the house, yet if the surviving partner prove insolvent, the estate of the deceased partner is liable in equity for the debts of the partnership.

In the case of *Galt's Executors vs. Calland's Executor*, 7 Leigh, 594, decided December, 1836. A sum of money is lent to a firm and the firm is charged with it on the partnership books, but the partner with which the transaction occurs executes by mistake a penal obligation, in the name of the firm, under the seal, instead of giving merely a promissory note. One of the partners dying, those who survived him, and the executors of the decedent, convey all the effects belonging and debts due to the firm, in trust to pay the debts due from the firm; then the creditor who lends the money files a bill in equity against the surviving partners, the executors of the decedent, and the trustee. Held:

1. That although at law there would be no remedy on the sealed obligation except against the partner who executed it, yet equity has jurisdiction to correct the mistake, and hold all the partners as much bound as if there were no seal.

2. That, regarding the debt as a simple contract debt of the firm, the estate of the deceased partner cannot be charged until the insolvency of the surviving partners and the deficiency of the trust-subject are first established.

In the case of *Jackson vs. King's Representatives*, 8 Leigh, 689, decided August, 1837. The creditor of a firm obtains judgment against the surviving partner who dies, and whose administrators exhaust the personal assets in paying other claims. Then the creditor files a bill in equity against those administrators and the heirs of the surviving partner, and the representatives of the deceased partner. The bill seeks a bill for the sale of lands of which the surviving partner died possessed, some of which belonged to himself and some to the firm; and when the funds from this source shall be exhausted, then it seeks to charge the representatives of the deceased partner. Held: Equity has jurisdiction of the case; and the representatives of the deceased partner are properly made defendants.

In the case of *Richardson's Executor vs. Jones*, 12 Grat., 53, decided January 29, 1855, it was held: In an action of debt against two, one dies, and the suit is revived against his administratrix; and then she and the other defendant give separate confessions of judgments, and a separate judgment is entered against each. This is not error.

In the case of *Brown's Administrator vs. Johnson*, 13 Grat., 644, decided February 4, 1857, it was held: The statute in relation to joint obligations, though it gives an action against the personal representative of a deceased joint obligor, does not affect the principle that the defeat of the remedy against one joint obligor upon a ground not personal to himself defeats it as to all the obligors.

There are two actions pending by the same plaintiff against obligors in the same bond; a deposition taken by the defendant in one of the cases can, under no circumstances, be competent evidence for the defendant in the others.

A covenant by the obligee in a bond with one of three joint obligors, that if after judgment against all the parties the money is not paid by the other two, he will relieve him from the payment of it is not a release, and will not bar an action on the bond against all the obligors.

In the case of *Ashby's Administrators vs. Porter*, 26 Grat., 455, decided September 16, 1875, it was held, p. 465. Though a member of a firm be dead, and he is largely indebted individually as well as a partner, his real estate is equally liable for his partnership debt as for his individual debts.

In the case *Robinson vs. Allen*, 85 Va., 721, decided February 7, 1889, it was held: Where deceased partner's separate assets are insufficient to pay all his debts, those due by him in a fiduciary capacity are to be paid first.

SECTION 2856.

In the case of *Yuille's Administrator vs. Wimbish (Administrator)*, 77 Va., 308, decided March 22, 1883, it was held: Sections 2856, 2857, and 2858 do not impair the obligation of contracts existing at the date of its passage, and is not unconstitutional as to such contracts.

In the case of *Penn vs. Bahnson*, 89 Va., 253, decided July 6, 1892, it was held: Under Code, Sections 2856, 2857, 2859, a creditor who has compromised with several joint obligors, and received his full share of the obligation, may sue the other obligors without making the released obligor a party.

SECTION 2858.

In the case of *Lee vs. Harlow (Treasurer) etc.*, 75 Va., 22, pp. 25 and 34, decided November 14, 1880. L., holding coupon

bonds issued under the act of March, 1871, after the passage of the acts of March 7 and March 9, 1872, received from the auditor of the State two-thirds of the interest due thereon, which payment was stamped upon the coupons. In 1880 he offered to the collector of the State taxes the said coupons for the one-third unpaid thereon, in payment of taxes due from him to the State. Held: L. is entitled to pay his taxes due the State in the unpaid one-third of said coupons.

In the case of *Smith et als. vs. Phillips*, 77 Va., 548, decided May 10, 1883. In 1849 P. conveyed his real and personal estate in trust to secure to S. a debt, and in 1865 P., then insolvent, conveyed to S. by deed, absolute on its face, said estate in consideration of said debt and another debt of five thousand six hundred and sixty-eight dollars, and thenceforward leased the property. S. died intestate in 1878. Then his representatives recovered the real estate by unlawful detainer. P. got an injunction on averment, that in 1875 intestate contracted that he would reconvey if P. paid in twelve years twelve hundred dollars, that thereof P. paid S. six hundred dollars, and retained possession in accordance with the contract, and that he was ready to pay the balance, and prayed for specific performance. Defendants demurred and answered. Held:

1. Agreement to accept a part of a debt for the whole is *nudum pactum*, and not enforceable in equity.

2. Promise to pay subsisting debt, or even its actual payment, is not a consideration upon which a court of equity can decree specific performance of an agreement for the conveyance of real estate.

In the case of *Seymore vs. Goodrich*, 80 Va., 303, decided March 12, 1885. M. S. and others of the firm of A. C. & Co., owed two thousand dollars to G. W. agreed to pay, and paid G. four hundred dollars on G.'s promise to release M. & S. from the debt. Held: The agreement was binding on G., and M. and S. were released.

The reference to 9 Va. Law Journal, 264 *et seq.*, is a reference to an anonymous article utterly unavailable as an authority before court.

In the case of *Smith & Wimsat vs. Chilton*, 84 Va., 840, decided May 3, 1888, it was held: Creditor agrees to accept less than amount due from his debtors in satisfaction of his debt. He then assigns the entire debt. Of his assignment debtors have notice, they permit the decree to be entered against them for the entire debt. Held: The debtors are estopped from falling back on the compromise and release.

SECTION 2860.

In the case of *Mackie's Executor vs. Davis*, 2 Wash., 219, de-

cided October, 1896, it was held, p. 223: The assignor of a note is liable to the assignee, who, after having used due diligence to recover the money from the obligor has failed to do so.

In the case of *Picket vs. Morris*, 2 Wash., 255, decided, October, 1796, it was held: J. being indebted to M., afterwards obtains, by assignment, the bond of M. to an equal amount. He offers a discount which M. declines, supposing he had an equitable objection to the payment of his bond in the possession of S. S. assigns over that bond to P. for valuable consideration, and without notice; under all the circumstances of the case the conduct of M. was not a waiver of his right to discount, and he was at liberty to offset the bond of S. against his bond assigned to P.

In the case of *Minnis vs. Pollard*, 1 Call., 226 (2d edition, 197), decided May 5, 1798. A. acknowledged in a letter to B. that he owes money to C., and C. assigned the paper to D. Held: It is probable no action can be maintained on it by D. in his own name. He must bring suit in the name of C.

In the case of *Craig vs. Craig*, 1 Call., 483 (2d edition, 419), decided April 11, 1799, it was held: A bond with a collateral condition was not assignable before the act of December, 1795, and, therefore, the assignee of such a bond could not maintain an action upon it.

In the case of *Lee vs. Love & Co.*, 1 Call., 497 (2d edition, 432), decided May 13, 1799, it was held: The assignee of a note of hand must sue the maker before he can resort to the assignor.

In the case of *Barksdale vs. Fenwick*, 4 Call, 492, decided October, 1803, it was held: There is no difference with respect to the liability of the assignor of a bond, whether the assignment was for a past or a present consideration.

If the assignment was for tobacco sold, but states that it was for value received, and the declaration against the assignor pursues the assignment, it is sufficient.

It is not necessary to state in the declaration against the assignor that the obligor was insolvent, but it is enough to set forth the return of *nulla bona*, as that is *prima facie* evidence of the inability of the obligor to pay.

The four judges were all of opinion that what was due diligence on the part of the assignee of a bond depended upon circumstances. But two of them held that a speedy suit was indispensable, and two that the situation of the debtors affairs might make it proper to postpone the suit and endeavor to obtain payment by negotiation.

In the case of *Dunlop vs. Harris*, 5 Call, 16, decided April, 1804, it was held: The last assignee of a promissory note can-

not maintain an action against a remote endorser, there being neither consideration or priority between them.

In the case of *Hooe vs. Wilson*, 5 Call, 61, decided April, 1804, it was held: If there be two endorsers of a promissory note, and the last endorsee strikes out the second endorsement, and fills up the first to himself, he cannot upon *nulla bona* returned to an execution against the maker charge the first endorser, because there is no priority between them.

In the case of *Bronough vs. Scott*, 5 Call, 78, decided April, 1804, it was held: It is not sufficient for the assignee of a promissory note to bring a suit against the maker, which fails on account of informality in the proceedings; but he must bring a sufficient suit before he can charge the assignor.

In the case of *Goodal vs. Stuart*, 2 H. & M., 105, decided March 15, 1808. A bond was assigned in these words: For value received, I assign the within bonds to A. S., and make myself responsible for the payment thereof should B., the obligor, who resides in G., prove insolvent. Held: This special assignment does not vary the nature of the undertaking, nor affect the assignor's liability, as, without an express stipulation to the contrary, he would have been so liable by the mere operation of the law.

In general, the return of the sheriff of "no effects" on an execution in favor of an assignee of a bond against the obligor is sufficient to charge the assignor, so that in an action against him no proof that the obligor was not insolvent can be admitted.

In the case of *Stubbs vs. Burwell*, 2 H. & M., 536, decided May, 1808, it was held: A bond may be assigned in general terms with a verbal agreement that the assignor shall not be responsible, and thereupon he will not be responsible, even to a subsequent assignee having no notice of such agreement.

In the case of *Mayo vs. Giles's Administrators*, 1 Munf., 533, decided March 29, 1810, it was held: Although the assignee of a bond with or without notice takes it subject to all the equity of the obligor, yet such equity must be clearly and manifestly established by proof before it shall affect an assignee without notice; especially if the obligor, after the assignment, promise payment of the full amount of the bond to the assignee.

In the case of *Stockton vs. Cook*, 3 Munf., 68, decided January 15, 1815, it was held: A purchaser of land warranted by the vendor to be free from all encumbrances is not precluded from relief in equity, against his bond for the purchase-money, by the circumstance that before he made his purchase he was fully appraised of the encumbrance. The assignee of the bond is not in a better situation than the assignor.

In the case of *Ritchie & Wales vs. Moore*, 5 Munf., 388, de-

cided February 4, 1817, it was held: In an action by the assignee against the maker of a promissory note, the defendant cannot set off a bill of exchange for which the assignor is responsible, unless it appear that such bill was his property before he received notice of the assignment.

In the case of *Harrison's Administrators vs. Raines' Administratrix*, 5 Munf., 456, decided March 5, 1818, it was held: The assignee of a bond may recover of the assignor, after suing the obligor and obtaining a judgment and execution with a return of *nulla bona*, notwithstanding his attorney directed that appearance bail be not required of the obligor.

In the case of *McClung vs. Arbuckle*, 6 Munf., 315, decided March 11, 1819, it was held: The assignee of a bond cannot recover against the assignor upon a declaration stating that the plaintiff brought suit and obtained a judgment which was enjoined upon a bill claiming equitable discounts on account of certain dealings and transactions between the obligor and the assignor before the assignment, and that the plaintiff was thereby entirely debarred from collecting the debt, without stating that the injunction was made perpetual, or what proceedings took place thereon.

In the case of *Brown vs. Ross*, 6 Munf., 391, decided April 22, 1819, it was held: It is generally necessary for the assignee of a promissory note to sue the drawer in order to charge the endorser, but to this rule there are exceptions, where the plaintiff can show a discharge of the drawer under the former bankrupt laws of the United States, or the insolvent law of this State, or that the drawer was actually insolvent, so that a suit would have been wholly unavailing.

In the case of *Johnston vs. Hackley*, 6 Munf., 448, decided December 4, 1819, it was held: In a suit by the assignee against the assignor of a bond, if it appear that, after judgment against the obligor, a *feri facias* was returned *nulla bona*, and that afterwards the assignee sued out a *capias ad satisfaciendum*, upon which the return was "executed on the body of the defendant, who stands committed to the prison bounds, as per bond," etc., the plaintiff cannot recover, but must be considered as having brought this action prematurely, because, for aught that appears in the record, the obligor is still in custody under the *ca. sa.*, or may have paid the debt.

In the case of *Garland vs. Richeson*, 4 Rand., 266, decided May, 1826, it was held: The assignee of a bond, under our statute, does not acquire the legal title to the debt, but an equitable right, which, by virtue of the statute, he may assert at law in his own name, and he has his election to sue at law, in his own name, or in that of the original obligee, for his benefit.

In the case of *Caton & Veale vs. Lenox, etc.*, 5 Rand., 31, decided March, 1827, it was held: Where a note not negotiable is endorsed by several persons in succession, the last assignee could only sue the maker and his immediate assignor, and not a remote assignor, before the act of assembly of 1807. In general, due diligence must be used by the assignee in bringing suit against the maker before the assignor can be sued; but there are many cases in which no suit need be brought against the maker, as where the note was a forgery, and the assignor has received the money from the assignee, or where the assignor practices a fraud upon the assignee, or where exchange notes were given between the maker and assignor, as a consideration for each other, and the note given by the assignor has never been paid by him, nor sued upon, etc.

In the case of *Coiner vs. Hansbarger*, 4 Leigh, 452, decided April, 1833. C. assigns to H. a bond of W., payable on demand. If the obligor is insolvent at the time of the assignment, it is not necessary that the assignee should bring suit on the bond against him in order to entitle himself to recourse against the assignor. In such case the assignor is immediately liable to the assignee upon the contract of the assignment.

A bond, payable on demand, is assigned by the holder to a third person. The obligor is insolvent at the time of the assignment, and so continues; the assignee forbears to bring suit against the obligor, and makes an arrangement with him whereby he agrees to receive payment at a future day; the assignor, being informed of the fact, though ignorant of the legal effect thereof to discharge him from liability, sanctions the arrangement, and promises payment of the debt to the assignee. Held: The assignee is bound by such promise to pay.

In the case of *Smith & Rickard vs. Triplett & Neal*, 4 Leigh, 590, decided November, 1833. Upon a bond assigned for valuable consideration, the assignee brings suit against the obligor, recovers judgment, and sues out a *fi. fa.*, which is levied, and a forthcoming bond taken, and that being returned forfeited, execution is awarded thereon against principal and surety, and a *fi. fa.* is sued out on the forthcoming bond; and on this execution the sheriff returns *nulla bona* as to the surety, but not as to the principal in the forthcoming bond, and gives plaintiff leave to amend his declaration, and to count on the amended return. Held: It was right to permit the sheriff to so amend his return, and to permit the plaintiffs to so amend their declaration. In the action between the assignees and assignors, the sheriff's return of *nulla bona* on the execution against the obligors in the forthcoming bond, though amended after the assignee's action and five years after the return, so as to show the insolvency of both, is conclusive evidence of such insolvency. In

such case the insolvency of the debtors might be proved by other evidence, but the assignees have a right to the conclusive evidence of the sheriff's return.

It seems the deputy sheriff, in whose hands the execution on the forthcoming bond was placed, is a competent witness to prove the insolvency of the obligors.

In the case of *Green vs. Ashby*, 6 Leigh, 135, decided February, 1835. A., claiming the benefit of a judgment of R. against T., as being transferred to him by R. for payment of a debt due by R. to him, brings *assumpsit* against R.'s attorney for the money collected by him on judgment; and produces in proof of his claim a written paper signed by R., authorizing A. to prosecute and recover the amount of R.'s claim against T. Held: This imports a mere authority to A. to collect the debt for R.; not an assignment or transfer thereof to A.

In the case of *Mays vs. Callison*, 6 Leigh, 230, decided April, 1835, it was held: A., holding a bond executed by B. to C., contracts to transfer this bond to D. for valuable consideration, and to procure C.'s assignment thereof to D., without any responsibility of or recourse against A. whatever; C., at A.'s instance, accordingly assigns the bond to D., who assigns it to another, who brings a suit against the obligors on the bond, in which it appears that the bond had been discharged by payment before it was assigned to D., upon which D. pays the amount to his assignee; C., who had made the assignment of the bond at A.'s instance to D., becomes insolvent. In an action by D. against A. to recover the amount of him, it seems the contract that the bond should be assigned by C. to D. without recourse against A. did not exonerate A. from liability to D. in the case, which actually occurred, of the bond being paid off and discharged at the time of the contract. The meaning and effect of the contract was properly left to the decision of the jury by the court.

In the case of *Drane vs. Scholfield*, 6 Leigh, 386, decided April, 1835, it was held: In an action by an assignee against an assignor of a promissory note, plaintiff, to maintain his action, must show that the maker was insolvent at the time the note was made or the contents fell due, or that he has used due diligence to recover from the maker, and failed.

In an action by an assignee against a remote assignor of a bond or note, under the statute, the plaintiff may recover under the general counts for money had and received, and for money paid, laid out and expended.

In the case of *Brooks vs. Hatch*, 6 Leigh, 534, decided July 1835. M. holding certain salt wells, etc., in fee, contracts to manufacture and deliver to D. A. & Co. a certain quantity of salt yearly for three years, at certain stipulated prices. To se-

cure fulfilment of the contract on his part, M. makes a lease of his salt wells, etc., to D. A. & Co. for a term of three years, and it is covenanted that until default of performance of the contract, M. and his heirs shall remain in possession of the premises. Before any salt is delivered by M. to D. A. & Co. under the contract, M., owing a debt to B., draws an order on D. A. & Co., requiring them to pay this debt to B. out of the first moneys to become due from them to him for salt to be delivered under the contract, and soon after dies. The order is never presented to D. A. & Co.; administration of A.'s estate is taken by H., and H., though not one of M.'s heirs, takes charge of the salt wells, etc., manufactures and delivers to D. A. & Co. the quantity of salt stipulated by M.'s contract, and receives of the proceeds thereof more than enough to pay the debt due to B., for which M.'s order on D. A. & Co. was drawn. Held:

1. M.'s order on D. A. & Co., in favor of B., was an equitable assignment to B. *pro tanto* of these funds of M., which afterwards should be in the hands of D. A. & Co.; but,

2. B. cannot recover the amount from H. in an action of *assumpsit* for money had and received by him to B.'s use; for H. did not receive the proceeds of the salt delivered to D. A. & Co., as administrator of M., but only as agent or bailiff for M.'s heirs, who are therefore the debtors responsible to B. on M.'s order in his favor; and

3. B.'s only remedy is a suit in equity against M.'s heirs, to enforce the payment of the debt due him out of the proceeds of the salt, which are profits of real estate descended, and belong to the heirs.

In the case of *Wood's Administrators vs. Duval*, 9 Leigh, 6, decided November, 1837, it was held: A written assignment of a claim does not necessarily import a valuable consideration, and if it be fairly inferable from the circumstances that the assignment was a gift, the assignor cannot be held responsible to make good the claim to the immediate assignee, or to his assignees for value.

A., having a claim for debt in suit, assigns that claim to B. for a valuable consideration, and writes a letter to his attorney entrusted to prosecute and collect the claim, informing him of the assignment, and requiring him to pay the money when collected to the assignee; the attorney accepts the order payable when collected; he afterwards collects the money, fails to pay it over to the assignee, and becomes insolvent. Held: The assignor and drawer are not liable to the assignee, unless he has used due diligence to recover the money from the acceptor of the order, and given the assignor and drawer notice of the acceptor's failure to pay.

In the case of *Scates vs. Wilson & Edmunds*, 9 Leigh, 473,

decided July, 1838. A suit by an assignee of a bond against the obligor, being referred to arbitration, the arbitrators find the debt to have been discharged by payments and set-offs against the assignor, and make an award in favor of the obligor, upon which judgment is entered; whereupon an action is brought by the assignee against the assignor. Held: That though the assignor is at liberty to controvert the facts found by the award, and show that the judgment is erroneous, yet, until the contrary be shown, the judgment is presumed to be right, and is therefore sufficient to establish the liability of the assignor, and support an *assumpsit* founded on such liability.

Upon a plea by the assignor that the action against him did not accrue within five years, it is found that though the debt originally due from the obligor has been discharged by payments to and set-offs against the assignor, yet the assignee did not know until after judgment in his suit against the obligor that nothing was due, and it is also found that five years have not elapsed since the judgment. Held: That as part of the debt was discharged by a set-off, it was only the judgment which established the set-off as payment, and until that judgment was rendered, the action did not accrue against the assignor.

In the case of *McLaughlin vs. Duffield*, 5 Grat., 133, decided July, 1848. D. the holder of a bond assigns it to H. by the following endorsement thereon, "I assign the within bond to H., and agree not to take any legal advantage of said H. in the indulgence he may give." A few days after, H. assigns the bond to M., who delays to bring suit against the obligor until he becomes insolvent. Held: D. is liable on his assignment not only to H., but to M.

In the case of *Drake vs. Lyons*, 9 Grat., 54, decided July 26, 1852. D. and T. sell land to S. and each receives a part, and takes S.'s bonds for one-half the balance of the purchase-money. S. not being able to complete the contract, it is agreed between the parties that it shall be rescinded, and the land is surrendered, and D. and T. deliver to S. his bonds, except one that D. has assigned away. On this bond a judgment was recovered by the assignee, and S. filed a bill to enjoin it, making the assignee and D. parties. Held: T. is not a necessary party.

S. is not entitled to have judgment enjoined as against the assignee. The agreement to rescind the contract being proved, S. is entitled to recover from D. the amount of the bond assigned by D.; but D. being liable as assignor of the bond, S. is not to collect it until he shall have paid off the judgment, or D. is otherwise released from his liability as assignor.

In the case of *Thompson vs. Govan*, 9 Grat., 695, decided March 7, 1853, it was held: Assignee delays for two years to sue the maker of the note. In the absence of proof of the maker's

insolvency at the time or shortly after the note fell due, he cannot recover against the assignor.

In the case of *Peay vs. Morrison's Executors*, 10 Grat., 149, decided July, 1853. In March, 1836, C. executed his bond to P. for twelve thousand dollars, payable on the 24th of February, 1841, with interest from the 1st of April, 1836, payable semi-annually, and executed a deed of trust to secure it, which might be enforced upon the failure of C. to pay the principal when due, or to pay the semi-annual interest. In July, 1836, P. purchased real estate from M., and paid in part cash, and for the balance assigned to M. the bond of C., and executed a mortgage on the property, with condition that if M. failed to collect from C. the bond and interest, or any part of it, and P. paid it, then the deed to be void. The interest was regularly paid on C.'s bond until October, 1839, and in September, 1840, the interest was again paid. In February, 1841, C. was insolvent. The trust property was sold in February, 1844, and soon after M. proceeded to foreclose the mortgage, and the property was sold in July, 1845, leaving a large balance still due M. Held: In absence of proof of an express agreement to the contrary, the assignment of P. to M. imports a guarantee that M. shall receive the full amount of the bond of C., and the right of M. to resort to P. for any part thereof which he should fail to collect from C. with the exercise of due diligence.

The sale of the trust and mortgaged property did not impair the right of M. to hold P. responsible for the balance of the debt.

The delay in the sale of the trust property not appearing to have been occasioned by the active agency of M., or that he can be regarded as assenting to it in any other sense than might legally be imputed to P., and it not appearing that the value of the security was diminished by the delay, that delay cannot discharge P. from his liability from his assignment.

C. having become insolvent before the bond was due, a suit against him would have been unavailing, and was therefore unnecessary to establish the right of M. to recover of P. And it does not appear from any circumstances in the case that a sale of the trust property for the failure to pay the semi-annual interest would have been judicious or expedient, still less that it was necessary to entitle M. to hold P. liable on his assignment.

In the case of *Davis vs. Miller*, 14 Grat., 1, decided April 11, 1857, it was held: When an overdue note is transferred, the holder takes it subject to all the defences and equities to which it was subject in the hands of his immediate endorser, whether or not he has any notice thereof; except that an accommodation note in his hands is not therefore invalid. A set-off as be-

tween the maker and the payee, acquired after the transfer of an over-due note, though acquired without notice of the transfer of the note, cannot be set-off against the holder.

By the endorsement of negotiable notes, though after due, the legal title passes without notice to the maker. But in the case of transfers of choses in action not negotiable, only the equitable title passes, and the maker may make payments to the payee or obligee until he has notice of the transfer. The statute in relation to suits by assignees does not apply to negotiable paper, though such paper has been transferred after due.

In the case of *Leage vs. Bossieux*, 15 Grat., 83, decided January, 1859, it was held, p. 93: Upon the statute, Code, Chapter 119, Section 2, p. 510, creating the mechanic's lien upon the building, the suit may be brought within six months from the time the building is finished to enforce the lien as to the instalments of the contract price due; and though some of them are not due and payable at the time the suit is commenced, the court may in its decree provide for them.

The contract and lien under the statute may be assigned, and the assignee may enforce the lien in the same mode that the mechanic might do.

By the contract for building a house, the builder is to furnish the materials and to build the house in a workmanlike manner, and the price is to be fixed by referees chosen by the parties. Soon after the work is finished it is valued, and the price fixed; but afterwards defects become apparent by the shrinking of the timber, which shows that the work was executed in a very defective and unworkmanlike manner. The valuation does not conclude the owner of the house, but he is entitled to compensation for the defects; and in a suit by the assignee of the builder to enforce the lien for the price of building the house, the owner will only be required to pay what the building was really worth.

A building fund company agrees to advance to one of its members money to build a house on the lot owned by him, and advances a part of the money, and takes a lien upon the lot and the buildings which may be erected upon it to secure the advances made and to be made. The member then makes a contract for the building of a house on the lot, with a mechanic, who, to raise money faster than it can be gotten from the company, assigns the contract to a person who undertakes to advance the money, and the contract is recorded; the company advances money from time to time, as it had agreed to do, which is paid to the assignee in part satisfaction of his advances to the mechanic, with a knowledge on his part that it comes from the company, and that company claims priority of lien upon the property. The company is entitled to priority over the

mechanic's lien for the advances made after the contract was recorded, as well as for the advances made before.

In the case of *Freeman's Bank vs. Ruckman*, 16 Grat., 126, decided September 4, 1860, it was held, p. 129: The declaration avers that the payee of a note endorsed and delivered it to the plaintiff; the note not being negotiable, but assignable, this is a sufficient averment of its assignment.

The declaration averring that the note sued on was made in Boston, and on the same day and year was endorsed and delivered to the plaintiff, a banking corporation under the laws of Massachusetts, upon demurrer the court will consider the assignment made in Massachusetts when it might legally be made.

In the case of *Arents vs. The Commonwealth*, 18 Grat., 750, decided April, 1868, it was held: The acts of March 20, 1848, and of March 29, 1851, authorized the guaranty of the State upon the bonds of the city of Wheeling, to pay her subscription to the stock of the Baltimore & Ohio Railroad Company, payable to bearer, and transferable by delivery, though not payable to the company, but to a third person.

If the contract of a guaranty of a coupon bond, transferable by delivery, is not negotiable at law, along with the bonds and coupons, it is assignable in equity, and an interest in it passes in equity to each successive holder of the bond or coupon.

In the case of *Mayo's Executor vs. Carrington's Executor et als.*, 19 Grat., 74, decided February 23, 1869, it was held: In a bill by the assignee against the obligor and assignor, the assignment is not questioned by the assignor. There is no necessity for proving it as against the obligor.

If the assignment of a debt is without recourse, it is doubtful whether it will carry with it an equitable lien for the debt; but if the assignment is general, the equitable lien passes with it.

In the case of *Wilson's Administrator vs. Barclay's Executor*, 22 Grat., 534, decided August 28, 1872. M., P., W. and B. were merchants and partners, doing business in Lewisburg, Greenbrier county, W. and B. living in Rockbridge. In 1843 the partnership terminated, and the firm assigned to B., as a part of his in-put capital, the bonds of D. for one thousand and thirty-eight dollars, bearing date in 1842, and secured by deed of trust on real and personal property. In 1843, E. and C., creditors of D., by judgment rendered before the execution of the deed, filed their bill to subject the real estate of D. to the payment of their judgment. B. was made a defendant in this suit, but did not answer. He retained the bonds in his possession till 1848, and then sent them with other papers to an attorney for collection. In 1843 there was a decree in the suit of E. and

C. for a sale of part of D.'s land, but it was never executed. At the May term, 1849, N., another judgment-creditor of D., made himself a party in the suit, and at the October term there was a decree for the sale of all the property, real and personal, of D. The sale was made in 1850, the personal property bringing but \$26.50, though it was in proof that when the deed was made there was a tavern on the land, well furnished with furniture. In 1851 there was a final decree applying the proceeds of the sale of the property, first, to pay the debt of E. and C.; second, the debt of N., and third, the debt of B. The proceeds of sale satisfied the debts of E. and C. and of N., but there was nothing left to be applied to the debt of B. except the proceeds of the personal property. At the time of the assignment the debt of D. was considered good, but he seems to have had no property except what was embraced in the deed of trust. In 1860 the administrator of B. filed his bill against the administrator and heirs of W. to recover W.'s proportion of said bonds assigned to B. Held: The negligence of B. in having the suit prosecuted, whereby interest on the prior debts was accumulated and the property deteriorated, bars B.'s administrator from any recovery against the estate of W. The negligence in enforcing the deed of trust by the sale of personal property, by which it was allowed to be lost to the trust, bars his recovery. B. not having done anything to recover the debt till 1848, and his administrator not having brought his suit until 1860, it is upon him to show clearly that the money could not have been made out of D.'s property. If D. was insolvent at the time of the assignment of the bonds, or when he became so afterwards, if B. relied upon D.'s insolvency as excusing B.'s prosecution of his suit against D., B. should, as soon as he ascertained the fact, have given notice to his assignors, and should have offered to return the bonds; and not having done this, he cannot recover against them.

In the case of *Edmunds (Assignee) vs. Harper*, 31 Grat., 637, decided March, 1870. S. as principal, and H. as his surety, executed their bond to E. E. owes S. and N., partners on account, and N. assigns to S. E. becomes bankrupt, and S. proves the account before the register in bankruptcy, and he afterwards becomes bankrupt. The assignee in bankruptcy of E. sues H. on the bond, and H. pleads the account as a set-off. Held: Under the Virginia statute of set-off, Code of 1873, Chapter 168, Section 4, the account is a valid set-off for H. in the action against him on the bond.

In the case of *Welsh vs. Ebersole*, 75 Va., 651, decided September, 1881. In an action of *assumpsit* to recover of the defendant the amount of a bond executed by N. W. S. to the defendant, transferred to the plaintiff, defendant's name endorsed thereon

in blank, the declaration contained three counts. In the first count the plaintiff declared on the bond as assigned to him by the defendant, for value received. The second count alleged that N. W. S. was indebted to the plaintiff in the sum of one thousand nine hundred dollars, part of the purchase-money for a tract of land sold by the plaintiff to said N. W. S.; that N. W. S. preferred to give personal security for the debt rather than a lien on the land, and offered the defendant as a guarantor, who, in consideration of the premises, and the fact that the plaintiff would not reserve such lien, guaranteed the payment of said debt, which guaranty is evidenced by the bond of said N. W. S. payable to the defendant and endorsed by the defendant to the plaintiff by writing his name in blank on the back of the bond; that the plaintiff obtained judgment on the bond against said N. W. S., sued out execution thereon, which was unavailing, etc. The defendant filed a general demurrer to the declaration and to each count therein, and the court overruled the demurrer to the declaration and to the first count, and sustained the demurrer to the second and third counts. Held: That the court erred in sustaining the demurrer to the second and third counts.

Assuming, as must be done on a demurrer, the truth of every material averment of the declaration, the arrangement was that the defendant should guaranty the payment of the debt N. W. S. owed the plaintiff, to give effect to which arrangement it was agreed that N. W. S. should execute his bond to the defendant, and the defendant should endorse his name thereon in blank, as a guarantor of the debt. There is nothing in this transaction which precludes the plaintiff from proving it by parol testimony and recovering upon it when so proved.

If the obligee of a valid instrument who endorsed it on the blank is conclusively presumed to be an assignor, no such presumption can attach to one who was never the holder of the instrument, to whom it was never delivered as a valid obligation, and whose only connection with it was to endorse his name upon it.

In the case of *Etheridge's Administrator et als. vs. Parker and Wife et als.*, 76 Va., 247:

2. Assignor.—Assignee.—Equities.—Assignee of non-negotiable chose takes it subject to all debtor's equities against assignor existing at time or before notice of assignment, and based on honest transactions between him and assignor.

3. Idem.—Private agreement, unknown to assignee, cannot be set up as defence to payment by one who lends to another his credit in the form of a note.

In the case of *Barley's Executor vs. Layman's Administrators*, 79 Va., 518, decided October 7, 1884, it was held: In absence of proof of consideration for assignment it must be presumed

to have been the value of the thing assigned, and such value measures the recovery on recourse.

In the case of *Roanoke Land and Improvement Company vs. Karn & Hickson*, 80 Va., 589, decided June 25, 1885. In suit of sub-contractor against owner for materials furnished general contractor, it is unnecessary to allege that any part of the price agreed to be paid remained due to latter from owner when notice was given.

In the case of *Dailey's Executor vs. Warren et als.*, 80 Va., 512, decided June 11, 1885, it was held: Assignments of choses in action need not in Virginia be recorded. The case here is one of competitive assignments.

Where one files petition in pending cause to assert claim as assignee to debt reported therein, the assignor must be made party to petition and summoned to answer.

Decree directing payment of such debt to such petitioning assignee will be reversed on the petition of the assignor, who has not been made party and summoned to answer; and on hearing such petition to rehear, the assignor and the rival assignee are competent witnesses to prove the assignment to the latter and the consideration thereof.

Declarations made and letters written by assignor subsequent to assignment are inadmissible as evidence against his assignee.

Where subsequent assignee claims that he took his assignment for value without notice of the previous assignment, and that the previous assignment was fraudulent, the burden is, of course, on him to prove the case.

In the case of *McClintic vs. Wise's Administrators et als.*, 25 Grat., 448, decided September, 1874. W. sold land to M., retaining the title, for four thousand one hundred dollars, cash one thousand dollars, and three bonds payable January 1, 1858, 1859, and 1860. The first was paid to W. He transferred the bond due January 1, 1860, to S. in May, 1859, who assigned it to H. W. died in possession of the bond due January, 1859. His administrators sued M. in equity to subject the land to pay the bond held by W. at his death, without making S. or H. a party, and the land was sold by a commissioner to J. for two thousand dollars, and the sale was confirmed and the commissioner was directed to collect the money and pay the plaintiffs. H., upon his petition, is made a defendant in the suit, and files his answer, claiming that his bond is still unpaid, and that he is entitled to priority of payment out of the land. The administrators file an answer, insisting that H. had lost his right to subject the land by his laches in not suing M., who had in the meantime become insolvent. The decree gives priority to the plaintiffs over H., and he appeals. Held: The bond held by H. having been transferred by W. in his lifetime, though due after

the bond retained by him, is to be first paid out of the proceeds of the sale of the land.

H. was a necessary party to the suit, and it was error to decree a sale of the land without having first made him a party, and the question of priority settled between him and the plaintiffs.

The purchaser at the sale made under the decree of the court is interested in the decision of the question of priority between the plaintiffs and H., and ought to be heard in opposition to any order affecting his interest. And a rule, if desired by the plaintiffs, should be awarded by the court below against said purchaser to show cause why said sale should not be set aside.

But in no event is said sale to be set aside and a resale ordered, unless the plaintiffs, or some one of them, shall give bond with proper security before said court for a substantial advance upon the price for which the property heretofore sold.

If no resale is made, the fund arising from the sale already made, being the proceeds of the sale of the land, is to be applied, or so much of it as may be necessary, to the satisfaction of H.'s debt and the residue, if any, to that of the plaintiffs.

In deeds of trust and mortgages, when the debt is assigned, the deed of trust or mortgage is assigned or transferred along with it. And the same principles apply to the vendor's lien, resulting from the retention of the legal title.

In such cases, where there are several debts secured, and there are successive assignments of them, the first assigned carries with it the assignment of so much of the lien as is necessary to pay it, unless it is expressly provided otherwise.

In such a case the assignee, though he may have lost his remedy against his assignor by want of due diligence in suing the debtor, does not thereby lose his remedy against the land.

If a vendor of land retaining the title assigns one of the bonds given for the purchase-money, and then brings ejectment against the vendor, and recovers possession of the land, he recovers and holds it in subordination to the rights of the assignee. The assignee having by the right of the assignment acquired the benefit of the lien, whatever it may be, is entitled to all the remedies of the vendor to enforce it, and he cannot be deprived of these remedies by any act of the vendor.

In the case of *Gordon vs. Fitzhugh et als.*, 27 Grat., 835, decided November 16, 1876, it was held: K. made a deed to F. conveying a tract of land in trust to secure the purchase-money of the land, evidenced by five bonds, payable at different periods to R., the vendor. R. first assigned the bond payable second in date to M.; next he assigned the bond payable first to McG., and afterwards he assigned the last three to G. The land when sold did not produce sufficient to pay all the bonds. Held: The bond assigned to McG., the first assignee, is to be first paid;

then the bond assigned to M., the second assignee, and the balance, if any, is to be paid to G., the last assignee.

In the case of *Grubbs vs. Wysors*, 32 Grat., 127 and 131, decided July, 1879. G. sold a tract of land to W., Jr., the purchase-money to be paid in three equal annual instalments, and G. retaining the title until the whole was paid. For the first instalment W., Jr., executed a negotiable note, with W., Sr., as surety, payable at one year, and he gave his own notes at two and three years for the rest of the purchase-money. G. assigned the note for the first payment to M., and M. assigned it to H., and it was paid after maturity and protested by W., Sr., to be subrogated to the lien rights of G., and to be paid out of the proceeds of the sale of the land before the two bonds given for the second and third instalments held by G. were paid. Held: While the assignment of the note for the first payment by G. carried with it to his assignee so much of the lien on the land as was necessary to secure the same, and, as between G. and the assignee, gave the latter a prior claim, these equities of the parties *inter sese* are not available to the surety of W., Sr., by subrogation in a case like this, where the rights of G., the creditor, would be impaired thereby; and therefore the lien of W., Sr., the surety, must be postponed to that of G., the vendor. While a surety who pays a debt of his principal will ordinarily be subrogated to all the lien rights of the creditor, when the latter has no longer occasion to hold them for his protection, equity will never displace the creditor to his prejudice merely to give the surety a better footing.

For the reference to 6 Leigh, 534, see *supra*, this section.

In the case of *Anderson et als. vs. DeSoer; Same vs. Gallegoe's Administrator et als.*, 6 Grat., 363, decided October, 1849. A bill of exchange drawn by a legatee under a will upon the executors, for value received, directing them to pay to the order of the drawee a specific sum, the amount of the legacy, out of the funds in their hands destined by the testator for the payment thereof, is an equitable assignment of the legacy.

The plaintiffs claim in their bill as equitable assignees of a legacy, by virtue of a bill of exchange drawn by the legatees upon the executors, and endorsed to the plaintiffs, and the bill of exchange is filed with the bill. No proof of the making the bill of exchange or of the endorsement is called for in the court below. Held: An objection to the evidence for want of this proof cannot be taken in the appellate court.

The reference to 76 Va., 372 and 376, is an error.

In the case of *S. V. R. R. Co. vs. Miller*, 80 Va., 821, decided October 1, 1885, it was held, p. 832-'33: It is well settled that where one man having funds in another's hands draws on them an order to be paid to a third party for value, such order

will pass to the payee the title to said funds, which title a court of equity will enforce. But drawee may refuse to accept, in which event he is not liable at law to payee; but payee may then return to drawer, or may sue drawer, or may sue in equity for the fund.

In the case of *Switzer et als. vs. Noffsinger*, 82 Va., 518, decided November 11, 1886, it was held: No particular form is necessary to constitute an equitable assignment of debt or chose in action. Order for value, appropriating a fund, is sufficient. No action can be maintained against a drawee without his acceptance. Notice to debtor is essential to perfect title. Until such notice the assignment is liable to all equities between debtor and assignor. Assignment of debt carries the security.

In the case of *Porter vs. Young*, 85 Va., 49, decided May 17, 1888, it was held: Under this section an ordinary running account between parties, showing an alleged indebtedness from the one to the other, is assignable.

In the case of *Norfolk & Western Railroad Company vs. Read*, 87 Va., 185, decided December 4, 1890, it was held: A right of action against a common carrier for injury to goods while in course of transportation is assignable.

In the case of *Tyler (Receiver) vs. Ricamore*, 87 Va., 466, decided February 5, 1891, it was held: A right of action in pending suit against railroad company for negligent setting fire to plaintiff's property may be assigned in whole or in part, and the suit continued to be prosecuted in assignor's name for benefit of assignee.

SECTION 2862.

In the case of *Winn vs. Bowles*, 6 Munf., 23, decided November 6, 1817, it was held: The right of the assignee of a bond to demand payment thereof in a court of equity, which existed before the statute authorizing him to sue at law in his own name upon the assignment, is not impaired by that statute, but the latter remedy is cumulative and additional to the former.

In the case of *Moseley vs. Boush, etc.*, 4 Rand., 392, decided July, 1826, it was held: The assignee of a chose in action has not a right in all cases to come into a court of equity upon the mere ground that he cannot sue in his own name at law, but it must appear that he is prevented from suing at law in the name of the assignor, or that the assignor himself would have had a right, if he had not assigned, to go into a court of equity.

CHAPTER CXXXIV.

SECTION 2863.

In the case of *McArthur vs. Chase*, 13 Grat., 683, decided February 25, 1857, it was held: In the act in relation to limited

partnerships the word insolvency means that the partnership has not sufficient property and effects to pay all its debts.

A deed made by a limited partnership, conveying all its property in trust to pay a debt to a firm of which the special partner is a member, at a time when the debts of the partnership exceeded the value of its property, and when the acting partners knew that the partnership must stop business unless the special partner or his firm would advance money to enable them to carry on the business, and without an undertaking on his part to make such advances, though they may have had some expectation that he would do it, is void as to other creditors of the partnership. Under such circumstances confessions of judgments in favor of some creditors in order to give them a preference are void as to the creditors.

A special partner taking a deed of trust to secure a debt due to a firm of which he is a member, under such circumstances, makes himself liable as a general partner to the creditors of the partnership.

In the distribution of the assets of such a partnership among its creditors, a debt due to the firm of which the special partner is a member is to be paid ratably with the debts due to other creditors.

A court of equity having obtained jurisdiction of a suit by creditors to set aside a deed improperly made, to give preference to a creditor of the partnership, and to have a distribution of the assets of the partnership among all the creditors, may proceed to do complete justice in the cause, and to make a personal decree against the special partner, who has made himself liable as a general partner, in favor of the creditors, for the balance due them respectively after distributing the assets of the partnership ratably among them. The fact that the creditors have recovered judgments at law against the general partners will not defeat the remedy against the special partner.

The share of the special partner in the debt due to the firm of which he is a member will be retained under the control of the court, and applied to the satisfaction of the creditors of the partnership. To ascertain what is the share of the special partner in said debt, the court will direct an inquiry into the ability of the firm of which he is a member, to pay their debts, independent of their claim upon the partnership, and into the interest of the special partner in said firm, and will direct that if no evidence is offered, it shall be presumed that the firm is able to pay its debts, and that the special partner has an equal interest in the concern.

SECTION 2874.

For reference to 13 Grat., 683, see *McArthur vs. Chase*, cited *supra*, Section 2863.

SECTION 2877.

In the case of *Trevillian vs. Powell*, Quarterly Law Journal for 1856, p. 257, decided May term, 1857, it was held: Where a person transacts business for a known principal, and is known to be such by all persons having any interest in knowing the fact, when it is notorious who is the principal, the goods in the store are not liable for the debts of the agent, although he has no sign over the door disclosing the name of his principal.

In such case he does not transact business as a trader, with the addition of the word agent, according to the true intent and meaning of this section, and it is not necessary that the name of the said principal should be disclosed by a sign, as is required to be done by this section in the cases to which it applies.

In such case, if a third person levy an execution against the agent upon the property in the store, the principal may come in by petition and have the said property discharged of the levy, with costs against the plaintiff in the execution.

In the case of *The Farmers' Bank of Virginia vs. Kent, Paine & Kent*, 16 Grat., 257, decided April 23, 1861. K., K. & A. were a firm doing a wholesale business as merchants in Richmond, and in 1846 they employed P. to carry on a retail business in Lynchburg, under the style of P., agent for J. S. K., the name of one of the partners. The publication was made, and the sign put up in the above name as prescribed by statute. In 1850 some of the partners retired, but the firm in Richmond was continued, new partners being admitted under the name of K., P. & K.; J. S. K. continuing to be a partner of the firm; but neither then, nor at any time after the Code of 1849 went into effect, was there any new publication as to the agency in Lynchburg. In 1853 the goods of K., P. and K. in the storehouse of P. in Lynchburg were taken under execution by his creditors. Held: The law having been complied with in 1846, and the present firm in Richmond being a continuation of the former, the goods are not liable to the creditors of P.

The reference to 17 Grat., 503, 524, is an error, as the court, while discussing the statute, held its own discussion of this act to be foreign to the matter then before the court.

CHAPTER CXXXV.

SECTION 2890.

In the case of *Croughton vs. Duval*, 3 Call, 69 (2d edition, 60), decided October 29, 1801, it was held: A surety to a bond prior to the act of 1794 is not absolved from the obligation by requesting the obligee to sue and his failure to do so.

In the case of *Wright's Administrator vs. Stockton*, 5 Leigh, 153, decided March, 1834. In debt on bond by C. S. against

W. S., administrator, defendant takes oyer of the bond, which was a bond executed by H. and four others, of whom W. was one, and then pleads in bar that W. and three of the other obligors were surety for H., the first obligor, and that those three other sureties required plaintiff to bring suit on the bond promptly, but plaintiff did not bring suit as required within a reasonable time, and when she did bring suit those three other sureties pleaded plaintiff's failure to bring suit promptly, in bar of her action against them, and on that plea judgment was given for those three sureties. Upon general demurrer to this plea, held: The matter pleaded is a bar to plaintiff's action against W., administrator. Where some of several sureties are discharged by any act or omission of the obligee, the other sureties are also discharged.

In the case of *Ashby's Administrators vs. Smith's Executor*, 9 Leigh, 164, decided January, 1838. Principal, debtor and surety being bound in a bond for money payable at a future day, the surety, before the debt has become payable, represents to the creditor that the principal is about to remove himself and his effects out of the Commonwealth, and requests the creditor to sue out an attachment against him under the statute, and the creditor sues out the attachment accordingly, and it is levied on the goods of the principal debtor sufficient to satisfy the debt; but afterwards the creditor accepts a mortgage from the principal debtor to secure punctual payment of the debt when due, and thereupon the attached effects are, with the creditor's consent, restored to the debtor, and the attachment no further prosecuted, and the debtor elicits the mortgaged effects. Held: The surety is in equity discharged from the debt.

In the case of *Humphrey vs. Hitt*, 6 Grat., 509, decided January, 1850, it was held, p. 523: A mere countermand of an execution by a creditor after it goes into the hands of a sheriff, but before it is levied, does not release a surety of the execution debtor.

In the case of *Harrison's Executor et als. vs. Price's Executor et als.*, 25 Grat., 553, decided December, 1874, it was held: Where one surety in a bond gives notice to the obligee to sue the obligation, the statute does not peremptorily require the obligee, after obtaining judgment, to sue out execution upon it, it only requires him to use due diligence in prosecuting suit to judgment and by execution.

In such case, where the creditor has not been guilty of laches, but the clerk has refused to issue the execution on the ground that the stay law forbade it, and the court has sustained him in it, whether the judgment of the court was right or wrong in enforcing the stay law, negligence cannot be imputed to the creditor.

Upon such notice to the creditor by a surety, the creditor is not required to pursue the estate of the principal in equity to impeach alleged fraudulent conveyances, or to subject an equity of the principal to the payment of his debt, or to exhaust his remedies against the principal before he can have satisfaction out of the estate of the surety.

The statute which authorizes a surety to give notice to the obligee to sue, gives the surety a more summary remedy than he had before by bill in equity, but does not change the relation or the contract between creditor and surety. It only holds the creditor responsible if, by reason of his laches or negligence, the equity of the surety against the principal is infringed.

In the case of *Davis (Administrator for, etc.) vs. Snead et als.*, 33 Grat., 705, decided September, 1880, it was held: A person appointed by a court of equity in a pending cause a receiver to collect the purchase-money of lands sold by him as commissioner under a previous decree in the cause, and for which he had taken a bond with surety to himself as commissioner, is not a creditor in the sense of the statute, Code of 1873, Chapter 143, Sections 4 and 5, to whom a surety on the bond may give notice to bring the suit upon it. If the receiver was such a creditor, he could only have authority to sue after giving the security required of him in the decree appointing him receiver; and in the absence of clear and satisfactory proof that he had given the security required, the notice to him is not sufficient to release the surety.

SECTION 2891.

The reference to 25 Grat., 553, is to the case of *Harrison vs. Price*, quoted *supra*, Section 2890.

In the case of *Yuille's Administrator vs. Wimbish's Administrator*, 77 Va., 308, decided March 22, 1883. In 1852 W. held bond to F., principal, and S., V. and P., sureties. March 14, 1868, Y.'s administrator, H., by notice in writing, required W. to sue on the bond. W. sued, May 14, 1868. All the obligors, except Y. F. and S., accepted service of writ. As to them, by consent, the suit was that day placed on the office judgment docket, and they pleaded. Of this H. was informed, and also that the proper credits would be given, and acquiesced, and suffered in September, 1868, in his county, judgment to go on the bond against him by the default. Against F. and S. in October, 1868, in their county, judgment went, and executions were issued, but were restrained by the extension of the stay law through 1869 by the military commandant.

In February, 1868, P. had, under the act of April 25, 1867, compromised with W. in full of one-third of the bond, which was endorsed thereon. Suit was brought, however, against him in August, 1868. At September rules, 1868, he pleaded his re-

lease, and the suit was dismissed. S., May 13, 1868, conveyed all his property to secure ratably all his debts. Another execution was issued against F. October, 1870, and returned "no effects." In August, 1871, the execution was issued against H. as administrator of Y., who got an injunction. It was dissolved in 1880, and a decree entered for the amount due on the judgment. On appeal to this court. Held:

1. The act of Assembly under which P. compromised his liability on the bond and was released was not unconstitutional as to that bond.

2. By the very terms of that act, Section 16, such release of P. cannot affect or impair the right of any other surety who may have been required to pay more of that bond than was so released to call on P. for contribution.

3. The circumstances do not show that the suit was not instituted within a reasonable time after the requisition, nor that it was not prosecuted with due diligence to judgment and by execution, nor that Y.'s administrator is entitled to the aid of equity to enable him to avail himself of defences (if any) which he might have made, but did not make at law.

4. The property conveyed in trust by S. is also liable, under the terms of the deed, to contribution to his co-sureties on the bond.

SECTION 2893.

In the case of *Graves vs. Webb*, 1 Call, 443 (2d edition, 385), decided November 2, 1798, it was held: The surety is entitled to judgment against the principal for the same specific thing which he has been adjudged to pay himself.

In the case of *Tinsley vs. Oliver's Administrators and Heirs*, 5 Munf., 419, decided February 11, 1817, it was held: A surety in a bond, having paid to a creditor the amount of a judgment against him, thereupon may file a bill in equity (without having made a motion or brought any action at law) against the administrator and heirs of the principal debtor for the purpose of establishing his demand, of having an account of the personal and real estate, and of being permitted to stand in the place of the obligee in the bond so as to be paid out of the real estate in default of the personal.

In the case of *Mountjoy & Triplett vs. Bank's Executor and Devisees et als.*, 6 Munf., 387, decided April 16, 1819, it was held: If an official bond given by a sheriff and his sureties before the act of 1786 be so worded as not to be joint and several, but joint only, a court of chancery is the proper tribunal to give the sureties relief against the estate of the sheriff after his death, upon their being compelled to pay a sum of money for a delinquency of such sheriff in his lifetime.

In the case of *Ayers vs. Lewellin*, 3 Leigh, 609, decided March,

1832, it was held: In the case of a summary motion by surety against principal to recover money paid by the surety, if the defendant appear and judgment be rendered on a hearing of the parties, the notice of the motion is not a part of the record, unless it be made so by a bill of exceptions to the opinion of the court.

A surety, having paid five several sums of money for his principal, may maintain five several motions, and recover several judgments for the debts and for the cost of each motion.

In the case of *Enders, etc., vs. Brune*, 4 Rand., 438, decided August, 1826, it was held: Equity does not regard form, but substance; and therefore it does not require that a surety shall be bound in the same bond with his principal in order to make the doctrine of substitution operate, but merely that, having bound himself for the debt of the principal debtor, he should have paid it.

In the case of *Watts et als. vs. Kinney and Wife*, 3 Leigh, 272, decided November, 1831. A judgment is recovered against a principal and his sureties; the judgment-creditor sues out no *elegit* or other execution; within the year the sureties discharge the judgment. Held: The sureties have a right to be subrogated in equity to the benefit of the lien of the creditor's judgment, upon the lands of the principal, in preference to a foreign attachment sued out by another creditor of the principal after the judgment.

In the case of *Douglass vs. Fagg*, 8 Leigh, 588, decided July, 1837. M. sells lands to F., who gives two bonds for the purchase-money. D., for whose benefit the purchase is made, pays off the first bond and part of the second. The balance he delivers to F. to be paid to M., but it is not paid over, and suit is brought for the same on the second bond against F. Judgment being rendered, F. gives a forthcoming bond with surety, which is forfeited, and afterwards obtains an injunction upon giving bond with surety to pay the amount of the judgment in case the injunction shall be dissolved. The injunction is afterwards dissolved, and judgment rendered against the surety in the injunction bond, which he satisfies. Then the surety claims for this money paid by him in satisfaction of the vendor's claim; the vendor had a lien upon the land, and files a bill to be substituted in the place of the vendor, and have the benefit of the lien. Held: The claim to substitution cannot be sustained, and the bill must therefore be dismissed.

In the case of *Hopewell et als. vs. The Cumberland Bank of Alleghany*, 10 Leigh, 206 (2d edition, 214), decided April, 1839. Several persons being bound as sureties for M. in bonds, and others being endorsers of notes for his accommodation at different banks, which notes had come to maturity and had been

protested for non-payment, M., by deed of trust, mortgages property to be sold and applied to the indemnification of each and all of the sureties and endorsers, without preference of any over the others, in case they should sustain loss by reason of their suretyships and endorsements; the endorsers of a note held by one of the banks are discharged from liability by the laches of the bank or otherwise, so that the endorsers of this note are never damnified. Upon a bill in equity filed by this bank for participation in the trust-fund with the sureties and the endorsers who had sustained damage, held: The bank could only claim to be subrogated to the rights of the endorsers of the note which it held, and these having sustained no damage, and so having no claim to participate in the trust-fund themselves, therefore the bank has no claim to participate in it.

In the case of *Givens et als. vs. Nelson's Executor et als.*, 10 Leigh, 382 (2d edition, 397), decided July, 1839. The principal in a bond, to indemnify his sureties therein, assigns a claim to a trustee in trust that he shall collect the amount and apply the proceeds to the discharge of the bond. Before this claim is collected suit is brought upon the bond, and the sureties contribute ratably to its payment. One of the sureties obtains a decree against the principal for what he pays, and upon this decree sues out a *ca. sa.*, which, being executed on the principal, he enters into a bounds bond with sureties and afterwards breaks the condition, whereby the sureties in that bond become liable. The claim assigned to the trustee being afterwards collected by him, the court of chancery allows the sureties in the bounds bond to participate in this trust-fund in the event of their having made payment. Held: By the court of appeals that this is erroneous, that the surety that secured the security of the bounds bond was bound to proceed thereon against the sureties in the same, and could only come upon the trust-fund for any deficiency in his recovery from them; and that the sureties in the bounds bond could have no right to resort to the trust-fund for their reimbursement, except to the extent of any surplus that might remain after the full indemnification of the original sureties.

In the case of *McClung vs. Beirne*, 10 Leigh, 394 (2d edition, 410), decided July, 1839. A judgment was rendered the 8th of May, 1828, for \$148.63 damages, with interest and cost, and on the same day an appeal was allowed. The judgment being affirmed, damages were recovered against the appellant for retarding the execution, and also costs in the appellate court. A *feri facias* being then issued and returned *nulla bona*, the surety in the appeal bond paid \$362.64 in satisfaction of the judgment, and within a year after the affirmance filed a bill to charge real

estate aliened by the debtor between the date of the original judgment and the date of the judgment of affirmance. Held:

1. The surety is to be substituted in the place of the judgment-creditor, and to have benefit of his lien.

2. The real estate aliened by the debtor between the date of the original judgment and the date of the judgment of affirmance, whether owned by him at the date of the original judgment or acquired afterwards, is subject to the lien.

3. The lien is not only for damages, interest and costs recovered by the original judgment, but also for the damage and cost to which the creditor became entitled by the judgment of affirmance.

8. In ascertaining the amount to be raised by a sale of the property, interest is not to be allowed on the sum of \$362.64 paid by the surety, but only on the original sum of \$148.63.

In the case of *Haffey's Heirs vs. Birchett*, 11 Leigh, 83, decided April, 1840. In order to secure the accommodation endorsers of a note due at bank, the maker conveys lands to trustees by a deed in which he covenants for himself and his heirs with the trustees and with the bank respectively, that he is possessed of an absolute estate of inheritance in the premises, and that he will warrant and defend the same against all persons; after the death of the grantor, the endorsers pay the debt to the bank, and the trust property having been sold to satisfy a debt secured by a prior deed of trust thereon, they file a bill to be subrogated to the rights of the bank under the second trust deed, and to have a satisfaction out of other lands of the grantor's descended to his heirs. Held: The covenant in the second deed of trust was broken by the sale under the first.

The complainants are entitled to come into equity for satisfaction out of the real assets in the hands of the heirs, to the extent of the damages accruing from the breach of the ancestor's covenant.

The amount of those damages being the sum paid in discharge of the first incumbrance, and so fixed and certain, an issue for the purpose of ascertaining them is unnecessary.

In the case of *Powell's Executor vs. White*, 11 Leigh, 309, decided August, 1840, it was held: A mere verbal recital in a deed of trust that the *cestui que trust*, are liable as endorsers for the maker of the deed, and that he is willing and desirous to indemnify and secure them from all loss and damage in consequence of their becoming endorsers by conveying property for the purpose, will not entitle the endorsers, after the death of the makers, to rank as specialty creditors in the administration of his personal assets.

Sureties in a bond who pay it off after the death of the principal are entitled to rank as specialty creditors of the prin-

cipal, and if they be administrators of his estate, may retain whatever they pay on account of such suretyship out of the assets that come to their hands as administrators against other specialty creditors.

In the case of *Wheatley's Heirs vs. Calhoun*, 12 Leigh, 264, decided April, 1841. C. and W. make a joint purchase of real estate, one of the terms of purchase being that on receiving a conveyance of the property from vendor, purchasers shall mortgage same property to secure payment of the purchase-money; vendor executes conveyance to C. and W., and they execute a mortgage of the property according to the agreement. C. dies, leaving unpaid three-fourths of the purchase-money, with interest thereon, all of which W. pays, except a trivial balance. Held: W. is entitled to be subrogated in equity to the rights of the mortgagee, and to have satisfaction out of the mortgaged subject, for the excess of the debt paid by him above his just proportion; namely, a moiety thereof, and, as the rights of the mortgagee were paramount to the right of C.'s widow to dower, so are the rights of W. by subrogation likewise paramount to her right of dower.

In the case of *The Bank of Virginia and May vs. Boisseau et als.*, 12 Leigh, 387, decided November, 1841. A deed of trust is executed to indemnify a first endorser at bank from loss; but though the note is not paid, the first endorser is exempted from liability by the failure of the bank to give him due notice of dishonor. Held: Neither the bank nor any subsequent endorser has any right to claim to rank as a creditor on the trust-fund under the deed of trust by subrogation to the first endorser, who was thereby indemnified, but who never sustained any loss.

In the case of *Kent vs. Matthews & Jackson*, 12 Leigh, 573, decided August, 1841, it was held: That a surety, before the payment of a debt, has a right to resort to equity against the creditor and the principal debtor to compel the debtor to collect, and the principal debtor to pay the debt out of any fund the debtor has subject to the debt, and when the surety pays it he has a right to be subrogated to all the rights and sureties of the creditor.

In the case of *Brown vs. Glascock's Administrator*, 1 Rob., 461, (2d edition, 486). A personal decree against an administrator being recovered by a creditor of the decedent, the administrator appeals, giving an appeal bond with surety; the decree being affirmed, an arrangement is made between the creditor and the surety in the appeal bond, by which the decree is transferred to the surety, who makes a part of the amount due thereon by execution against the administrator, and then brings an action on the administration bond, in the name of the creditor as relator, against the surety therein bound, in which action a judgment is

recovered for the balance due on the affirmed decree, being less than the amount of damages incurred by the appeal. Held: The surety in the administration bond has no claim to be substituted to the remedy of the creditor on the appeal bond, and equity will not interfere in his favor by enjoining the judgment.

In the case of *Robinson et als. vs. Sherman et als.*, 2 Grat., 178, decided July, 1845, it was held: The surety of a joint debtor in a forthcoming bond becomes, upon the forfeiture thereof, surety for the debt, and where he has discharged it, is entitled to be substituted to all the rights of the creditor against the original debtors subsisting at the time he became so bound for the debt. The surety in a forthcoming bond is entitled to recover from the original debtors the principal, interest and costs of the original judgment, but not the costs incurred by the execution and forfeiture of the forthcoming bond. The original debtors are each bound for the whole amount of the debt to the surety in the forthcoming bond who discharges it.

In the case of *Bently vs. Harris's Administrators*, 2 Grat., 357, decided October, 1845, it was held: A principal debtor in a judgment obtains an injunction thereto, and executes an injunction bond with a third person as surety, the surety in the judgment not being a party to the injunction. Upon a dissolution of the injunction, the surety in the injunction bond is liable for the debt enjoined before the surety in the judgment. The surety in the injunction bond being held insufficient, and another bond being executed with other sureties, upon a dissolution of the injunction the sureties in both bonds are equally liable.

In the case of *Leake vs. Ferguson*, 2 Grat., 419, decided January, 1846, it was held: On a joint judgment against several, the service of a *ca. sa.* on one, and the execution and forfeiture of a forthcoming bond by him, does not extinguish the lien of the judgment upon the land of the others.

In such a case, the party upon whom the *ca. sa.* was served and who executed the forthcoming bond, having been a surety of the principal debtor in the judgment, his surety in the forthcoming bond, having paid the debt, is entitled to be substituted to the creditor's remedies against the land of the principal debtor; and this though the land was sold by the principal debtor, and had come into the hands of a *bona fide* purchaser for value without notice before the service of the *ca. sa.*

In the case of *Roders vs. McClure*, 4 Grat., 81, decided July, 1847, it was held: A judgment-debtor having obtained an injunction to the judgment, which was afterwards dissolved, and the surety in the injunction bond having been sued thereon, and judgment recovered against him, which he has discharged, he is entitled to the benefit of the creditor's judgment lien.

In the case of *Preston vs. Preston*, 4 Grat., 88, decided July, 1847, it was held: One surety of an insolvent principal is entitled to contribution from his co-sureties; and if all the sureties are solvent, each is bound for his share of the sum advanced and paid to release them from a common burden. A judgment having been recorded against one surety, and an execution levied on his property, he executed a forthcoming bond with another of the sureties, against whom no judgment had then been obtained, as his surety in the forthcoming bond, and the bond is forfeited. The surety in the forthcoming bond, having paid the debt, is entitled to contribution from the other sureties in the original bond. The general rule is, that if one surety is insolvent his share shall be apportioned among the solvent sureties, but the surety in the forthcoming bond having, by executing that bond, released the property of the principal in said bond, and that principal having become insolvent, his surety will not be entitled to recover from the other sureties in the original bond any part of the share of the said principal in the forthcoming bond, as one of the sureties in the original bond. The surety in the forthcoming bond is entitled to a decree for the costs of awarding the execution on said bond, neither against the principal in the original bond, nor his sureties, but only against the principal in the forthcoming bond.

In the case of *Stephenson vs. Traveners*, 9 Grat., 398, decided September 6, 1852, it was held: A surety whose principal is dead may file a bill *quia timet* and against the creditor and the executor of the debtor, to compel the latter to pay the debt, so as to exonerate the surety from responsibility. He may enforce for his exoneration any lien of the creditor on the estate of his principal, and may bring any suit in equity which the creditor could bring for a settlement of the administration account on the estate of the deceased, and for the administration of the assets, whether legal or equitable; but the creditor must be a party, that he may receive the money when it is recovered.

In the case of *Hill vs. Manser et als.*, 11 Grat., 522, decided July, 1854, it was held: A surety in a forfeited forthcoming bond is a surety for the debt; and when he pays it as such surety he is entitled to all the rights of the creditor against the original debtor subsisting at the time he became bound for the debt; and the judgment for the benefit of the surety so paying is not extinguished, but transferred with all its obligatory force against the principal, and constitutes a legal lien upon his real estate owned at the date of the judgment or afterwards acquired.

The surety in the forthcoming bond pays to the creditor a sum certain on the execution issued on the bond against the principal and himself, and takes a receipt as money paid by himself. The evidence of payment afforded by the receipt will

not be repelled by proof of loose declarations that he had loaned the money to the principal debtor, who was his brother, so as to deprive him of the rights and remedies of the creditor.

The creditor having taken a deed of trust from the principal debtor to secure his debt, and the debtor having subsequently given another deed of trust upon the same or other property to secure debts due to a third party, one of which was for money loaned to pay a balance due upon the judgment of which this third party had notice, the surety in the forthcoming bond is entitled to have the property embraced in the first deed of trust applied to satisfy the amount he has paid, with interest on so much thereof as went to discharge the principal of the debt, and if that property does not discharge it, to have the land embraced in the second deed subjected to discharge the balance.

In the case of *Clevinger vs. Miller*, 27 Grat., 740, decided September 21, 1876, it was held: A sheriff or other officer who pays an execution in his hands for collection, without an assignment at the time of the judgment on which it is founded or the debt, is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having liens by judgment or otherwise.

In the case of *Cromer vs. Cromer's Administrators*, 29 Grat., 280, decided November, 1877. A bond on which principal and surety are both bound, once paid by the surety in the lifetime of the principal without assignment by the creditor, or an agreement to assign, is forever dead as to a security, as well in equity as at law. There can be no subrogation in such a case.

In the case of *Christman's Administrators vs. Harman et als.*, 29 Grat., 494, decided December 6, 1877, it was held: A surety on an injunction bond for the second endorser of a negotiable note, who has been compelled to pay said note, is entitled to recourse against the first endorser to recover the amount so paid.

Such surety is not barred from such recourse by the fact that in a suit in equity brought by the holder of such note against the maker and endorsers, a decree was rendered in favor of the first endorser.

Nor is such surety barred of such recourse by the fact that, in another suit in equity brought by the second endorser to establish the liability to him of the first endorser, the bill was dismissed upon answer and demurrer, there being set out several causes of demurrer, of which some went to the merits of the controversy and others did not, and it not appearing for what cause the bill was dismissed.

In the case of *Robertson vs. Triggs (Administrator) et als.*, 32 Grat., 76, decided July, 1879, it was held: Two of the sureties of a United States collector who has made default and died insolvent are entitled to be subrogated to the right of priority of

the United States in the payment of the debt, when they have paid it, as against the estate of another surety who had died before the insolvency of the collector. In such case, there having been six sureties to the bond, two of whom were insolvent at the time of the collector's death, and continued to be so until their death, the two sureties who paid the debt are entitled to recover from the estate of the deceased surety one-fourth of what they have paid.

The principles of equity in relation to subrogation are not affected by the United States statute, 1 Brightley's Dig. of Laws, 382, Section 266, which provides substitution for the surety against the estate of the principal where the surety pays the debt, as to which the statute gives the United States priority of right to satisfaction.

In the case of *Grubbs vs. Wysors*, 32 Grat., 127, decided August 7, 1879, it was held: Whilst a surety who pays a debt of his principal will ordinarily be subrogated to all of the lien rights of the creditor, when the latter has no longer occasion to hold them for his own protection, equity will never displace the creditor to his prejudice merely to give the surety a better footing.

In the case of *Sherman's Administrator vs. Shaver et als.*, 75 Va., 1, decided November 11, 1880. In October, 1859, R. recovered a judgment against S., on which execution was issued, which went into the hands of C., the deputy of K., the sheriff, and was levied by C. on the property of S. which he left with G., who converted it to his own use. R. moved against K., and recovered a judgment for the amount of his judgment against S., which K. paid. Held: G. is not entitled to be subrogated to the lien of R.'s judgment against G., as against junior judgment creditors of S.

A sheriff who by his act, or the act of his deputy, in violation of official duty, has suffered property liable to levy, and which has been levied on by him or his deputy, to be converted by the debtor to his own use, cannot be allowed as against and to the prejudice of creditors holding liens on the debtor's remaining property to have indemnify thereout to the use of another, by substitution (if admissible in any case), for what he has been compelled to pay on account of official delinquency or misconduct.

In the case of *Rhea et als. vs. Preston*, 75 Va., 757, decided July 21, 1881, it was held: Where the accommodation endorser or surety of a note, on which judgment has been obtained, purchases real estate from the principal debtor, who retains a lien for the purchase-money, and it is a matter of contract between them at the time of the sale that the endorser or surety shall assume the payment of the judgment, the relation of the parties

inter se is changed. The endorser or surety becomes the real debtor, and the principal debtor the surety; and the latter has the right to require that the lien of the judgment shall be enforced for his exoneration against the real debtor.

In the case of *Bank of The Old Dominion vs. Allen et als.*, 76 Va., 200.

1. Subrogation endorsed for accommodation paying off judgment against himself of and the maker on protested negotiable note, is entitled to be subrogated to all rights of the holder. He is under no obligation to appeal from the judgment, as he could not know that relief could be thus obtained. The law imposes no such unreasonable burden on a surety.

2. *Idem.*—Merger.—At different terms separate judgments were had against endorser and maker. On the judgment against endorser a judgment was obtained in Illinois, which judgment endorser satisfied. Held: This did not extinguish the lien of the judgment against the maker, and *eo instanti* endorser paid it, he and his assignees were entitled to be subrogated to lien of that judgment.

In the case of *Hauser, Guardian ad litem, etc., vs. King et als.*, 76 Va., 731.

Subrogation.—Surety.—Creditor.—Surety is entitled to all means of payment held by creditor against principal debtor; and creditor hath reciprocal rights to all securities which principal debtor may have furnished for surety's indemnity.

In the case of *Rosenbaum vs. Goodman*, 78 Va., 121, decided December 6, 1883. This principle applies on payment of debt or duty by one secondarily liable, and gives him right to enforce the debt against all whose liability, as compared with his own, is primary.

In the case of *Penn vs. Ingles*, 82 Va., 65, decided June 17, 1886, it was held: The general rule is, that creditor is under no obligation to exhaust his remedies against principal before resorting to surety. But when he goes into equity to enforce his debt against principal and sureties, the burden will be laid first on the principal.

Surety is entitled to enforce every security for the debt which creditor had against principal.

This is the case cited from 10 Va. Law Journal, 531.

In the case of *Croughton vs. Duval*, 3 Call, 70 (2d edition, 60), decided October 29, 1801, it was held *obiter dictum*: A forbearance without the consent of the surety, under a definite arrangement as to the time of forbearance, releases surety.

In the case of *Hill vs. Bull*, 1 Va. (Gilmer), 149, decided December 20, 1820, it was held: Giving further time for payment to the principal, without the consent of the surety, discharges the surety from all liability.

In the case of *Norris vs. Crumney et als.*, 2 Rand., 323, decided February, 1824, it was held: An indulgence granted by a creditor to a principal debtor will not discharge the sureties of the latter, unless the creditor has bound himself in law or equity not to pursue his remedy against the principal for any length of time.

In the case of *Loop vs. Summers*, 3 Rand., 511, decided October, 1825. If the obligee has parted with any security he may have in his hands by which the debt, or a part of it, might have been paid, the surety will be discharged *pro tanto*.

In the case of *Hunter's Administrators, etc., vs. Jett*, 4 Rand., 104, decided February 1826, it was held: A surety will not be discharged by an indulgence granted by the creditor to the principal debtor, unless such indulgence ties up the hands of the creditor from pursuing the debtor at law. Nor will the surety be discharged from his responsibility unless he demands such discharge in his bill, and states such a case as would entitle him to it.

In the case of *McKenny's Executors vs. Waller*, 1 Leigh, 434, decided October, 1829, it was held: A mere indulgence given by a creditor to a principal debtor, the creditor not binding himself to suspend his proceedings against the principal for any time, though such indulgence be given at the very time the sheriff is about to levy the execution on the principal's property, and though in consequence of that indulgence the principal is enabled to remove his property out of the reach of future process, does not, even in equity, discharge the surety.

In the case of *Alcock vs. Hill*, 4 Leigh, 622, decided December, 1833. A creditor suspends execution on a forthcoming bond for several years, but does so without consideration, and he nowise binds himself to suspend execution for any definite time. The principal and all the sureties but one become insolvent, and then the creditor sues out execution against the solvent surety. Held: The surety is not entitled to relief in equity.

In the case of *Harnsberger vs. Geiger*, 3 Grat., 144, decided July, 1846, it was held: A conditional agreement by the holder to give time to the principal obligor will not bind the holder, unless the condition is strictly complied with, and therefore, though such agreement was without the consent of the surety, yet if the condition has not been complied with, the surety is not released.

In the case of *Humphrey vs. Hitt*, 6 Grat., 509, decided January, 1850, it was held: A mere countermand of an execution by a creditor after it goes into the hands of a sheriff, but before it is levied, does not release a surety of the execution debtor.

In the case of *Walker et als. vs. The Commonwealth*, 18 Grat., 13, decided October, 1867, it was held: A plaintiff may always, with the consent of all the defendants, abandon a levy upon the property of all or any of them, and afterwards sue out a new execution.

If the defendants in an execution be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the consent of the sureties only, abandon the levy, and afterwards sue out executions against all the defendants.

In the case of *Shannon vs. McMullen*, 25 Grat., 211, decided June, 1874, it was held: It is a settled law that a surety is entitled to be relieved from his liability to pay the debt of his principal, either *in toto* or *pro tanto*, as the case may be, if the creditor, without the consent of the surety, make a new contract with the principal, founded on valuable consideration, to postpone the day of payment of a debt for a certain period, however short, beyond the day on which it was to be paid by the terms of the contract on which the surety was liable, or if the creditor, without the consent of the surety, release any lien which he may have on any property of the principal for the security of the debt. In the first case the relief of the surety is *in toto*, without regard to the extent of the damage actually sustained by the surety by reason of such new contract, or whether any such damage was sustained or not; and in the latter case, being *in toto* or *pro tanto*, according as the value of the property released was as much as, or less than, the amount of the debt.

See the case of *Harrison's Executor vs. Price (Executor)*, 25 Grat., 553, cited *ante*, 2890.

In the case of *Commonwealth by, etc. vs. Holmes*, 25 Grat., 771, decided January, 1875. In July, 1871, H. became the surety of B. as collector of township B. At that time the taxes for that year, by law, went into the hands of the collector on the first of September, and were to be accounted for to the county treasurer on the first of December. After the execution of the bond by H. there were several extensions, by joint resolutions and statutes of the General Assembly, of the time in which collectors should make their settlements with the county treasurer. Held: That though it is true that the law at the date of the contract enters into and forms part of the contract, yet laws which are merely directory to officers of the government form no part of the contract, and the extension of the time as aforesaid does not release the surety, H.

In the case of *Smith et als. vs. The Commonwealth*, 25 Grat., 780, decided January, 1875, it was held: The surety of a public collector or treasurer is not discharged from liability for his principal on his official bond, by an act of Assembly passed

subsequent to the execution of the bond, without the surety's assent, extending the time in which, by the law in force at the date of the bond, the officer was required to settle his accounts and make payment of the public money in his hands.

The relations prescribed by law for the settlement of such accounts at stated periods, being intended for the benefit of the government, to secure punctuality and promptness in its officers, are directory merely, and do not enter into and form a part of the surety's contract, so as to prevent the legislature from altering the time of settling at pleasure, without the surety's assent, and therefore, from the nature of the officer's obligations and duties, and of the conditions of his bond, such extension does not operate as a discharge of the surety.

In the case of *Adams et als. vs. Logan et als.*, 27 Grat., 201, decided January, 1876. A. and B. are sureties of W. in a bond to L. for three thousand dollars executed in 1858. In May, 1862, L. lent to W. seven thousand five hundred dollars in Confederate money, and took his bond payable in two years with interest, and W. executed a deed by which he conveyed to S. real and personal estate in trust to secure both debts, and it provided that upon the prompt payment annually of the interest upon the two bonds W. would keep quiet possession of the property for two years. W. did not pay the interest. Held: W. not having paid the interest, the parties were left in the same situation and with the same rights and obligations as if the agreement to extend the time had not been made.

The agreement only operated to postpone a sale of the property under the deed of trust. It did not tie up the hands of L. from pursuing his debtor W. at law.

If D. had sued W. at law, and recovered judgment, and levied an execution on the personal property embraced in the deed, he might thereby have forfeited the benefit of that security or subjected himself to an action for damages, but a court of equity would not interfere to prevent a sale of the property under the execution, upon the mere contract to pay interest on the debt. But if the agreement operated as an extension of the time of payment of the debt, as the act of the 29th of March, 1862, known as the stay law, forbade the issue of execution upon a judgment, and A. was under no obligations to the sureties to raise the question of its constitutionality, the agreement did not have the slightest effect upon the rights and remedies or obligations of any of the parties.

The principle upon which an agreement for an extension of time discharges a surety is, that the creditor thereby deprives the surety of the means of relieving himself by paying the debt and proceeding immediately against the principal, or by his filing his bill *quia timet* to compel the debtor to

pay the debt, or by notice to the creditor under the statute. The sureties cannot be discharged by an act which in no manner affected their rights or impaired the rights of the creditor.

In the case of *Coffman et als. vs. Moore's Executors*, 29 Grat., 244, decided September, 1877. M. holds the bond of C. and of E. and three others for thirteen thousand eight hundred dollars, in which C. is principal and E. and the three others are sureties, due in September, 1869. On the 17th of June, 1870, C. and M. enter into an agreement under seal, by which C. sells to M. his farm of six hundred and twenty-eight acres at fifty dollars per acre in the present currency, the whole to be due on the first of September next, when possession was to be delivered. And C. agreed that M. should be paid all claims binding on the land, and the claims that M. holds against C., and C. agreed to receive as money a note M. held against the estate of J., who was one of the sureties. At this time C. was very much involved and probably insolvent. M. a short time before the first of September ascertains C.'s condition, and fearing he will either go or be put into bankruptcy, and that his debt may be jeopardized, declines to carry out the contract, and a few days after the first of September C. conveys the land in trust to secure other debts. M. having recovered judgment against C., E. and two of the other sureties, the sureties enjoin it on the ground that M., having under his contract bound himself not to enforce his debt until the first of September, and by this act failed to have his debt satisfied out of the land, had discharged the sureties. Held: M. was not bound by the contract to sue upon the bond before the first of September, and was not bound under the circumstances to carry out the contract; and therefore the sureties are not released.

In the case of *Richmond & Petersburg Railroad Company vs. Kasey et als.*, 30 Grat., 218, decided March, 1878. K., as a general freight and ticket agent of the Richmond & Petersburg Railroad Company, gave a bond with sureties. The rule of the company was, that he should settle monthly, and though there was no rule on the subject, it was expected that freight and tickets should be paid for in cash. K. seems to have given credit at his own risk to such persons as he chose, for the freight, and this was known by the president, who remonstrated with him for doing it. He did not settle his accounts properly, and the deficit grew for eighteen months, when he was dismissed. There was no fraudulent concealment of these facts by the officers of the company, though the sureties of K. were not informed of them. Held: The sureties are not released from their liability for the default of K. by the knowledge of the officers of the company and that he gave credit for the freight

delivered. And if there had been a rule that freight should be paid for in cash, and that rule had been changed after the execution of the bond, that would not have released the sureties. There having been no fraudulent concealment of the fact that K. did not settle promptly, the failure to inform his sureties of the fact did not relieve them from their liability for the default of K.

The rules and regulations of a corporation made for the government of the conduct of its officers do not become terms and conditions of the bond of its officers unless such an intention is expressed on the face of the bond.

In the case of *Callaway's Executor vs. Price's Administrator et als.*, 32 Grat., 1, decided July, 1879. In January, 1858, L. as principal, and P. as surety, executed to C. a bond for nine hundred and twenty-five dollars, payable in twelve months. P. died before the note came due, and L. qualified as his administrator. In December, 1860, C. sued L. upon the bond, and at the earnest solicitation of L., C. accepted from him three negotiable notes, satisfactorily endorsed, payable in three, six and nine months, for the amount of the bond, and in January, 1861, dismissed his suit; one hundred and fifty dollars was paid on the first note and it was twice renewed; the second was also renewed. No more was paid on them, and both principal and sureties on the notes had become insolvent before 1866, when C. sued upon them. He then filed a bill to subject the estate of P. to the payment of the bonds. Held: If upon accepting the notes the agreement was to give time upon the payment of the debt, then the surety in the note was released, and the estate of P. is not liable to pay the debt. Though there was no agreement to give time upon the payment of the debt, the legal effect of accepting the notes was to suspend the right of action on the bond during the period allowed for the payment of the notes; and that operated as a release of the surety in the bond.

In the case of *Dey (Receiver) vs. Martin*, 78 Va., 1, decided March 15, 1883, it was held: It is well settled that any change in the contract made without surety's consent, however immaterial, and even if for his advantage, discharges him.

In the case of *Christian & Gunn vs. Keen*, 80 Va., 369, decided April 2, 1885, it was held, p. 376: Surety is discharged by any change of contract, however immaterial, if made without surety's consent.

Where the wife charges her property to secure a debt of her husband, she becomes the surety of her husband, and is entitled to all the rights of a surety.

Payment, not acceptance merely, entitles acceptor to sue the drawer.

A credit on the account of the principal debtor should discharge *pro tanto* the lien on the surety's estate.

In the case of *Kyger vs. Sipe (Trustee)*, 89 Va., 507, decided December 15, 1892, it was held: If principal in an obligation is not liable by reason of a purely personal defence, in the nature of a privilege or protection, as infancy or coverture, then the surety is not released, but the contract subsists as against him in full force.

SECTION 2895.

In the case of *McCormack's Administrator vs. Obannon's Executor*, 3 Munf., 484, decided November 25, 1811, it was held: A court of equity will not compel a surety in a bond to contribute to the relief of his co-surety who has been forced to pay the debt, unless it appear that due diligence was used without effect to obtain reimbursement from the principal obligor, or that he was insolvent.

In the case of *Harrison vs. Lane et als.*, 5 Leigh, 414, decided November, 1834. W., deputy of S., sheriff of F. county, gives a bond to his principal, with five sureties, for the faithful discharge of the office of deputy sheriff, but S. not being satisfied with this security, W. and three other persons as sureties give a second bond to S., with like conditions. A memorandum being endorsed on this second bond at the time of its execution, in conformity with a previous agreement that S. should not resort to the second bond for indemnity for the misconduct of the deputy in office, so long as the sureties in the first bond should be resident in the State, and it should appear that he could be indemnified without recourse to the sureties in the second bond, S., the sheriff, recovers judgment on the first bond against the sureties therein bound, for the amount of damages sustained by him by reason of the deputy sheriff's misconduct in office. Held: The sureties in the first bond have no right to contribution from the sureties in the second bond.

In the case of *Langford's Executor vs. Perrin*, 5 Leigh, 552, decided December, 1834. A., B. and C. are sureties for D. in a bond; judgment is recovered against D., the principal, and the sureties A. and B., but not against the other surety, C., and a *fi. fa.* being sued out on the judgment, and levied on the property of D., the principal, he gives a forthcoming bond, in which A. and B. and another person join him as sureties; execution awarded on such forthcoming bond is levied on the goods of A., one of the sureties in the original bond, as well as in the forthcoming bond. Held: A. has no right to contribution from C., his co-surety in the original bond. Judgment recovered and *fi. fa.* sued out against D., principal debtor, and A. and B., his sureties; the *fi. fa.* is levied on the goods of D., the principal, who gives a forthcoming bond, in which A. and B. and another

person, E., are bound as D.'s sureties, and on execution of the forthcoming bond E. is compelled to pay the debt. Held: E. is co-surety with A. and B. for D. in the forthcoming bond, not surety for A. and B. as well as D., and therefore E. is entitled only to contribution from A. and B. as co-sureties, not to full indemnity from them as principals.

See the case of *Preston vs. Preston*, 4 Grat., 88, *ante*, Section 2493.

In the case of *Wayland vs. Tucker et als.*, 4 Grat., 267, decided January, 1848, it was held: The right of one surety to call upon his co-surety for contribution arises from a principle of equity growing out of the relation which the parties have assumed towards each other; the equity springs up at the time of entering into that relation, and is fully consummated when the surety is compelled to pay the debt.

The principal and two of three securities in a bond become insolvent, and the other surety paid the debt. Previous to this payment, the solvent surety had executed his bond for less than half the first bond, to one of his co-sureties, who had conveyed it in trust for his creditors. After the payment of the first-mentioned debt by the solvent surety, judgment was recovered against him on his own bond; and he then enjoined the judgment, claiming to offset it by his co-sureties' portion of the debt he had paid. Held: That he is entitled in preference to the assignee of his bond.

In the case of *Tarr vs. Ravenscroft*, 12 Grat., 642, decided September 11, 1855, it was held: One of two sureties of an insolvent administrator purchases legacies for which the sureties are bound at a discount. He shall only charge his co-surety for his proportion of what he paid for the legacies and of the expenses of purchasing them.

In the case of *Harnsberger et als. vs. Yancey et als.*, 33 Grat., 528, decided September, 1880, it was held: If there are two parties bound as a principal and surety for a debt, and a third party afterwards, at the request of the principal, bind himself as surety for the debt, the two sureties, in the absence of any agreement to the contrary, become co-sureties of the same principal, and this relation may be established by implication from circumstances, as well as by express agreement. But where there is a judgment against a principal and his surety, and a third party, at the instance of the principal, and for his sole benefit, and without the assent of the surety, enters as surety for the principal, in an obligation the effect of which is to suspend the execution of the judgment, and thus prejudice the rights of the first surety, the equity of the latter (first surety) is superior, and the second would not be entitled to contribution from the first, and, according to some authorities, the first would be entitled to

indemnity from the second. This is not the case with Y. and W. in this case.

In the case of *Strother's Administrator et als. vs. Michels's Executor et als.*, 80 Va., 149, decided January 29, 1885, it was held: Where principal is insolvent, surety against whom judgment has been rendered may have judgment against his co-surety for his share of the debt. But unless such judgment has been rendered, such surety cannot have judgment against his co-surety.

In the case of *Turner's Administrator vs. Thom (Trustee)*, 89 Va., 745, decided March 16, 1893, it was held: To entitle one joint obligor to recover from his co-obligor the amount paid by him in excess of his proportion, the payment must have been made upon a debt for which the latter was legally liable at the time of payment, and which the obligor paying was compellable to pay, and not upon a debt that was barred as to the obligor sought to be charged, and who may be, as in the case here, a personal representative, forbidden to pay under Code 2676, without making himself personally liable to extent of such payment.

TITLE XLI.

CHAPTER CXXXVII.

SECTION 2896.

In the case of *Parker vs. Elliott*, 6 Munf., 587, decided April 6, 1820, it was held: Trespass on the case may properly be brought by a father for the loss of the service of his daughter, and expenses incurred by him in consequence of being debauched and got with child, no forcible injury to himself or his property being alleged in the declaration.

In the case of *Parker vs. Elliott*, 1 Va. (Gilmer), 33, decided April 6, 1820, it was held: The plaintiff in an action for debauching his daughter may elect to bring trespass or case for the injury.

In the case of *White vs. Campbell*, 13 Grat., 573, decided September 9, 1856, it was held: In an action for the seduction of plaintiff's daughter, to enhance the damages he may prove that the defendant promised to marry her and by means of such promise had succeeded in debauching her.

In the case of *Lee vs. Hodges*, 13 Grat., 726, decided March 10, 1857, it was held: The action by a father for the seduction of his daughter is founded on the relation of master and servant, and not that of parent and child.

In such action the declaration must allege the relation of master and servant, or it will be totally defective on demurrer.

The only change made by the act in relation to the action of seduction is to dispense with proof of the loss of service. The act does not give the action in any case where it did not lie at common law.

When a daughter over the age of twenty-one years, who lives away from her father's house, under a contract for her services made by herself after she came of age for her own benefit, is seduced, the action by the father will not lie either at common law or under the statute.

In the case of *Clem vs. Holmes*, 33 Grat., 722, decided September, 1880. In an action by a father for the seduction of his daughter, a count which avers she is under twenty-one years of age and unmarried, and was at the time of the seduction, and the plaintiff was then and still is entitled to her attention and services. Held: This is a sufficient averment of the relation of master and servant between father and daughter.

In an action by the father for the seduction of his daughter, evidence offered by the father of the pecuniary order of the defendant is competent. The statute, Code of 1873, Chapter 145, Section 1, which in an action for seduction dispenses with any allegation or proof of the loss of service of the female by reason of the defendant's wrongful act, does not alter the rule as to the commencement of an action on the case by the father; and when the daughter lived away from the father's house at the time of the seduction, but returned and was confined and nursed there, the statute of limitation will only begin to run from that time.

SECTION 2897.

See the references given to Section 3375.

In the case of *Brooks vs. Calloway*, 12 Leigh, 466, decided December, 1841, it was held: To an action for insulting words, under the statute to suppress duelling, no plea of justification can be received.

In the case of *Moseley vs. Moss*, 6 Grat., 534, decided January, 1850, it was held: In actions of slander under the statute the truth of the words spoken may be given in evidence in mitigation of damages.

In an action for a statutory slander, the plaintiff must declare under the statute. If plaintiff does not declare under the statute, his declaration must set out a common law slander, and if the words charged do not amount to slander they cannot be helped by the innuendo.

In the case of *Bourland vs. Edison*, 8 Grat., 27, decided July, 1851, it was held: In an action of slander, under the plea of not guilty the defendant may, in mitigation of damages, prove any facts as to the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language com-

plained of which tend to excuse him for uttering the words, provided the facts do not prove or tend to prove the truth of the charge complained of, but, in fact, relieve the plaintiff from the imputation involved in it.

In the case of *Hogan vs. Walworth*, 16 Grat., 80, decided August 30, 1860, it was held: In an action of slander, if the plaintiff proceeds under the statute he must in his declaration aver that the words, from their usual construction and common acceptation, are construed as insults, and tend to violence and breach of the peace, or else employ some other equivalent or averment to denote that the words are actionable under the statute.

When the declaration does not show by the proper averments that the action is under the statute, it may be demurred to as defective, unless it sets out properly, and in substantial compliance with the rules of pleading, such a charge as constitutes defamation at the common law.

The common law and statutory causes of action cannot be blended in one count.

In the case of *Dillard vs. Collins*, 25 Grat., 343, decided September, 1874, it was held: In an action of slander, a plea that since the commencement of the action the plaintiff has been adjudicated a bankrupt is not a good plea.

In every instance of slander, whether verbal or written, malice is an essential ingredient and must be averred. But when averred, and the language, verbal or written, is proved, the law will infer malice until the proof, in the event of denial, be overthrown or the language itself satisfactorily explained. Confidential or privileged communications are an exception to this rule; and in such a case the burden is on the plaintiff to prove malice.

Confidential or privileged communications are of four classes: First, Where the author or publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interest. Second, Anything said or written by a master in giving the character of a servant who has been in his employment. Third, Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. Fourth, Publications duly made in the ordinary mode of parliamentary proceedings.

These excepted instances so far change the ordinary rule with respect to slanderous or libelous matter as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circum-

stances connected with that matter, or in the situation of the parties adequate to authorize the conclusion.

R. G. and J. rented land of D. They were strangers in the neighborhood. On several occasions D. told R. G. and J. that C. and all his sons were horse-thieves, and made their living by that means, and that they frequently harbored that kind of men. There is nothing in the relation of landlord and tenants between D. and R. G. and J. which raises any presumption in favor of D. that the words were spoken without malice, or brings them within the class of privileged communications.

On a trial in an action for slander by C. against D., the slanderous words having been proved, D. will not be allowed to prove by his own testimony what were his feelings and motives in making the charge, whether with any ill-will against C., or only for the protection of his own interests.

A deposition is taken to be read on a trial at law, and the witness is asked if he is acquainted with the general character of C., the plaintiff, for honesty; if so, state what it was and is. To which he answered, as far as he could see he did not see anything against the man; he never heard anything against him by any other man except D., the defendant. To this answer the defendant excepted generally. On the cross-examination it appears that witness did know enough of C.'s general character to authorize him to speak of it. The exception of the plaintiff should have stated the grounds of the objection to the answer. And it appearing from the whole deposition that the witness was competent to speak as to the character of C., the answer will not be stricken out.

In an action for slander the defendant cannot inquire into the social intercourse of the plaintiff with his neighbors. And where the slander charged is for horse-stealing, the defendant cannot introduce evidence of rumors as to the plaintiff or his sons having stolen a hog.

In the case of *Hansboro and Wife vs. Stinnett*, 25 Grat., 495, decided September, 1874, it was held: In an action for slander at common law, the words charged are, "D. killed my beef." There being no colloquium, the words not necessarily importing a felony, they cannot be extended in their meaning by the innuendo. In such case, the words themselves not being actionable at law, unless the averment of extrinsic facts and the colloquium concerning them show that the defendant, in speaking the words laid, imputed the crime felony, they are not actionable.

When the words laid in the declaration have been proved, and not before, proof of the speaking of like words, or those laid either before or after they are spoken, is admissible to affect the measure of damages.

In the case of *Chaffin vs. Lynch*, 83 Va., 106, decided April,

1887, it was held: This act applies to words written as well as words spoken.

A publication containing insulting words may be declared on under the statute, though it be libelous at common law. Declaration showing by proper averment that the words are within the statute is sufficient. The two causes of action cannot be united in one count. In either case malice must be alleged. Mere publication is *prima facie* evidence of malice, but the occasion may rebut the presentation.

One insult cannot be set off against another, yet if a man be attacked by another in a newspaper he may reply. If his reply is not unnecessarily defamatory of his assailant, and is honestly made in self-defence, it will be privileged.

In a trial of action for defamation, it is error to give instructions withdrawing from the jury the question whether the publication declared on falls within the protection extended to privileged communications, and telling them to consider the evidence tending to show that defendant made the publication without malice and *bona fide* in self protection, only in mitigation of damages. On the contrary, if the jury from the evidence believed that, though the language used was untrue, yet the defendant believed it true, and used it honestly, and without malice, in self defence and reasonable protection of his own interest, it would have been their duty to find for the defendant, and they should have been instructed to that effect.

This is the case referred to from 11 Va. Law Journal, 598.

In the case of *Rolland vs. Batchelder*, 84 Va., 664, decided March 29, 1888, it was held: Words that, according to their usual and common acceptance, are construed as insults, and tend to violence and breach of the peace, are actionable, whether written or spoken, and, it would seem, whether published or not. If publication be necessary, the writing and sending of such words to the person libeled is sufficient.

Letters sent per servant to neighbor's wife, artfully asserting that she had invited writer to meet her, and proposing private interview at a time and place specified, are within the meaning of the statute and actionable.

At a trial of action, no "demurrer shall preclude a jury from passing on the alleged insulting words," and it is therefore improper for the trial court to compel plaintiff to join in defendant's demurrer to evidence.

In the case of *Chaffin vs. Lynch*, 84 Va., 884, decided May 10, 1888, it was held: Section 3575 (allowing justification in action for defamation by proving truth) and the rule as to privileged communications apply as well to this section as to common law actions of libel and slander.

SECTION 2898.

In the case of *Jones vs. Murdaugh*, 2 Leigh, 447, decided December, 1830, it was held: In an action upon the statute for wrongful distress for rent when no rent is in arrear, the declaration must set forth the relation of landlord and tenant existing between the plaintiff and defendant, and if it does not the declaration is bad on general demurrer.

In the case of *Olinger vs. McChesney*, 7 Leigh, 660, decided July, 1836, it was held: Where a distress is made for rent pretended to be due, when in truth there is none due, and the goods distrained are not sold, the remedy is by action at common law, and trespass may be maintained, but the party suing is not obliged to bring trespass; he may waive the trespass and bring case.

The circumstance that the party distrained upon sued out a writ of replevin, which was never prosecuted, will not prevent him from maintaining case for the wrongful distress. Case will lie for suing out an attachment for rent maliciously and without probable cause. When an action of tort is founded on a contract, a variance from the contract alleged will be as fatal as in an action on the contract itself. In case for a wrongful distress, if the plaintiff allege that he held under a lease for five months, for twenty dollars payable in repairs and labor, and at the trial it appear that the lease was for twelve months, for a rent of sixty-five dollars, the variance will be fatal.

SECTION 2899.

In the case of *Vaiden vs. Bell*, 3 Rand., 448, decided October, 1825, it was held: A writ of replevin lay at common law for all goods unlawfully taken, and this was the law of Virginia until the act of 1823, which abolished the writ in all cases, except those of distress for rent. That act is not retrospective, and does not affect cases where the action was brought and the judgment rendered before its passage.

SECTION 2900.

In the case of *Western Union Telegraph Company vs. Reynolds Bros.*, 77 Va., 173, decided February 15, 1883, it was held, p. 178: Where such company has received a message for transmission and the usual charges according to their regulations, it is bound to transmit the message faithfully and promptly, whether it be in cipher or intelligible; and should the company negligently fail to transmit such a message altogether, or to transmit it faithfully and promptly, it will be liable to an action for damages by the party aggrieved, and the measure of damages in such case is such loss as the parties aggrieved have sustained by reason of the wrongful act of the company in violation of

the duties imposed on it by law. A more precise statement of the rule is, "the company is liable to all the direct damages which both parties would have contemplated as flowing from the breach of the contract or violation of the duty, if at the time they had bestowed proper attention to the subject, and had been fully informed of all the facts."

Telegraph company received a cipher message for transmission, and the usual charges according to its regulations, and failed altogether to transmit it, whereby the sender lost a large sum of money, and brought his action for damages against the company. At the trial the defendant asked the court to instruct the jury that in order to make the defendant liable for more than nominal damages they must believe from the evidence that the defendant was substantially informed of the meaning of the message and of the approximate extent of the plaintiff's liability to loss in case of failure to transmit the message promptly and correctly. Court below refused.

In the case of *Norfolk & Western Railroad Company vs. Irvine*, 84 Va., 553, decided February 16, 1888, it was held: Plaintiff injured by railroad company's refusal to carry his baggage is not limited to a recovery of a penalty prescribed by Section 1201, but under this section may recover the amount of the actual damages.

In the case of *R. & D. R. R. Co. vs. Noel et als.*, 86 Va., 19, decided April 11, 1889, it was held: Obstruction of streets by a railroad company, unless the train is standing to load or unload passengers, and unless a passway is left open, is unlawful, and the company is liable to fine and for such damages as may be caused thereby to any person; but these damages must be proved, not inferred.

SECTION 2901.

The references to 2 H. & M., 423, 6 Munf., 27; 2 Rand., 440, and 4 Grat., 151, are all to cases determining when an action at trespass *vi et armis* must be brought, and are all obsolete now.

In the case of *Parsons vs. Harper*, 16 Grat., 64, decided August 28, 1860, it was held: Under this statute counts in trespass may be joined to counts in case in an action on the case.

In the case of *Wcmack vs. Circle*, 29 Grat., 192, decided October 4, 1877, it was held, p. 197: In an action of trespass on the case, counts in case and counts in trespass *vi et armis* may be joined in the declaration.

In the case of *Fecheimer vs. National Exchange Bank of Norfolk*, 31 Grat., 651 and 656, decided March, 1879. L. & S. carried on two stores in Norfolk on premises on which they held leases. On the 8th day of May, 1866, they conveyed to F. all their goods in their stores, all debts due them, and the lease-held premises, in trust to pay certain specified debts, with

authority to take possession, sell the goods, and collect the debts. On the 15th of May, W. sued L. & S. in *assumpsit* for \$913.30, and on the same day sued out an attachment against their effects, and this attachment was levied on all their goods and debts at the two stores, which were taken possession of by the sergeant of the city. On the same 15th of May, but two or three hours after, the attachment of W. was levied. The National Exchange Bank of Norfolk sued out an attachment against the property of L. & S., claiming a debt of eleven thousand six hundred and sixty-five dollars, and this attachment was levied by the same officer upon the goods, etc., in his hands under the other attachment, and also upon the lease-hold of the two houses. In this case F. interpleaded, and there was a verdict and a judgment in his favor. And afterwards the suit of W. was dismissed. F. then sued the bank in an action of trespass on the case for the damages he had sustained by the levy of their attachment. Held: Though at common law action on the case was the proper remedy so far as the goods, etc., embraced in the first attachment were involved, and trespass *vi et armis* was the remedy as to the lease-holds which were not levied on by the first, yet, as under the Virginia statute, case may be brought wherever the action of trespass *vi et armis* could be brought, the action on the case was properly brought to recover the damages sustained as to all the property attached.

In the case of *Dangerfield vs. Thompson*, 33 Grat., 136, decided April, 1880. In an action of trespass on the case, the declaration charged the defendant with an assault in various forms, one of which was by a wounding from a pistol shot, so as to cause the amputation of the leg of the plaintiff, and also set out an ordinance of the city in which the wound was inflicted, prohibiting the discharge of firearms therein; also alleging the continued sickness, disorder, and suffering in consequence of said wound, the expense, medical attention, and other costs consequent on said wound, which, plaintiff claimed, amounted to a large sum and for which he claimed damages amounting to ten thousand dollars. On demurrer, held: The declaration alleges a case of trespass at common law, and under our statute trespass on the case will lie wherever trespass will, and is sufficient.

In the case of *New York, Philadelphia & Norfolk Railroad Company vs. Kellam's Administrator*, 83 Va., 851, decided November, 1887, it was held: Abolishes distinction between these two actions. Writ in former action; declaration in latter; demurrer for the variance properly overruled.

SECTION 2902.

In the case of *Baltimore & Ohio Railroad Company vs. Wightman's Executor*, 29 Grat., 431, decided November 29,

1877, it was held: In an action under this section it is not necessary to aver in the declaration for whose benefit the suit is prosecuted.

In the case of *Matthews vs. Werner's Administrator*, 29 Grat., 570, decided December 19, 1877, it was held: In an action under this section it is not necessary to aver in the declaration for whose benefit the action is brought.

In the case of *B. & O. R. R. Co. vs. Sherman's Administrator*, 30 Grat., 602, decided September, 1878, it was held: In an action under the statute by the administrator of a party killed upon a railroad track against the company, the plaintiff may, upon the trial, and before the jury has rendered a verdict, introduce evidence to prove that the deceased left a widow and children, and the number and ages of the children.

In an action on the case by the administrator of a person killed upon a railroad track against the company, the deceased not being an employee of the railroad or passenger, but walking on it for his own convenience, but not of necessity, it was held in this case upon the evidence that there was little ground to charge negligence upon the company; but if there was any negligence on the part of the company, there was contributory negligence on the part of the deceased, and certainly the negligence of the company, if any, was not so gross as, notwithstanding the contributory negligence of the deceased, to render the company responsible for the damage sustained by the plaintiff for the killing of the deceased.

In the case of the *B. & O. R. R. Co. vs. Whittington's Administrator*, 30 Grat., 805, decided September, 1878, it was held: In an action for damages occasioned by the negligence or misconduct of the defendant, it is not necessary for the plaintiff to allege in his declaration or to prove the existence of due care and caution on his part to entitle him to recover. If the defendant relies upon contributory negligence of the plaintiff to defeat the action, he must prove it unless the fact is disclosed by the evidence of the plaintiff, or may be fairly inferred from all the circumstances.

In an action for damages against a railroad company, a count in the declaration, after setting out that the defendant was working a railroad in the county with engines and cars for carrying passengers and freight, alleged that on a day named "the defendants conducted themselves so carelessly, negligently and unskilfully in the operation of their said business as to inflict upon W. (plaintiff's intestate) severe bodily injuries, by reason whereof he did, on the 28th of June, die." The count is defective in not stating where the deceased was, or how he was injured. Where issue has been joined on the plea of general issue, the court may refuse to allow the defendant to file special pleas, where

the facts stated in the pleas may all be given in evidence under the general issue.

An employee of a railroad company, who is engaged in mending the track of the road, whilst he may get further off, stands near enough to the railroad track to be struck by a train, if perchance there should be an increase of speed or a change of cars, is guilty of the grossest imprudence and negligence. No man is justified in placing himself near a passing train upon any such idea or presumption, and for an injury sustained by so doing he or his representative cannot recover. In this case, upon the facts certified, the deceased was guilty of contributory negligence, and his administrator is not entitled to recover damages from the railroad company for the injuries sustained by the deceased.

If the injury sustained by the deceased was the result of a change of the usual train, from an accommodation train of moderate rate of travel to what is known as a lightning express train, of a rate of travel from twenty-five to thirty-five miles per hour, and of a change of schedule of the time of running the train, passing the point at which the deceased was killed, and said changes were by the chief authority of the railroad company, and the death of the deceased was without fault on his part, and the company had not given notice of said changes to the employees, of whom deceased was one, so as to enable them to avoid the danger, it was the duty of the said company to give such notice, and their failure to do so was negligence of the company, for which it is responsible in damages.

In the case of *Richmond & Danville Railroad Company vs. Anderson's Administrators*, 31 Grat., 812, decided May 1, 1879, it was held: The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has been guilty of any negligence or want of ordinary care which contributed to cause the accident. But though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

In the case of *B. & O. R. R. Co. vs. Norvell's Administrator*, 32 Grat., 394, decided November, 1879, it was held: When injury or damage happens to a passenger by the breaking down or overturning of a railroad train, or the breaking down of a bridge, wheel, axle, or by any other accident occurring on the road, the presumption *prima facie* is, that it occurred by the negligence of the railroad company, and the burden of proof is on the railroad company to prove that there has been no negligence whatever, and that the damage has been occasioned by

inevitable casualty or by some cause which human care and foresight could not prevent.

The law, in tenderness to human life and limbs, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proof every imputation of such negligence; and therefore, where the death of a passenger on said railroad is caused by slightest neglect, against which human prudence and foresight could have guarded, the company is liable in damages for such death.

Railroad companies are held by law to the utmost care, not only in the management of their trains and cars, but also in the structure, repair and care of the bridges and all other arrangements necessary to the safety of passengers.

Charles L. Norvell's administrator brought suit against the B. & O. R. R. Co., lessees of the Washington City, Virginia Midland & Great Southern Railroad, running from the town of Strasburg, in Shenandoah county, to the town of Harrisburg, in Rockingham county, to recover damages for the death of said Norvell, which occurred by what is known as "Narrow Passage Bridge disaster," in said county of Shenandoah, Virginia. Norvell was an unmarried young man, whose father was dead and who lived with and cared for his mother. On the trial, on the motion of the plaintiff, the circuit court instructed the jury as follows:

In ascertaining such damages the jury should find the sum with reference *first* to the pecuniary loss of Phoebe Ann Norvell, the mother of said Charles L. Norvell, by the death of said Charles L. Norvell, fixing the same at such sum as would be equal to the probable earnings of the said Charles L. Norvell, taking into consideration the age, business capacity, experience, habits, energy, and perseverance of the deceased during what probably would have been his lifetime, and the lifetime of said P. A. Norvell, if he had not been killed. *Second*, In ascertaining the probability of life, the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life. *Third*, By adding thereto compensation for the loss of his care, attention and society to his mother. *Fourth*, By adding such sum as they may deem fair and just, by way of solace and comfort to his said mother, for the sorrow, suffering, and mental anguish occasioned by his death. Held: There was no error in either of the instructions.

In an action under this section, it is not necessary to aver in the declaration for whose benefit the suit is prosecuted.

In the case of *Richmond & Danville Railroad Company vs. Moore's Administrators*, 78 Va., 93, decided December 6, 1883. M. was on December 24, 1879, conductor of a freight train on

Richmond & Danville Railroad, running from Greensboro to Richmond. A car was taken into train during night at Burkeville, the handle of the ladder whereof had been broken off long enough for the fracture to appear weather-worn. Next morning at Powhatan Station, M., attempting to descend this ladder, face towards it, caught at and would have caught the handle had it been in its place, but fell and was killed; conflict in evidence as to whether M. was drunk and negligent or otherwise. In suit by personal representative of M. for damages, defendant demurred to the evidence. On error. Held: Defendant was guilty of negligence in permitting the car ladder to remain out of order, which negligence caused M.'s death and renders defendant liable for damages.

Under the rule governing demurrers to evidence, M. contributed in no way to the accident by his own misconduct.

In the case of *Clark's Administrators vs. R. & D. R. R. Co.*, 78 Va., 709, decided March 13, 1884, it was held: Where defendant's negligence was proximate cause of injury to plaintiff, who did not, by want of common care of himself, contribute to such injury, or where defendant, by exercise of care, could have prevented the consequence of plaintiff's carelessness, plaintiff may recover compensation.

C., a minor, but with his father's consent employed as a brakeman on a freight train, while doing duty on top of car by moonlight was killed by a colliding highway bridge, not high enough for a man erect on car top to pass under. When employed he was warned by company's agent to look out for highway bridges, and his co-brakemen were told to show him the dangerous ones. Under this bridge in daylight C. had thrice passed. That night, leaving the station next to the bridge, C. was warned to look out for the bridge. On nearing the bridge, co-brakeman seeing C. erect on car-top told him to stoop, but C. did not stoop. Action by C.'s administrator; company demurred to the evidence. Held: Defendant was entitled to demur and plaintiff was compelled to join.

Though defendant may have been culpable for lowness of bridge, yet C.'s carelessness contributed to injury, and defendant is not liable.

The risk of collision with such bridges was incident to the employment. C. had opportunity to know their dangerous character, which must have been contemplated when he accepted employment.

In the case of *Moon's Administrators vs. R. & A. R. R. Co.*, 78 Va., 745, decided April 24, 1884, it was held: The fellow-servant or co-employee for whose negligence the company is not liable is one employed in the same shop or place with, and having no authority over the one injured, and who is no more

charged with the discretionary exercise of powers and duties resting on the company than is the one injured.

But when the company delegates to an agent duties made incumbent on it by the law, his acts and negligences are those of the company, and such agent is not a fellow-servant with those under him, nor with those in a different department of its service, and it is liable for an injury done by such agent's acts or negligences to an employee of either of the two classes aforesaid.

The case of *The Harrisburg, in rem*, 119 U. S. S. C., 199, decided November 15, 1886, it was held: If a suit *in rem* can be maintained in admiralty against an offending vessel for the recovery of damages for the death of a human being on the high seas, or in waters navigable from the ocean, which is caused by negligence, when an action at law is given therefor by statute in the State when the wrong was done, or where the vessel belonged (which is not decided), it must be commenced within the period prescribed by the State statute of limitation there. The time within which the suit should be commenced operating as a limitation of the liability created by statute, and not of the remedy only.

In the absence of an act of congress, or a statute of a State giving a right of action therefore, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas or waters navigable from the sea, which is caused by negligence.

In the case of *Sheeler's Administrator vs. C. & O. R. R. Co.*, 81 Va., 188, decided December 3, 1885. In order to maintain an action for an injury, it must be proved that the injury was caused by the negligence of the defendant or his agents, and it must not appear from the evidence that want of ordinary care and prudence on the part of the plaintiff directly contributed to the injury. Where negligence is the gravaman of the action, the law does not impute it, but the burden of proving it rests on him who alleges it.

On defendant's railroad is a bridge with sides five feet high. The top is one foot higher than the cab floor, and thirteen and one-half inches of passing engines, making it unsafe for one to be on outside of engine passing bridge. The bridge is more properly built with respect to safety on passing engines than other bridges on that and other roads. S. well knew this bridge, having passed over it on engines daily for months. Whilst the engine whereof S. was, on November 27, 1883, fireman, was running eighteen miles an hour, he, without orders and in violation of the rules, opened the ashpan, by means whereof fire fell out and set blazing some greased woolen ravelings on the box of a driving-wheel of the engine. The fire could not be

extinguished without stopping the train, and it was sufficient to stop it at the next stopping place. But without orders and unnecessarily, S. got down on the side of the engine and tender, with his right foot on step of engine and left on step of tender, clasping with right hand hand-holder on engine, and holding in his left hand a small hose attached to spigot on tender, swung his body out and forward in a stooping posture, and with left arm resting under side of engine, was attempting to extinguish the blaze, when he was struck by the upright side of the bridge and was killed. Held: S., and not the defendant company, was guilty of negligence, but for which injury would not have occurred, and hence is not entitled to recover.

The case of *Frarley's Administrators vs. Richmond and Danville Railroad Company*, 81 Va., 783, confirms the case of *Richmond and Danville Railroad Company vs. Anderson*, 31 Grat., 812, cited *supra*.

The case of *Roberts vs. The A. & F. R. R. Co.* has since been reported, 83 Va., 312, and is not relevant to this section.

SECTION 2903.

The reference to 29 Grat., 570, is to the case quoted *supra*, Section 2902.

SECTION 2904.

In the case of *Powell's Administrator vs. Powell*, 84 Va., 415, decided January 26, 1888, it was held: The money received by administrator upon a compromise of an action for damages for the killing of his intestate, must, after paying the costs and attorney's fees, be distributed according to the statute of distributions.

CHAPTER CXXXVIII.

In the case of *Burnley vs. Lambert*, 1 Washington, 308, decided at the fall term 1794, it was held: If the defendant has had possession of the property at a time anterior to the issuing of the writ it is sufficient, and he can only avoid the burden by showing that he has been evicted by proper process of law.

In the case of *Bigger's Administrators vs. Alderson*, 1 H. & M., 54, decided October 17, 1806, it was held: In detinue, where a demurrer to evidence states that the defendant in support of his right offered a bill of sale, and no other evidence of the defendant's possession is mentioned, that is sufficient to prove said possession.

In the case of *Newby's Administrators vs. Blakely*, 3 H. & M., 57, decided October, 1809, it was held: A plaintiff in detinue, who, after having five years peaceable possession of a slave, acquired without force or fraud, loses that possession, may regain it on the mere ground of his previous possession, on the same

principle that a defendant may protect himself, on that length of possession, under the act of limitation.

But such recovery will not affect the rights of others not parties to the suit.

In the case of *Eppes vs. Royal's Administrators*, 2 Munf., 479, decided March 29, 1811, it was held: If the plaintiff and defendant claim under the same executory bequest, and a case agreed be submitted to the court, to be adjudged according to the legal construction of the will, without saying anything about the executors assent to the legacy, the court will assume that as a fact between the present parties.

An executor or administrator, holding slaves in which his testator or intestate had only an estate for life, terminable upon his dying without issue living at the time of his death (which event actually took place), may be charged, in detinue, personally, and not as an executor or administrator.

It seems that if a declaration in detinue demand a negro woman by name and her three children, not mentioning their names, and a case be agreed, submitting that if the law be for the plaintiff upon certain other points, judgment may be entered in his favor, "for the slaves in the declaration mentioned," the court may insert the names of the negro children in the judgment.

In the case of *Kent vs. Armistead*, 4 Munf., 72, decided March, 1813, it was held: A declaration in detinue for a slave is insufficient to support the action if it omit to state that the slave in question belonged to or was the property of the plaintiff, and such defect is not cured by verdict.

In the case of *Austin's Executor vs. Jones*, 1 Va. (Gilmer), 341, decided June, 1821, it was held: In detinue, the jury having found for the plaintiff the slave mentioned in the declaration, etc., but that she had died since the suit was brought, the court must nevertheless give judgment for the slave or her value, the death not being put in issue by plea *pais darrien continuance*.

In the case of *Lynch vs. Thomas*, 3 Leigh, 682, decided May, 1832, it was held: If in detinue for chattels the plaintiff prove that he had title at the time of the action brought, and that then the defendant had possession, defendant to defeat the action must show that he had been divested of the property by due course of law.

In the case of *Allen's Executors vs. Harlan's Administrator*, 6 Leigh, 42, decided February, 1835, it was held: Detinue lies against an executor as such, if the goods demanded have come to his possession, otherwise not. If in detinue the defendant dies pending the action, it may be revived by *sci. fa.* against the executor under the statute, if the goods demanded have come to the executor's possession, otherwise not, therefore it must be

suggested in the *sci. fa.* or alleged in a declaration thereupon that the goods came to the executor's possession; for if the executor's possession be nowise alleged, there can be no recovery against him.

Judgment in detinue against an executor as such should be given against him personally for the goods by him detained, or the alternative value; but for all damages for detention, both in his testator's time and his own, it should be against him *de bonis testatoris*.

In the case of *Catlett's Executor vs. Russell*, 6 Leigh, 344, decided April, 1835, it was held: Detinue for a chattel lies against an executor as such, if the chattel actually came to the executor's possession, otherwise not; and detinue brought against testator, and pending at his death, may be revived by *sci. fa.* against the executor if the chattel demanded actually came to the executor's possession, otherwise not. Therefore, in *sci. fa.* against an executor in such case, it must be either suggested in the *sci. fa.* or alleged in a declaration thereon, that the chattel came to the executor's possession, and if there be no such allegation, no judgment can be given against the executor.

It seems that judgment in detinue against an executor as such, should be for the goods or the alternative value against the executor *de bonis propriis*, and for the damages for detention, both in the testator's and executor's time, *de bonis testatoris*; *dissentiente* Brockenbrough and Cabell, J., who held that the judgment should be against the executor for the goods, if to be had, for the alternative value, the damages for detention, and the costs, all to be levied *de bonis testatoris*.

In the case of *Boyle vs. Townes*, 9 Leigh, 158, decided January, 1838, it was held: A person appointed curator and receiver of chattels by a court of chancery does not, by virtue of that appointment, acquire a right of property, but if he bring detinue for the chattels, describing himself as curator and receiver, and counting as upon his own property, and on a bailment thereof to the defendant, the count is good, the description of curator, etc., being surplusage. A bailee of chattels may maintain detinue for them upon his right of possession as bailee. Two counts in a declaration in detinue, one counting on a right of property in the plaintiff, and the other on a right of possession in him as bailee. Held: Here is no misjoinder of counts.

In the case of *Greenlee vs. Bailey*, 9 Leigh, 526, decided July, 1838, it was held: Upon the death of a defendant in detinue, if his administrator consents that the cause shall stand revived against him, such consent places the cause in the same situation that it would be in after the service of a *scire facias* against the administrator, alleging that the property had come to his possession and was detained by him.

In such a case, if the administrator instead of pleading *de novo* go to trial upon a plea put in by his intestate, he cannot, after verdict against him, arrest the judgment because of his own failure to plead anew. The judgment against the administrator in such a case is personal against him for the property or its alternative value; but it provides as to the damages and costs, that the same are to be levied of the goods and chattels of the intestate in the hands of the administrator.

In the case of *Martin vs. Martin*, 12 Leigh, 495, decided January, 1842. S. brings detinue against J. for one slave, and J. detinue against S. for three slaves, and J. brings also an action of debt against S., and the parties agree to refer all matters in difference in the three suits to two arbitrators and their umpire, whose awards, or the awards of their umpire, to be made the judgments of the court; which submission is made a rule of the court. The arbitrators proceed to arbitrate the two actions of detinue, and make an award therein without arbitrating the action of debt. In their award the date of the submission is not recited, and the submission is recited as referring to arbitration the two actions of detinue only; and the award in J.'s action of detinue against S. gives J. the three slaves demanded in his declaration, and two other slaves, the increase of a female slave, demanded, born after the action brought. Held: Neither the omission to state the date of the submission in the award, nor the recital of the submission as referring the two actions of detinue only, nor the failure to proceed to arbitration of the action of debt, is a good ground of objection to the award under the terms of this submission.

In the case of *Morris vs. Perego*, 7 Grat., 373, decided May 5, 1851, it was held: In an action of detinue, the recovery may be not only for a female slave named in the writ, but for her children born since the commencement of the suit.

In the case of *Hunt's Administrator vs. Martin's Administrator*, 8 Grat., 578, decided April, 1852, it was held: Where a defendant in detinue dies, and the action is revived against his administrator with the will annexed, the plaintiff is entitled to demand from the administrator not only the property sued for, but damages for its detention, and the costs incurred in prosecuting the original action against the testator in his lifetime.

The *scire facias* to revive the action of detinue against the administrator should suggest the coming of the property into the hands of the administrator since the death of the testator; and the *scire facias* not being in the record nor in the clerk's office of the court below, and no objection appearing to have been taken to it in that court, this court will presume that it was in all respects regular.

Where an action of detinue is revived against an administra-

tor with the will annexed, and a judgment is recovered, the judgment for the damages for detention of the property and the costs should not be against the administrator personally, but against him as administrator, to be levied of the goods, etc., of his testator in his hands to be administered.

The reference to 17 Grat., 490-502, is an error, as the case is not of value on this point.

SECTION 2912.

In the case of *Butler vs. Parks*, 1 Wash., 76, decided at the spring term, 1792, it was held: Where a verdict is rendered for part of the property demanded in the writ, and is silent as to the residue, the verdict must be set aside. Hence the statute.

In the case of *Higginbotham vs. Rucker*, 2 Call, 313 (2d edition, 265), decided April 19, 1800, it was held: If in a declaration for several slaves, laying separate values, the jury find a joint value, it is error, and as to that a *venire facias de novo* will be awarded under the act of assembly in order to ascertain the separate values.

In the case of *Cornwell vs. Truss*, 2 Munf., 195, decided March, 1811, it was held: In detinue for several slaves, if their value be jointly assessed in the verdict, judgment ought not to be entered, but a writ of inquiry to ascertain their respective values should be awarded.

TITLE XLII.

CHAPTER CXXXIX.

SECTION 2915.

In the case of *Seekright on demise of Gore vs. Lawson et als.*, 8 Leigh, 458, decided August, 1836, it was held: Though waste and unappropriated land be claimed by the patentee of adjoining land as being included within the boundaries of his patent, and actual possession thereof be taken by such patentee and maintained for fifteen years, such possession cannot be adversary to the Commonwealth, and her grantee of the land is consequently entitled to recover it.

In the case of *Dawson vs. Watkins*, 2 Rob., 259, decided August, 1843. The demandant in a writ of right claims the land (of which the tenant is in possession) under a patent bearing date the 17th of June, 1876, and the tenant disproves the constructive seisin of the demandant by showing a patent for a large tract embracing the same land, which issued as early as the 1st of December, 1773. Whereupon the demandant, to establish a seisin in deed by a *pedis positio*, proves that the

patentee, under whom the claims came in 1824 or 1825, to the county in which the land lies, and employed an agent to enter upon and survey the said land and various other tracts in the same county; that the said agent procured a surveyor and chain-carriers immediately thereafter, who went upon the land in question and surveyed and remarked the same for the patentee. Held: These facts are not sufficient to authorize a jury to find a seisin in the demandant.

In the case of *Taylor's Devisors vs. Burnsides*, 1 Grat., 165, decided September, 1844, it was held: If the tenant in a writ of right would protect himself by the plea of the statute of limitations, he must show that he entered on the land in controversy, claiming the same under his junior grant, when the demandants had not actual possession thereof under their elder patent, and took and held actual possession thereof by residence, improvement, cultivation, or other open, notorious, and habitual acts of ownership, and so continued the same for more than twenty-five years before the commencement of the demandant's suit. If the tenant, or those under whom he claims, have abandoned their possession within the twenty-five years, the statute of limitations is no bar to the demandant's title under his elder patent.

The tenant cannot sustain his defence of continued adversary possession, so as to make the statute a bar, if the demandants, or those under whom they claim, have, within the period of twenty-five years before bringing the action, entered upon the land in controversy, and taken actual possession thereof by residence, improvement, cultivation, or other open, notorious, and habitual acts of ownership.

In the case of *Overton's Heirs vs. Davisson*, 1 Grat., 211, decided September, 1844, it was held: When land which is the subject of controversy is embraced by conflicting grants from the Commonwealth to different persons, and the junior patentee enters thereupon, and takes and holds actual possession of any part thereof, claiming title to the whole under his grant, such adversary possession of part of the land in controversy is an adversary possession of the whole, to the extent of the limits of the younger patentee, and to that extent is an ouster of the seisin or possession of the elder patentee, if the latter has no actual possession of any part of the land within his grant. In the case above stated, if the older patentee is in the actual possession of any part of the land in controversy at the time of the entry thereon of the junior patentee, then the latter can gain no adversary possession beyond the limits of his mere enclosure without an actual ouster of the older patentee from the whole of the land in controversy.

Upon the question of adversary possession, it is immaterial whether the land in controversy is embraced by one or several

coterminous grants of the older or younger patentee; in either case the land granted to the same person by several patents is regarded as forming one entire tract. *Quære*: Whether the possession of the junior patentee will be limited to his enclosure by the actual possession of the elder patentee of a part of the land embraced in his grant, not embraced in the limits of the grant to the junior patentee? To constitute an adversary possession of the land there must be an actual occupation of some part of the land in controversy, or the use or enjoyment of some part thereof, by acts of ownership equivalent to such actual occupation, and such adversary possession cannot be acquired by the open exercise of acts of ownership over the same falling short of such actual occupation, use, or enjoyment. When patented lands remain completely in a state of nature, they are not susceptible of a disseisin or ouster of, or adversary possession against, the older patentee, unless by acts of ownership effecting a change in their condition.

A possession of lands not held under a grant from the Commonwealth prior to the emanation of any patent therefor to a third person cannot constitute an adversary possession thereof. The elder patent of the Commonwealth confers seisin of the land embraced therein, though at the time of its emanation there was an actual occupation of the land by another person.

In a controversy between parties claiming land under the elder and junior patentee, the party claiming under the latter, to protect his possession by the defence of the statute of limitations, must show an actual possession of the lands in controversy since the emanation of the elder patent for the time of limitation fixed by the statute. If the possession of the tenant in possession was sufficient to bar the action of the ancestor of the demandants at the time of his death, it is sufficient to bar the action of his heirs.

In the case of *Purcell vs. Wilson*, 4 Grat., 16, decided April, 1847, it was held: The possession of one coparcener or tenant in common being the possession of all, none in possession of the whole subject can avail themselves of such possession as a defence under the statute of limitations against the rest, without an actual disseisin or ouster of their coparceners or tenants.

A special verdict in a writ of right, where the defence is the statute of limitation, must find either an actual disseisin or ouster of the demandants, or those under whom they claim, or facts which in law constitute such actual disseisin or ouster. Though a great lapse of time, with other circumstances, may warrant a presumption of a disseisin or ouster by one coparcener or tenant in common of another not laboring under disabilities, this presumption is a matter of evidence for the con-

sideration of the jury, and not a question of law for the decision of the court upon a special verdict.

In the case of *Middleton vs. Johns et als.*, 4 Grat., 129, decided July, 1847, it was held: A person having held actual possession of land for more than fifteen years under color of title, and being then ousted by another who is a mere trespasser without pretence of title, may recover in ejectment against such trespasser, though it does not appear that the land has ever been granted by the Commonwealth.

In the case of *Robinett vs. Preston's Heirs*, 4 Grat., 141, decided July, 1847, it was held: It seems that for the statute of limitations to be a good defence for the tenant, his possession must be adverse to and not under the title of the demandants.

In the case of *Shanks et als. vs. Lancaster*, 5 Grat., 110, decided July, 1848, it was held: There can be no adversary possession against the Commonwealth, and, therefore, a junior patentee cannot go behind the elder patent for the purpose of giving color to his possession prior thereto. But a junior patentee may go behind his own patent, and also behind the elder patent, for the purpose of giving color to his possession from, or subsequently to, the granting of the elder patent.

It is immaterial whether an adversary possession under a claim of title be under a good or a bad, legal or an equitable title.

A tenant in ejectment claiming under a junior patent founded on an inclusive survey may, to show possession under color of title prior to his patent, introduce in evidence the entries for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey itself.

In the case of *Pasley vs. English et als.*, 5 Grat., 141, decided July, 1848, it was held: A temporary possession of land by cutting and sawing timber upon it is not such adversary possession as will give title.

In the case of *Evans and Wife vs. Spurgin*, 6 Grat., 107, decided July, 1849, it was held: The possession of the original owner, and of those claiming under him, from the time of the sale by the commissioners until the final decree, was not an adverse possession to the purchaser and those claiming under him.

In the case of *Hannon et als. vs. Hannon*, 9 Grat., 146, decided August 11, 1852. A. conveyed lands in the western part of the State to S. by a deed dated December 13, 1814, which was recorded January 25, 1815, in the county of Hanover, where the grantor lived, but not in the county where the lands lay. This deed recites that A. is the heir at law of his son, to whom the lands were patented. S., by a deed recorded in Kanawha, conveyed to J. W. and W. two-thirds of all the lands, wherever the same might be found, conveyed by A. to S.

by deed dated December 13, 1814, and recorded in Hanover County Court January 25, 1815. This deed refers to and recites the provisions of the deed from A. to S. In September, 1824, J. W. conveyed to P. an undivided third part of a tract of three thousand and eighty acres of land in Mason county. This third part vested in the heirs of P. and his alienees, H. and B. In 1845 W. conveyed his third part of this land in Mason county to H., who filed a bill for partition against the heirs of S. and the heirs and alienees of P. An office copy of the deed from A. to S. was filed by the plaintiff and was excepted to by the defendants, the heirs and alienees of P., and B. claimed part of the land under a patent to himself, issued after the institution of this suit. Held: As B. has shown no forfeiture of the land or transfer of a forfeited title to him, and as the Commonwealth had previously granted the land to A., the land was not waste and unappropriated, and nothing passed by the junior grant to B.; and as the patent issued after the institution of this suit, there could be no adverse possession under it.

The payment of taxes on an undivided third, or a conveyance of a portion by metes and bounds, not followed by actual entry and possession, does not constitute an actual ouster by one tenant in common of his co-tenant.

In the case of *Creigh's Heirs vs. Henson*, 10 Grat., 231, decided July, 1853. In May, 1816, A. conveys to S. a tract of land in trust to secure a debt to C., which is duly recorded on the same day, and in October of the same year he executes to H. a title bond for a part of the land, and H. immediately enters into possession, cultivating and farming and claiming it under said bond, and continues thus to hold possession; A., during his lifetime, and his family since, having resided on the residue of the tract. In 1827 the trustee, S., sells under the trust and conveys the land to C., the purchaser. In 1848 the heirs of C. bring ejectment against H. for the land in his possession, and there is a special verdict which does not find an ouster or disclaimer by H. Held: That the possession of A. after the deed was as a tenant by sufferance, and that the possession by H. after his entry was of the same character; and therefore the statute of limitations is no bar to the action.

In the case of *Clarke vs. McClurr*, 10 Grat., 305, decided July, 1853, it was held: An open, exclusive, notorious and uninterrupted possession of the land for more than twenty years, taken, held and claimed under a parol gift from a plaintiff in ejectment for life, not yet terminated, is no bar to his recovery in the action.

As a general rule, possession, to give title, must be adversary; and where a defendant has entered under a plaintiff, and ac-

knowledge of his title as that under which he holds, he cannot controvert it.

To make out a title by adverse possession, as a general rule, the title must be adverse in its inception. An adverse possession depends upon the intention with which the possession was taken and held. Wherever the act itself imports, and there is a superior title in another, by whose permission and in subordination to whose still-continuing and subsisting title the entry is made, such entry cannot be adverse to the owner of the legal title; and such possession so commencing cannot be converted into an adverse possession but by disclaimer, the assertion of an adverse title and notice.

A vendee who enters under an executory contract which leaves the legal title where it was, and contemplates a future conveyance, enters in subordination to it, holds under and relies upon it to protect his possession in the meantime. And in such case, as is also in the case of lessee, mortgagor, *cestui que* trust and the like, where it is under the owner of the legal title a privity exists which precludes the idea of a hostile tortious possession, which would silently ripen into a title by adverse possession under the statute of limitations.

An entry on land under a parol gift from the owner, and a claim to hold an estate by virtue of the gift, is in its nature a recognition of the continued existence of a subsisting title in the legal owner; and a claim to hold any estate by gift from the legal owner is a claim to hold in subordination to his legal title.

In the case of *Anderson vs. Harvey's Heirs*, 10 Grat., 386, decided July, 1853. R. held a patent for one thousand two hundred acres of land, and H. held a junior patent for two thousand one hundred acres, which covered a part of the land included in R.'s patent. By a decree made in 1807, R. was directed to convey to H. that part of the land covered by his patent which was included in the patent of H. No deed was executed, but in 1805 H. entered upon this contract and cultivated and improved a part of it, though not the part included in the patent of R. He held possession of this land until his death in 1831, and his heirs continued to hold possession.

There was no actual occupancy of the interlock until 1836, when a purchaser under R. cut the timber upon it and converted it into coal. R. died in 1817, and in 1834 his executor and devisees conveyed the one thousand two hundred acres, one of which of junior date to that covered the same interlock, and his executor and devisees, by deed of the same date of the other, conveyed to the same parties these several tracts of land without any reference to the decree of 1807. The subsequent conveyances of this property either referred to these deeds or referred to subsequent deeds which referred to them. In 1845,

A., the then owner of the land under R., took iron ore from the interlock aforesaid, and the heirs of H. filed a bill to enjoin him. Held: H. having entered upon his land and improved it, and held possession under his patent and decree of 1807, his possession and that of his heirs gave them a perfect title to the extent of the limits of his patent.

The temporary occupancy of the purchaser under R., and the cutting and taking off the wood from the interlock, was not a disseisin of the heirs of H.

In the case of *Koiner vs. Rankin's Heirs*, 11 Grat., 420, decided July, 1854, it was held: The effect of a patent issued upon an inclusive survey, and the right of the tenant claiming under it to show possession under color of title, is the same as in other grants. He may give in evidence the entrance for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey made in pursuance of the order. But he cannot show possession further back than the senior grant.

To protect himself under the statute of limitations, the tenant must show continued adversary possession for the time of limitation of some part of the land in controversy. Actual possession of a part of his land outside of the boundaries of the demandant's elder patent is not sufficient.

While patented lands remain uncleared, or in a state of nature, they are not susceptible of adversary possession against the elder patentee, unless by acts of ownership effecting a change in their condition.

In the case of *Caperton et als. vs. Gregory et als. (Lessee)*, 11 Grat., 505, decided July, 1854. J. T. died in 1823, leaving seven children, and seised in fee of a tract of land. S. T., one of his sons, took possession of the land soon after his death, claiming that J. T. had made a will giving it to him for life, with remainder to his two sons; and he filed a bill against the other heirs to set up the will, which could not be found. The suit was pending until 1837, when it was dismissed for a failure to give security for costs. S. T. held the exclusive possession of the land during his life, and his two sons, and those claiming under them, continued to hold it until 1844, when the other heirs filed a bill for partition of the land, and in that suit the court directed that the plaintiffs should first establish their title at law. At the death of J. T. four of his heirs were married women, and three of them so continued; one of them died in 1832, leaving infant children and her husband surviving her, and he died in 1833; this suit was brought in 1848. Held: That S. T., having taken possession of the land in 1823, claiming title to it, and his sons having possession on his death, and they and those claiming under them having continued to hold the land

claiming title, such taking and holding possession was adverse to the other heirs, and the statute of limitations commenced to run from the time of such taking possession by S. T.

That the pendency of the suit brought by S. T. to set up the will of J. T. did not prevent the running of the statute; that, having commenced to run, could not be stopped by anything occurring subsequently; and, moreover, the will as will of lands being valid without probate, and the suit being not to acquire title, but to establish evidence of title.

If in the suit for partition the heirs of J. T. had alleged and proved any equitable grounds to repel the statute, the chancery court might have given it effect by an order when directing the suit to be brought for trial of title, but no such ground having been shown, and no such order made, the statute must have the operation which a common law court ascribes to it.

The statute runs against the *femes covert* and their husbands, so as to bar a recovery during the coverature.

The infant children of the female heir who died a *feme covert*, are barred after three years from the death of their mother, though they may continue infants all the time.

In the case of *Cline's Heirs vs. Catron*, 22 Grat., 378, decided July 6, 1872, it was held: The possession which would, under the former law, render a conveyance by a party out of possession inoperative, must have been an adversary possession.

In the case of *Nowlin vs. Reynolds*, 25 Grat., 137, decided June, 1874. In 1845 N. sold a tract of land to his son C., who was then seventeen years of age, received the entire purchase-price, executed a deed or title bond thereto, which was lost or mislaid and never entered of record, and delivered it to C. and put him in possession of the land, who immediately went to work and erected a dwelling house thereon and put up other buildings. Soon after this sale was made to C., N. conveyed his land and other property to S. to secure certain debts, and in 1869 the trustee sold the land under the deed of trust to R., who brought ejectment against C. to recover the land. On the trial, after R. had introduced the said deeds, C. proved the above facts and then proposed to prove that he had been in actual adverse and peaceable possession of the land for more than twenty years before the institution of the suit. Held: It is clear that the possession of a mere intruder on the land of another with pretence or color of title, no matter how long such possession may continue, will not be deemed at law adverse to the title of the true owner, and can never ripen into a good title. But it is equally clear that possession under color or claim of title does amount to adverse possession, and if held long enough under the law, will ripen into a good title; and it is not necessary to constitute an adverse possession that there should be a rightful

title. But the holder and claimant of property under an equitable title derived from a vendor or grantor, who retains the legal title for future conveyance, does not hold adversely but in subordination to the grantor's title; and no length of possession under such title will ripen into a legal title. Whether the contract is executory or executed; whether the defendant or vendee claims title under an absolute deed or not, is a question of fact for the jury and not of law for the court.

If the claim of C. was under a deed purporting to convey the title to the property, whether recorded or not, an exclusive possession under such title is adverse, not only against the grantor himself, but against all the world. The evidence should be admitted.

In the case of *Norfolk City vs. Cooke*, 27 Grat., 430, decided April 13, 1876, it was held: The city of Norfolk is the owner of the ground which she has not disposed of, covered by water, lying between Parker street and the port-warden's line, both as riparian proprietor and as having had long possession thereof, and the city may maintain an action of unlawful entry and detainer against any intruder on said water lots.

In the case of *Thomas vs. Jones*, 28 Grat., 383, decided April 19, 1877, it was held: J. has held possession of a piece of ground in a city for forty years, which in all that time has been within his enclosure, claimed by him and cultivated as his own property. His said possession has been and is adverse to T. and those under whom he claims, claiming the land, and the statute of limitations is a bar to any claim which T. might otherwise have to the land, and the title of J. thereto, even if it may not have been originally good, has thus matured and become perfect by adverse possession and by lapse of time, and the operation of the statute of limitations.

In the case of *Turpin vs. Saunders*, 32 Grat., 27, decided July, 1879. In 1830 B., holding a large tract of land called the Austin Nicholas survey, conveyed twenty-five thousand acres of it to W., and three years thereafter conveyed twelve thousand acres of the same survey to S. W. conveyed to G., G. to C., and C. to T., the defendant. A portion of the land conveyed to S. was found on examination to have been embraced in the conveyance to W., under whose grantees T., the defendant, claims. The claim being that of an interlock, and T. and his grantors holding the older title, must succeed, unless S., Jr., the plaintiff, and his grantor can show a title by adversary possession, which is then attempted. No possession of any part of the land in controversy was shown by S. prior to 1842. In that year one Simpkins settled on ten or twenty acres of it. Whether he claimed title or was a mere squatter does not appear; but he did not claim title under S. Some time after this there was

a verbal agreement between Simpkins and S. that Simpkins should continue in possession and have what he could make on the land, in consideration that he would salt the cattle of S., which he was in the habit of sending to this county to range on his lands there every spring; S. living in an adjoining county and owning other lands adjoining those in controversy. This arrangement seems to have continued until S.'s death in 1851. About this time C., under whom, as aforesaid, T., the defendant, claims, finding Simpkins in possession and knowing nothing of his contract with S., agreed to give him a lease of the land in his possession, which, at Simpkins's request, was reduced to writing. Simpkins remained in possession until 1860, when he either voluntarily abandoned or was driven from the possession. The land in controversy contained about three thousand five hundred acres, and with the exception of the small clearing made by Simpkins, was at the time of these occurrences an unbroken forest and in a state of nature. In an action of ejectment brought by S., Jr., claiming under C. a grantee from W. as aforesaid, and claiming title by adverse possession on the ground that the possession of Simpkins was the possession of S.,; that Simpkins having accepted a lease from S., his subsequent attornment to C. was null and void. Held: The ground upon which an adversary title is established is the supposed laches of the true owner. The possession of the adverse claimant must not only be with claim of title, but must be visible, and with such notoriety that the true owner may be presumed to know of it; and Simpkins not having taken possession in this case under claim of title either in himself or in S., and S. never having exercised any notorious acts of possession over the land in controversy, either through Simpkins as his tenant or in any other way, S., Jr., his grantee, is not entitled to recover in this action as adversary claimant.

Wild and uncultivated lands cannot be the subject of adversary possession whilst they remain completely in a state of nature. A change in their condition to some extent is essential; without such change accomplished or in progress there can be no occupation, use or employment. Evidence short of this may prove an adversary claim, but cannot establish an adversary possession. The only improvement on the land in controversy being the small clearing made by Simpkins, this did not constitute an adversary possession under the circumstances of this case in any just and legal sense of the term. The residue of the tract being in a state of nature could not be the subject of adversary possession, and the mere fact that herds of cattle were permitted to wander over it at will did not amount to a claim of ownership of the property.

In the case of *Stonestreet et als. vs. Doyle et als.*, 75 Va., 356,

decided March 10, 1881, it was held: In an action of ejectment, where the defendants rely upon their adversary possession of the premises, they must show not only entry, but they must show that their possession has been continuous during a period necessary to give title under the statute of limitations. A break in the possession restores the seisin of the true owner.

In the case of *Creekmur vs. Creekmur et als.*, 75 Va., 430, decided April 14, 1881, it was held: Adversary possession must be actual, exclusive and notorious, accompanied by a *bona fide* claim of title against that of all other persons, and it must be continued for the period of the statutory bar. A mere naked possession without a claim of right, no matter how long, never ripens to a good title, but is regarded as being held for the benefit of the true owners.

In the case of *Hollinsworth vs. Sherman et als.*, 81 Va., 668, decided December 17, 1885, it was held: The period of time necessary to ripen possession under claim of right into complete title, is determined by limitations provided by law when plaintiff's right of action accrued.

The possession requisite to bar plaintiff's right of entry must be actual, exclusive, uninterrupted, visible, notorious and hostile, and must continue during the whole period of statutory limitation. Its character, however, depends upon the situation of the land and the condition of the country.

When several persons enter upon land in succession, the several possessions cannot be tacked so as to preserve the essential continuity, unless there is privity of estate between them, or the several estates are connected; but one cannot sustain his defence of adversary possession if, during the period of limitation, the possession has been abandoned by him or those under whom he claims.

In the case of *Virginia Mining and Imp. Company vs. Hoover*, 82 Va., 449, decided October 7, 1886, it was held: The exclusion, under the statutes of this State, and the decisions of this court, of the period of seven years, eight months, and thirteen days, between April 17, 1861, and January 1, 1869, applies to actions of ejectment equally as to other actions.

In the case of *Yates vs. Town of Warrenton*, 84 Va., 337, decided January 19, 1888. Trustees in 1811 laid off town, locating a street twenty-three feet wide. Survey showed that plaintiff had all the land called for in his deed, and included within his enclosure twenty-three inches of said street. He proved that he had had long adverse use of said strip. Held:

1. There was a dedication and acceptance of the streets as located by the trustees.

2. The possessor can acquire no right or title to any part of such highway by adverse possession thereof for any length of time whatever.

In the case of *Whitlock vs. Johnson*, 87 Va., 323, decided January 15, 1891, it was held: Where sale of land under decree is made and confirmed, purchase-money paid, but no deed, and former owner's heirs remain in possession. Held: The statute of limitations does not begin to run against purchaser until the heirs make distinct disavowal of his title, and their assertion of adverse claim is brought home to him.

In the case of *Andrews vs. Roseland Iron and Coal Company*, 89 Va., 393, decided November 17, 1892, it was held: Uninterrupted, honest, adverse possession of land, under color of title, for the statutory period, is a defence to an action of ejectment by a party claiming under a senior patent.

Where there is an interlock between a senior and a junior patent, and there has been no actual possession under the former, possession of the interlock, accompanied by claim of title to the whole of the land covered by the junior patent, is, in contemplation of law, possession of the whole.

In the case of *Straughan et als. vs. Wright et als.*, 4 Rand., 493, decided November, 1826, it was held: In questions purely equitable, twenty years adverse possession will bar the remedy of the plaintiff; but, where the court is only called upon to grant partition under a legal title, which is disputed, the proper course is to retain the cause until the title is decided at law.

In the case of *Cresap vs. McLean et als.*, 5 Leigh, 381, decided April, 1834. Grant of land from the Commonwealth, founded on survey as containing five hundred and eighty-seven acres, but the metes and bounds described in the survey and grant, in fact, include one thousand two hundred and ninety-three acres. Held: Though the grant may be avoided as to the excess, at the suit of the Commonwealth timely prosecuted, yet the legal title of the whole one thousand two hundred and ninety-three acres passes by the grant to the grantee, and no individual claimant has a right to have the grant avoided for the excess.

An equitable title to land asserted against the holder of the legal title is barred by an adversary possession of more than twenty years held by the claimant of the legal title, the claimant of the equity having full knowledge of such possession from its commencement and being under no disability.

SECTION 2917.

In the case of *Birch vs. Sinton et ux.*, 78 Va., 584, decided February 14, 1884, it was held, p. 589: It is well settled that an infant's conveyance of lands is voidable only; and after attaining majority he may affirm or avoid it. No notice of disaffirmance is required; entry or action suffices. Mere silence or inertness for any period short of bar to ejectment, unaccompanied by some confirmatory act, affirms not the conveyance.

SECTION 2918.

In the case of *Parsons vs. McCrackens*, 9 Leigh, 495, decided July, 1838, it was held: It seems that if a party claim the benefit of the saving for infants and *femes covert* in an act of limitations, no other disability is available than the one which existed when the right of action accrued.

SECTION 2919.

In the case of *Hill vs. Rixey & Starke*, 26 Grat., 72, decided March 25, 1875, it was held: This statute does not apply to a judgment creditor to relieve him from the necessity of docketing his judgment.

In the case of *Danville Bank vs. Waddill*, 27 Grat., 448, decided March, 1876. In an action of assumpsit on the plea of the statute of limitations, the time from the second of March, 1866, to the first of January, 1869, is to be left out of the computation. To an action of assumpsit there is a plea of payment and of the statute of limitations. On the trial the plaintiff asks the court to instruct the jury that in passing upon the plea of the statute they must leave out of the computation of time all the period extending from the second of March, 1866, to the first of January, 1869. The court refuses to give the instruction and plaintiff excepts. The jury find a general verdict for the defendant and there is a judgment accordingly. Held: That the appellate court will reverse the judgment for the error in refusing the instruction and send the cause back for a new trial.

In the case of *Johnston et als. vs. Gill et als.*, 27 Grat., 587, decided June, 1876, it was held: The stay-law suspended the statute of limitations as to suits to set aside fraudulent conveyances.

In the case of *Borst vs. Nalle et als.*, 28 Grat., 423, decided March, 1877, it was held: The docketing of a judgment is an act to be done to preserve or prevent the loss of a civil right or remedy within the meaning of the acts of March 4, 1862, acts of 1861-'62, Chapter 81, and of March 2, 1866, Code of 1873, Chapter 146, Sections 6 and 7, pp. 998-999. And therefore, in computing the time within which a judgment is required by Section 8, Chapter 186, of the Code of 1860, to be docketed in order to preserve the lien of such judgment against purchasers, the period between the 17th of April, 1861, and the 2d of March, 1866, is not to be computed as a part of such time.

In the case of *Justis vs. English et als.*, 30 Grat., 565, decided July, 1878. In contemplation of the marriage of B. and L., B., by deed in which L. joined, conveyed her property, consisting of personalty and a life estate in land, to M., in trust for her separate use, with full power in her to dispose of the rents and

profits as if she had never married, and to transfer in such proportion and form as she shall from time to time direct, notwithstanding her coverture by any writings under hand and seal, attested by three or more credible witnesses, or by her will executed and attested in the same mode. By a paper executed as prescribed in the deed, B. directed her trustee to purchase two lots to be paid out of her trust fund, and this was done, and they were conveyed to the trustee on the same trusts. These deeds were duly recorded. The trustee dying, C. and W. were appointed trustees. Afterwards B., by deed executed by herself alone, and acknowledged by her in the clerk's office without privy examination, upon full consideration conveyed the lots to W., and he died, and they were sold to different purchasers. B. died intestate in 1862, and in March, 1875, her heirs file their bill against the purchasers to recover the lots. Held: Mrs. B., being under coverture until her death in 1862, and the statutes of limitations having been suspended until December 31, 1869, the statute of limitations does not bar the claim of the heirs of B., and under the circumstances the delay in bringing the suit does not bar the claim.

SECTION 2920.

In the case of *Lomax vs. Pendleton*, 3 Call, 538 (2d edition, 465), decided July 7, 1790, it was held: Where the plaintiff holds a right of action, and takes in satisfaction thereof a bond, he should not be barred unless the bond was a payment and gave him a complete right of action for the amount of his claim.

In the case of *Clark vs. Hardiman*, 2 Leigh, 347, decided October, 1830. H. makes a bill of sale of slaves to C. without any consideration, and notwithstanding the deed remains in uninterrupted possession for twenty-five years, and dies in possession; after his death, his widow claims these slaves as her own property, and holds adversary possession of them for more than five years. Then administration of H.'s estate is committed to the sheriff, who gets possession of the slaves, and a creditor of H. who had recovered judgment against the sheriff, administrator, levies an execution on one of them, which is sold to satisfy the same; in detinue by the widow against the purchaser. Held: That the statute of limitations did not enure to give the widow a title to the slave, since it did not begin to run till an administrator of her husband's estate was appointed.

In the case of *Lynch vs. Thomas*, 3 Leigh, 682, decided May, 1832. Testator bequeathes a slave to an infant son, and then that his wife shall hold the slave bequeathed to his son till he shall attain to full age; the executor delivers the slave to the wife, and never resumes possession. Held: The act of limita-

tion never could begin to run against the claim and title of the son to the slave and her increase till he attained to full age.

In the case of *McAlexander vs. Montgomery*, 4 Leigh, 61, decided December, 1832. Contract to locate a treasury warrant on lands in Kentucky is made in August, 1782, and it appeared, the breach, if any, must have occurred before the erection of Kentucky into a separate State. Held: The act of limitations of Virginia began to run from the time of the breach, and was, therefore, a bar to an action on the contract brought in 1816.

In the case of *Duncan vs. Wright*, 11 Leigh, 542, decided February, 1841. Testator lends three slaves to his daughter during her natural life and to her heirs lawfully begotten of her body, but should his daughter or her husband dispose of, convey out of the way, conceal or attempt to alienate the slaves, then her title to them ceases, and he directs his executors to take them into possession, and after her decease, they and their increase to be divided among her children; the daughter's husband sells one of the slaves; the testator's executors are apprised of the sale but fail to take the slave sold into their possession, or to bring any action to recover the same; the daughter dies, and long after the lapse of five years from the date of sale, but within five years after the daughter's death, her children bring detinue for the slave, the only question being from what time the statute of limitations began to run. Held: The rights of the children accrued upon the death of their mother, and so the statute began to run against them only from the time of her death.

In the case of *Cookus et als. vs. Peyton's Executor et als.*, 1 Grat., 431, decided March, 1845, it was held: An administrator, paying away the assets of the estate to distributees without notice of debts or liabilities of his intestate, must account to creditors for the amount so paid away, with interest.

In the case of *Bowles' Executor vs. Elmore's Administratrix*, 7 Grat., 385, decided May 5, 1851. In September, 1837, the administratrix of E. sued the executor of B. in a debt on a promissory note dated June, 1817. The executor pleaded the statute of limitations, and the administratrix replied that after making the note, B. having become the bail of E., they in October, 1818, entered into a covenant, by which it was agreed that E. should deliver to B. the note of B., who was to hold it until the liability of B. as bail was ended and then he was to redeliver it to E.; that pending the suit E. died, in February, 1832, and there was no administration on his estate until August, 1836. There was a demurrer to the replication, which was sustained, because there was no profert of the covenant. The plaintiff was then allowed to amend the application by adding the profert of the covenant, and the defendant again demurred. Held:

The statute of limitations did not run from the time the covenant was executed until the liability of B. as bail had ceased.

In the case of *Ball et als. vs. Johnson (Executor) et als.*, 8 Grat., 281, decided October, 1851, it was held: The statute of limitations does not commence to run against the owners of the remainder in slaves in favor of the purchaser of the life estate until the death of the life tenant.

See the case of *Caperton et als. vs. Gregory et als.*, ante, Section 2915.

In the case of *Layne vs. Norris's Administrators*, 16 Grat., 236, decided April 16, 1861, it was held: In an action to recover property, if the defendant has been in adversary possession a sufficient length of time to render the statute of limitations a bar to the action, this possession gives title, and it is not necessary to plead the statute.

When a special verdict finds personal property in possession of a defendant, the law infers it to be adversary, in the absence of any finding to the contrary.

In the case of *Fant et als. vs. Fant*, 17 Grat., 11, decided May 3, 1866, it was held: There being a plea of usury in the transfer of the bond by the obligee to the assignee, if he transferred it with the knowledge that there was such usury, he was then guilty of a deceit, and the right of action arose upon the transfer, and if time has barred that action, the assignee is not therefore an incompetent witness for the holder of the bond against the obligee.

In the case of *Clem vs. Holmes*, 33 Grat., 722, decided September, 1880, it was held: When the daughter lived away from the father's house at the time of the seduction, but returned and was confined there and nursed, the statute of limitations will begin to run from that time.

In the case of *Effinger vs. Hall*, 81 Va., 94, decided November 19, 1885, it was held, p. 100: Where legacy is limited upon a future event, cause of action cannot accrue, nor statute of limitations begin to run, nor laches be imputed, until such event occurs.

In the case of *Tomlin, Mitchell & How vs. Kelly*, 1 Wash., 190, decided at the spring term of 1793, it was held: This statute applies only to store accounts of retail dealers.

In the case of *Beall vs. Edmunson*, 3 Call, 514 (2d edition, 446), decided July 7, 1790, it was held: A new assumpsit for a store account barred by the six months act of limitations binds the debtor.

In the case of *Wortham & Co. vs. Smith & Sampson*, 15 Grat., 487, decided January, 1860, it was held: The act limiting actions on store accounts to two years does not embrace wholesale dealings of importing and wholesale merchants, but applies ex-

clusively to the store account of retail dealers with their customers.

A plea of the act of limitations should state on what act the defendant relies, though if it appears that the plaintiff could not probably be mistaken as to the act relied on, the appellate court will not reverse the judgment for the failure of the plea to specify the act.

In the case of *Moore vs. Mauro*, 4 Rand., 488, decided November, 1826, it was held: The savings in the fourth section of the act of limitations apply to the seventh section of the same act, by which an action between merchant and merchant is neither barred by one year nor five years.

Under the eighty-sixth section of the act concerning proceedings in civil suits, etc., an account filed in an action of *indebitatus assumpsit*, which gives notice of the character of a claim, is sufficient, although it may be made up of various items of which no notice is given.

In the case of *Watson vs. Lyle's Administrator*, 4 Leigh, 236, decided February, 1833. The escheater, who is defendant to the petition, has the same right to plead the act of limitations in bar of the petition that a representative of the debtor would have to plead the statute in bar of an action.

In replication to the plea of the statute of limitations that the accounts concerned the trade of merchandise between merchant and merchant, no evidence is adduced to prove that either party was a merchant during the time of the dealings between them, nor any evidence of the character of those dealings but that furnished by the account of the petitioner, in which account the debits to the alleged debtor, consisting of two items for cash paid him on account of bills of exchange, one item for goods sold him, and the other item for cash advanced to or for him, and there was a single credit for the proceeds of a bill of exchange bought of him. Held: That the replication was not supported by the evidence, and the demand therefore was barred by the statute.

In the case of *Marsteller vs. Weaver's Administrators*, 1 Grat., 391, decided February, 1845, it was held: Upon a bill filed by a surviving partner against the administratrix of a deceased partner, the plea of the statute of limitations cannot be sustained where it appears that there were good debts due to the firm outstanding, within five years before the suit was brought. The bill is filed nine years after the dissolution of the partnership and after the death of the other partner. Held: That the circumstances of the case do not show such laches on the part of the plaintiff as to deprive him of the right to have an account.

In the case of *Coalter vs. Coalter*, 1 Rob., 79 (2d edition, 85): An action of account by one partner against his co-partner, for

settlement of the partnership accounts, must be commenced within five years next after the cause of action, and unless so commenced, will be barred by the statute of limitations; for such accounts do not concern the trade of merchandise between merchant and merchant, and therefore are not embraced by the exception to the statute.

A suit in equity by one partner against his co-partner, for a settlement of the partnership accounts, being a substitute for the action of account, should, like that action, be brought within five years; and if not brought within that time, will be barred by the statute of limitations.

In the case of *Jordan vs. Miller et als.*, 75 Va., 442, decided March 21, 1881, it was held: In the case of a bill by a partner against his co-partners, for the settlement of the partnership accounts, the statute of limitations will not begin to run whilst there are debts due to and by the partnership.

In the case of *Hunter's Executor and Herndon's Executor vs. Spotswood*, 1 Wash., 145. At the fall term, 1792, the question of the application of the statute of limitations by a court of equity was discussed, but the case was remanded to the General Court solely on the ground that there was no order of publication shown in the record; so no decision was reached.

In the case of *Spotswood vs. Dandridge et als.*, 4 H. & M., 139, decided October 3, 1809, it was held: To prevent length of time from barring a claim, on the ground that the possession of the defendant was fiduciary, such possession must have been fiduciary as to the plaintiff, or those under whom he claims; its being fiduciary as to any other person is not sufficient.

An executor having delivered certain slaves to legatees as their property under the will, a subsequent action of detinue against him for other slaves which the testator held in the same right is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running both at law and in equity in favor of the legatees.

In the case of *Redwood vs. Riddick and Wife*, 4 Munf., 222, decided March 3, 1814, it was held: A trustee cannot take advantage of the act of limitations against the claim of the *cestui que trust*, or of persons claiming under him.

In the case of *Kinney's Executors vs. McClure*, 1 Rand., 284, decided February, 1823, it was held: The act of limitations is a good plea to a suit in equity brought to recover money collected by an attorney for the plaintiff, and not accounted for by him.

In the case of *Rankin vs. Bradford et als.*, 1 Leigh, 163, decided March, 1829, it was held: R. could not protect himself under statute of limitations, because he bought with the notice of the trust, and so was charged with it, and because his removal of the slaves to a distant county, thus keeping owners in igno-

rance where they were, was an obstruction to the assertion of their rights of action, precluding him from leading the statute.

In the case of *Sheppards vs. Turpin*, 3 Grat., 373, decided January, 1847, it was held: A mere constructive trustee may protect his possession by a plea of the statute of limitations.

If the statute of limitations will bar the action of the trustees against third persons for the recovery of the trust property, it will equally bar the action of the *cestui que* trust for the same subject-matter.

In the case of *Livesay vs. Helms*, 14 Grat., 441, decided July 29, 1858. A widow qualifies as administratrix of her husband and takes possession of and holds certain slaves in which she claims a life estate, as having been given to her by her father's will. She is afterwards removed from her office of administratrix, but she continues to hold the slaves, claiming them as her own for life, and she holds them for more than five years after she ceased to be administratrix. Held: The statute of limitations will protect her against any claim by the administrator *de bonis non*, and next of kin of her husband. And the fact that one of the next of kin had been a married woman during the whole period, will not prevent the running of the statute against her.

In the case of *Rowe vs. Bentley et als.*, 29 Grat., 756, 759, and 763, decided January, 1878. In 1851 R. was appointed trustee for B., a married woman and her children, she, taking for her life and they in remainder. In 1885 R. was removed, and T. appointed in his place. Of the trust property there was four hundred dollars which R. had lent to a firm of which his brother, W., was a member, and R. directed W. to settle for it with T. W. transferred to T. the bond of H., and received from T. a receipt for the four hundred dollars. In a few months after, H. died, and T. sued his administrator and recovered a judgment, but the execution upon it was returned "no effects." In 1871 B., still under coverture, by her next friend and her children, sued R. and T. for a settlement of their accounts as trustees. Held: Both R. and T. were guilty of a breach of trust in the transfer, and the receipt of the bond of H., and are liable for the amount to the *cestui que* trust.

The statute of limitations is not a bar to the claim as to either of the trustees.

Under the circumstances, the coverture of B., the life-tenant, the suspension of legal proceedings during the war in that county, the subsequent stay-laws, and the ignorance of the facts by the *cestui que* trust, the lapse of time is not a bar to the recovery of the claim.

A decree against R. for the amount, leaving him to assert any claim he may have against T., is not erroneous.

In the case of *Harshberger's Administrator et als. vs. Alger et ux.*, 31 Grat., 53, decided November 21, 1878, it was held, p. 67: If A. had a valid claim to compensation for her services for nursing E. in her last illness, it accrued during the lifetime of E., who died in 1871, and the statute of limitations then begins to run; and this suit not having been brought till 1877, the statute is a bar to it.

In the case of *Cole's Administrators vs. Ballard et als.*, 78 Va., 139, decided November 6, 1883, it was held, p. 149: Bond executed November 10, 1844, payable on demand, was not barred when action was brought July 17, 1877. Under Code, 1849, Chapter 149, the twenty years' limitation began July 1, 1850, and was suspended during war and stay periods, from April 17, 1861, to January 1, 1869, and had not expired when action was brought.

Presumption of payment from lapse of time has no reference to the positive bar of the statute, but is repellable by proof, and in case at bar is repelled by the testimony of principal obligor, the endorsement of interest, payments on the bond, and other circumstances.

If a legal demand which is barred at law be asserted in equity, equity follows the law. If such demand be one to which the statute applies, but the lapse of time be not such as to bring it within the statute, laches and lapse of time cannot of themselves constitute a bar to the suit.

In the case of *Harvey's Administrators vs. Steptoe (Administrator) et als.*, 17 Grat., 289, decided February 13, 1867, it was held, p. 304: In a bill by a creditor against the trustee and executor of his debtor to have payment of his debt, and charging deed fraudulent and voluntary in part, court makes a decree directing a commissioner, among other things, to take an account of debts of testator. The statute of limitations ceased to run against creditors from the date of that decree.

In the case of *Bank of the Old Dominion vs. Allen et als.*, 76 Va., 200 and 205.

3. Limitations.—Last of notes given to satisfy the Illinois judgment was paid January, 1880, yet the Illinois judgment was marked satisfied December, 1869. General creditors' bill filed July, 1873, to enforce judgment against maker, and order of account of debt, etc., entered October, 1873. Held: The statute of limitations does not bar the claim of endorser or his assignee to be subrogated, and plaintiff's rights in judgment against maker. Order of account entered; all lien creditors became parties, and at liberty to assert their demands in that suit.

In the case of *Norvall's Administrators vs. Little et als.*, 79 Va., 141, decided July 17, 1884, it was held: Upon entry of decree for account in such suit, time ceases to run against all

creditors of estate. It is a well-settled rule of the common law, that a bond is presumed to have been paid after the lapse of twenty years from its maturity. But this presumption may be repelled by satisfactory evidence. If less than twenty years have elapsed, such presumption arises not, yet even then lapse of time may be relied on in connection with other circumstances as evidence of payment.

From the twenty years between maturity of bond and action brought, the period between April 17, 1861, and January 1, 1869, must be eliminated both as respects the statutory bar of limitation, and the common law presumption of payment. The object of the legislature was to protect debtors from immediate enforced collections, without prejudice to the rights of creditors.

In the case of *Richmond vs. Irons*, 121, U. S. S. C. Reports, 28 (referred to as 53-'4), decided March 27, 1887, it was held: The rights, under the statute of limitations, of a creditor who becomes a party to a creditor's bill pending, will depend upon the date of the filing of the creditor's bill, and not upon the date of his becoming a party to it.

In the case of *Sweitzer et als. vs. Noffsinger et als.*, 82 Va., 518, decided November 11, 1886, it was held: Where the bar is pleaded, plaintiff, to bring himself within its savings, must set forth the facts relied on either by replication or by amending his bill.

New promise to remove the bar must be determinate and unequivocal, and by one against whom the right to maintain an action has accrued; acknowledgment from which promise may be implied must be unqualified.

This is the case cited from 10 Va. Law Journal, 732.

In the case of *Carr's Administrators vs. Chapman's Legatees*, 5 Leigh, 164, decided March, 1834. Bill by the legatees of A. against the executor and legatees of B., who is executor of A., for an account of B.'s administration of A.'s estate. B.'s executor being himself one of A.'s legatees, and so a party in interest with plaintiffs, it appears that no account of B.'s administration of A.'s estate has ever in fact been settled; but this bill is filed twenty-eight years after B.'s death, and from twelve to twenty years after the youngest of the plaintiffs attained full age, and the accounts called for would involve very ancient and complicated transactions. Held: The great lapse of time is a sufficient objection to the relief prayed by the bill against the representatives of the first executor, especially under circumstances showing that nothing was probably due, and that from loss of papers and evidence, the accounts cannot be now fairly settled.

In the case of *Hayes et als. vs. Goode et als.*, 7 Leigh, 452, decided April, 1836. A testator died in 1782, and his will was proved and the executors qualified in that year. The chief act-

ing executor died in 1792, and in the following year the account of that executor was settled, and the balance thereby appearing due was paid over to the surviving executor. In December, 1797, a suit was brought by legatees against the surviving executor and the representative of the deceased executor, which suit was discontinued in October, 1806 for want of prosecution. The surviving executor died in the latter part of 1808, or beginning of 1809, and in April, 1809, a second suit was brought, making defendants thereto the representatives of both executors, the surviving sureties of the executors, and the representatives of those sureties who had died. New parties were frequently made, numerous accounts were ordered, and from remissness of the plaintiffs and other causes, the case lingered for a long time. In October, 1827, the chancellor decreed that the bill be dismissed on appeal from this decree. Held: The great lapse of time before the suit was commenced, together with the remissness in prosecuting it afterwards, was a sufficient reason for refusing to entertain the bill against representatives and sureties, especially as the circumstances appearing in the case tended to show that the debts due from the testator were sufficient to exhaust his slaves and personal assets.

In the case of *Curuther's Administrators vs. The Trustees of Lexington*, 12 Leigh, 610, decided August, 1841. A lottery is authorized in 1802, for the relief of sufferers by fire in Lexington, but commissioners, with consent of greater part of sufferers, determine to apply the proceeds of the lottery to the construction of roads through the town. About two thousand dollars are obtained by the lottery, which is drawn in 1805. By application of funds derived from lottery and of private subscriptions and of donation from the legislature, the roads are completed in 1808-'9; J. C. was the treasurer and W. C. secretary of the lottery, but W. C. was the chief manager, and actually received and disbursed the greater part of the funds; W. C. died in 1817; in 1827, by act of Assembly, the balance in the hands of the treasurer of the lottery is vested in the trustees of Lexington, the treasurer or his representative is required to settle with them, and to pay them the balance, and in case of failure they are authorized to recover it by action of debt; and in 1830 trustees bring bill in chancery against the administrators of W. C. for an account of the lottery fund. Held: Equity will not entertain a bill for an account of such stale transactions, when all parties to the transactions, who could explain them, are dead, and bill dismissed.

In the case of *Smith et als. vs. Thompson et als.*, 7 Grat., 112, decided May 14, 1850, it was held: A party who comes into a court of equity to enforce an equitable claim, must do so within a reasonable time, and he must not delay until by his negligence

there can no longer be a safe determination of the controversy, and his adversary is exposed to the danger of injustice from loss of information and evidence, and means of recourse against others, occasioned by deaths, insolvencies, and other untoward circumstances.

The application of this equitable doctrine is for the sound discretion of the court, and does not require the conviction of the court against the original justice of the claim or of any other specific ground of defence, but its belief that, under the circumstances of the case, it is too late to ascertain the merits of the controversy.

In the case of *West's Administrators vs. Thornton*, 7 Grat., 177, decided December 7, 1850. The bill was dismissed on the ground of lapse of time and the laches of the plaintiff, and the danger of doing injustice by attempting to settle the accounts between the parties.

In the case of *Tazewell's Executor vs. Whittle's Administrators*, 13 Grat., 329, decided May 23, 1856, it was held: Though a creditor's debt is evidenced by deed, yet where there has been gross laches in its prosecution, and the account cannot be settled without injustice to the estate of the deceased debtor, a court of equity will not give the creditor relief.

In the case of *Tazewell's Executor vs. Saunders's Executor et als.*, 13 Grat., 354, decided May 23, 1856, it was held: Laches in the assertion or prosecution of a claim is not always enough to defeat it. The laches must be such as to afford a reasonable presumption of the satisfaction or abandonment of the claim; or such as to prevent a proper defence by reason of the death of parties, loss of evidence or otherwise.

The reference to 17 Grat., 544, is the case of *Robertson et als. vs. Read's Administrators et als.*, in which there is an extended decision on the subject of the effect of laches, too long and uncertain, however, for use here.

In the case of *Bargamin et als. vs. Clarke et als.*, 20 Grat., 544 and 553, decided March, 1871. In 1819 L. conveys a lot of land to C., in trust, to pay certain debts which are due upon executions in the hands of the sheriff, and the other is due to the father of C. Ten years afterwards the father dies, and makes C. his executor and one of his residuary legatees. The lot is never sold under the deed of L., but in 1839 C. takes possession of it, and some years afterwards leases it in his own name to R. for eight years. In 1854 W., claiming it under another title, sues R. for it, and C. being then dead, his heirs make themselves parties and defend the suit, and obtain a final judgment in 1867. Then the heirs of L. sue the heirs of C. for the lot, alleging that C. took and held possession as trustee under the deed, and his heirs held under the trust, and defended

the action under that title. The heirs of C. deny this claim that C. took possession for himself, and he and they have so held for twenty-eight years, and they defended the suit for themselves. Held: The heirs of L. are barred.

In the case of *Harrison et als. vs. Gibson et als.*, 23 Grat., 212, decided March, 1873, it was held: The decided cases do not fix any period as limiting the demand for an account. If, from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court may arrive at must, at best, be conjectural, and that the original transactions have become so obscured by time and loss of the evidence and the death of parties as to render it difficult to do justice, the court will not relieve the plaintiff. If, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim.

Though a delay of fourteen years after a right has accrued does not create a statutory bar, it will, in connection with other circumstances, be very persuasive against the justice of the claim. Relief refused in this case.

In the case of *Carter (Trustee, etc.) vs. McArtor et als.*, 28 Grat., 356, decided March, 1877. In March, 1844, by an agreement in writing, D. sells a tract of land to M., for which M. is to transfer to D. bonds of K., secured by a deed of trust on real estate, and gives his bond for the balance of the purchase-money, payable in ten years with interest; and M. is to convey the land to secure the payment of the bonds of K. and the balance of the purchase-money. In December, 1844, M. conveys the land in trust to secure to D. a bond of six thousand dollars, payable in ten years with interest, but no reference is made in the deed to the bonds of K. The real estate on which the bonds of K. are secured diminishes in value, and when sold by D. in 1852 brings only one-third of the amount due on the bonds. In 1858 C., trustee claiming under D., files his bill against M. and others, claiming that by mistake the deed of trust executed by M. omitted to secure the K. bonds. A witness who drew the agreement, but was not present when the deed was drawn and executed, says he, in 1845, called attention to the mistake, and was told the agreement was sufficient to bind the land. Held: The parties having known as early as 1852 that the real estate on which the K. bonds was secured was not sufficient to secure them, and they having delayed until 1858 before they filed their bill, they are precluded by their laches from any relief.

The case of *Stampers's Administrator vs. Garnett*, 31 Grat., 550, decided March 13, 1879, was a case in which, from the lapse of time, the death of all the parties cognizant of the trans-

actions, the destruction of the records of the county, and loss of papers, it was held that an account of administration of an estate could not be settled without great danger of injustice to the deceased administrator, and was therefore refused.

In the case of *Hatcher et als. vs. Hall et als.*, 77 Va., 573, decided July 10, 1883, it was held: It is an inherent doctrine of courts of equity to refuse relief where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights. This doctrine, founded on considerations of natural justice and public policy, is always firmly enforced, especially where the immediate parties to the transactions are dead.

In the case of *Updike's Administrators vs. Lane*, 78 Va., 132, decided December 6, 1883, it was held: Bond payable October, 1847, not when action commenced in 1876. By Chapter 149, Code of 1849, the twenty years limitation on bonds executed prior to July 1, 1850, began on that day, and it was suspended during the period from April 17, 1861, to January 1, 1869.

The common law presumption of payment applies only to cases where twenty years have elapsed after the right of action accrued. This is, however, repellable by express admissions within twenty years, by payment of interest or part of the principal, obligor's inability to pay, suspension of collection by stay-law or war, and even by near relationship of the parties.

In the case of *Nelson's Administrators vs. Kownslar*, 79 Va., 468, decided October 6, 1884, it was held: Record discloses circumstances under which it is held improper to rehear a decree confirming a settlement of executorial accounts after the lapse of thirteen years, the death of the principal parties, the trustees removal west, and the loss of all the vouchers, proofs, and evidence.

In the case of *Morrison's Executors et als. vs. Householder's Administrators et als.*, 79 Va., 627, decided December 4, 1884, it was held: In computing time within which suits on demands against fiduciaries may be brought, the stay period must be eliminated as in other cases.

In the case of *Wissler vs. Craig's Administrators*, 80 Va., 22, decided January 8, 1885, it was held: Laches is neglect to do something one ought to do. Mere lapse of time unaccompanied by circumstances affording evidence of a presumption that the right has been abandoned, is not considered "laches."

Where, from delay, no correct amount can be taken, and any conclusion the court may arrive at must, at best be conjectural, and the original transactions have become so obscured by lapse of time, loss of evidence, and death of parties, as to render it difficult to do justice, the case will be considered as a case of laches, and the court will not relieve the plaintiff.

In the case of *Morgan vs. Fisher's Administrators*, 82 Va., 417, decided September, 23, 1886. Executrix paid, in 1850, the purchase-money on the land purchased in 1840 by her testator, and took conveyance to herself "as executrix." In 1854 she conveyed the land to a trustee (reciting in the deed that although she was described in the deed to herself "as executrix," she had paid for it with her own money, and it was hers) in trust to secure six bonds, payable to her son, by whom they were assigned to Fisher. After her death Fisher's administrators, in 1881, instituted suit to enforce the trust deed to satisfy the said bonds, claiming that if the land were not her property, she was at least subrogated to the vendor's lien thereon as security for the money advanced by her, and that this lien passed by the trust deed. Held: Fisher's rights had been lost by his laches.

This is the case cited from 10 Va. Law Journal, 692.

In the case of *Turner's Administrators vs. Dillard's Executors*, 82 Va., 536, decided November 11, 1886. L. qualified as executor of his father's estate in 1841. Suit for settlement was instituted thirty-seven years afterwards. Both plaintiff and defendant were old and died within a few months. Estate was large. Much money had been paid out to legatees. L. had actually donated to plaintiff a farm worth double her claims. Witnesses were dead; vouchers destroyed by public enemy during civil war, and a correct account had become impossible, whilst the delay to demand settlement sooner was unexplained. Held: The court will leave the parties where they contentedly rested so long and will dismiss the bill.

This is the case cited from 11 Va. Law Journal, 117.

In the case of *Backhouse (Administratrix) vs. Jones (Executor)*, 5 Call, 462, decided April, 1805, it was held: The defendant cannot plead the act of limitations upon setting aside the office judgment after the next term unless good cause is shown.

In the case of *Brockenbrough vs. Hackley*, 6 Call, 51, decided April, 1806, it was held: If there be several partners, and one of them, after the co-parceny is dissolved, assumes a partnership debt, but afterwards pleads the act of limitations jointly with the other partners, the assumpsit may be given in evidence, for the plea of non assumpsit within five years admits that the defendants did once assume.

In the case of *Tomlin's Administrators vs. How's Administrators*, 1 Va. (Gilmer), 1, decided April 10, 1820, it was held: The plea of the statute of limitations is an issuable plea, and sometimes an honest plea. Another plea may be added to the general issue under circumstances.

Presumption of payment arising from the staleness of the demand will excuse delay in pleading the statute of limitations, especially in favor of an executor or administrator.

In the case of *Martin vs. Anderson*, 6 Rand., 19, decided August 21, 1827, it was held: A plea of the statute of limitations ought not to be received after issue joined on another plea, unless some good reason be assigned why the plea of the statute of limitations was not sooner tendered.

In the case of *Hickman vs. Stout*, 2 Leigh, 6, decided February, 1830, it was held: The statute of limitations cannot be insisted on in equity without being pleaded, or in some form relied on as a defence in the pleadings.

In the case of *Calvert vs. Millstead's Administratrix*, 5 Leigh, 88, it was held: Upon a bill in chancery for slaves the statute of limitations cannot avail the defendant unless it be pleaded.

In the case of *Clopton's Administrator vs. Clarke's Executor*, 7 Leigh, 325, decided March, 1836. In assumpsit defendant pleads the general issue at September term, 1818; his death is suggested in October, 1823, and the cause is revived at March term, 1824, against his administrator, who obtains leave at October term, 1825, to plead the statute of limitations; but by inadvertence, as it seems, the plea is not then filed; at the March term, 1826, the cause is called for trial, and the administrator asks leave to put in the plea. Held: It cannot now be received.

In the case of *Tunstall vs. Pollard's Administrator*, 11 Leigh, 1, decided March, 1840, it was held: The statute is a bar on such judgments against an administrator of the deceased debtor, though no assets of the debtor's estate came to the hands of the representative within five years of his qualification; and the administrator is bound to plead the statute to actions of the judgment-creditors in favor of other creditors prosecuting claims to which the limitation does not apply, and it seems the representative is bound to plead that statute, in all cases to which it applies, to protect the decedent's estate for the benefit of other creditors, or of legatees or distributees of the decedent.

In the case of *Herrington vs. Harkins's Administrators*, 1 Rob., 591 (2d edition, 624): Where an action of debt is brought on a judgment after ten years from the date thereof, and the defendant wishes to avail himself of the statute of limitations, it is necessary that he should do so by plea. A demurrer to the declaration is not the proper mode to take advantage of the statute.

In the case of *Trimyer vs. Pollard*, 5 Grat., 460, decided January, 1849, it was held: Where a defendant does not file a plea of set-off, but files his account and gives notice of set-off, the plaintiff cannot apply the statute of limitations, and he is therefore at liberty to rely upon it in evidence. If the set-off accrued before the action was brought, the period of limitation is five years before the commencement of the action. If the set-off accrued after the action was brought, the period of limita-

tion is five years before the plea pleaded on account of offsets filed.

For the reference to 13 Grat., 329, see *supra*, this section.

For the reference to 16 Grat., 236, see *supra*, this section.

The references to 32 Grat., 66-72, are *errors*.

In the case of *Smith vs. Hutchinson et als.*, 78 Va., 683, decided March 13, 1884, it was held: The defence of the statute of limitations is a personal privilege, and to be made available must be pleaded by the defendants. The court has no power to interpose the plea *ex mero motio*.

In the case of *Virginia Fire and Marine Insurance Company vs. Aiken*, 82 Va., 424, decided September 30, 1886, it was held: Condition in policy that suit shall not be brought except within a period less than that fixed by the statute of limitations is valid. This is the case cited from 10 Va. Law Journal, 714.

In the case of *Gover vs. Chamberlain*, 83 Va., 286, decided April, 1887, it was held: Writing, not mentioning "seal" in its body, but having scroll attached to the signature, is only a simple contract. The bar of five years applies, and it can be taken out of its operation, not by payment or promise to settle, but only by promise in writing to pay it, or an acknowledgment in writing, such that a promise to pay it must be inferred therefrom.

In the case of *Virginia Fire and Marine Insurance Company vs. Wells (Trustee)*, 83 Va., 736, decided September, 1887, it was held: Stipulation in policy limiting the period within which suit thereon should be brought to a period shorter than the period prescribed in the statute of limitations for the institution thereof is valid.

In the case of *Leith (Administrator) vs. Carter's Administrator et als.*, 83 Va., 889, decided November, 1887, it was held: Administrator may interpose bar of limitations by plea or answer, or by exceptions to report.

In the case of *Radford vs. Fowlkes*, 85 Va., 820, decided February 21, 1889, it was held: When before the bar of the statute of limitations has attached to accounts current they are presented to debtor, and are converted into accounts stated, the statute of limitations begins to run against them only from the date of such conversion.

In the case of *Hamilton vs. Glenn*, 85 Va., 901, decided March 14, 1889, it was held: Where corporation's property, including unpaid subscriptions, is conveyed to secure its debts which, though barred by the statute of limitations, are not extinguished, equity will aid in enforcing their payment.

In the case of *Gibson and Wife vs. Green's Administrator et als.*, 89 Va., 524, decided January 5, 1893, it was held: Statute of limitations cannot be availed of unless pleaded.

In the case of *Cottrell vs. Watkins et als.*, 89 Va., 801, decided March 30, 1893, it was held: Lapse of less than two and a half years after a sale under a deed of trust, procured through the fraudulent representations of one representing himself as entitled to the benefit of its provisions, will not bar a suit to set aside the sale when the suit is not barred by the statute of limitations.

SECTION 2921.

In the case of *Franklin's Administrator vs. Depriest*, 13 Grat., 257, decided March 10, 1856. Testator dies intestate as to one slave who is sold by the executor and purchased by himself. Afterwards the executor having failed to settle his accounts, a suit in equity is brought against him, in which there is a claim for the slave and his heirs, and for a settlement of his accounts; and in this suit the sale to the executors is set aside, and he is required to account for the heirs of the slave, and in 1850 there is a decree against the executor in favor of the parties interested in the estate for their respective shares of these heirs.

In an action against a surety of the executor, founded on this decree, held: The statute of limitations in favor of securities of fiduciaries did not begin to run in favor of the surety until the decree of 1850, and this, though the surety was not a party to the suit in equity.

In the case of *Tilson vs. Davis (Administrator) et als.*, 32 Grat., 92, decided July, 1879. G. died early in 1849, leaving a widow, T., and three infant children, and in March, 1849, D. qualified as his administrator. In March, 1851, D. settled his account, and had for distribution \$5,090.63; and having qualified as guardian of the children, he retained in his possession two-thirds of this sum as their guardian. He had in 1850 executed his bond for the balance due to T. as his widow. There is some uncertainty as to the provisions of the bond, whether given to her as a payment of the third due to her as widow, or as a mere acknowledgment of what was due to her; and whether it provided only for the payment to her of the interest during her life, and then of the principal to her children. In April, 1875, T. instituted a suit in equity against the administrators and sureties of D. to recover the amount of her interest in the estate of her husband, G., and the sureties answered, insisting that T. had accepted the bond of D. in satisfaction of her claim, and pleading the statute of limitations. Held: If the bond was given so that T. was only entitled to the interest during her life, then it was to go to the children, it was a novation of the debt due by D. as administrator, and his sureties were not bound for the claim.

That D. having settled his administration accounts finally in 1851, and given the bond to T., if it was intended merely as an

acknowledgment that that much was due to her, it was a settlement to the amount of the bond, and from the moment of its execution and delivery to T. right of action accrued thereon, and more than ten years have elapsed before she brought her suit, his sureties are discharged from their liabilities by the statute of limitations.

In the case of *Leake's Executors et als. vs. Leake et als.*, 75 Va., 792, decided November, 1881, it was held: The statute, Code 1873, Chapter 146, Section 9, declares that the action upon the bond of an executor, or an administrator, may be brought within ten years after the right of action accrues, and there is no other limitation applicable to the sureties upon the official bond.

In the case of *Pearle's Administrator vs. Thurmond*, 77 Va., 753, decided October 4, 1883, it was held: Guardian *de facto* is liable to his wards for rents and profits received by him during his possession of the corpus of their estate.

Father acting as such guardian, and liable for such rents and profits, is entitled to set-off against same, the amount advanced his female ward's husband to assist him in business, and it is inequitable to settle on the wife the whole she is entitled to, without deducting the amount so advanced. So, guardian being a fiduciary, the statute of limitations runs not in his favor against his ward's claims, nor does any presumption arise from lapse of time, where the claim is clearly established.

In the case of *Sharpe's Executor vs. Rockwood et als.*, 78 Va., 24, decided November 15, 1883, it was held: Action on fiduciary's bond is barred only after ten years from accruing of cause of action, that is, from return-day of execution against fiduciary, or from time of right to require payment or delivery from fiduciary.

Where suit is brought and decided in 1858, but retained on docket till 1867, because there was no hand to receive the funds, when it is dismissed with leave to reinstate it on motion of any person interested, and it is reinstated in 1878, and a supplementary suit is brought, the latter is deemed a continuation of the former, *quoad* questions arising under the statute of limitations.

In the case of *McCormick's Executors vs. Wright's Executors*, 79 Va., 524, decided October 7, 1884, it was held: As to fiduciaries themselves, there is no limitation except what results from staleness of demand or presumption of payment, otherwise as to their sureties. Action against sureties on fiduciary's bond may be brought within ten years after accrual of right of action, that is, from return day of execution against fiduciaries or from time of right to require payment or delivery from fiduciary.

In the case of *Morrison's Executors vs. Householder's Admin-*

istrators et als., 79 Va., 627, decided December 4, 1884, it was held: In computing time within which suits on demands against fiduciaries may be brought, the stay period must be eliminated as in other cases.

In the case of *Ashby vs. Bell's Administrators*, 80 Va., 811, decided October 21, 1885. In 1865 E. sued out distress warrant against estate of J., deceased, which had been committed to sheriff as administrator, who wasted it. Warrant was placed in hands of sheriff's deputy to levy. It was never levied, but was returned to, and remained effete in clerk's office until 1880, when E.'s administrator brought chancery suit against sheriff-administrator and his two sureties, alleging the *devastavit*, and asking relief. Against principal and all his sureties, except A., the bill was taken for confessed. A. answered and pleaded statute of limitations. Held: The claim of E.'s administrator for the *devastavit* was debarred as against sheriff-administrator's surety, though not against himself, when the suit was brought in 1880.

The suit being on the joint obligation of all the sureties, the defence by A. not being purely personal to him, enured to the benefit of all, and no decree can be entered against any.

In the case of *Morrison et als. vs. Lavell*, 81 Va., 519, decided March 11, 1886. Supports the case of *Leake's Executors vs. Leake et als.*, cited *supra*, this Section.

SECTION 2922.

In the case of *Butcher vs. Hixton*, 4 Leigh, 519, decided May, 1833, it was held: If in any case of an action of debt on simple contract the plaintiff would rely on a subsequent acknowledgment to take the case out of the statute of limitations, it seems he must count on such subsequent acknowledgment in his declaration, otherwise in an action of assumpsit.

In the case of *Aylett (Executor) vs. Robinson*, 9 Leigh, 45, decided November, 1837. In assumpsit against an executor for a debt of his testator on an open account, all the items of which appear to have been due more than five years before testator's death, plaintiff proves that within five years after the date of his account he applied to the testator to settle the same, and testator said, "I am too unwell to do business now, but when I am better I will settle your account." Held: These words import no such promise to pay, or acknowledgment of the debt, as will take the case out of the statute of limitations, requiring the court, in such cases, to expunge from such account every item which shall appear to have been due more than five years before the testator's death. Such a promise to settle would not amount to a promise to pay, or acknowledgment of debt, that would take the case out of the general statute of limitations in regard to such actions.

In the case of *Sutton vs. Burruss*, 9 Leigh, 381, decided April, 1838. On a plea of non-assumpsit within five years, it was proved that within five years the defendant acknowledged the items in the plaintiff's account to be just, but said that he had some offsets, and that at a subsequent time the defendant promised the plaintiff that he would settle all their differences and accounts fairly, and would not avail himself of the act of limitations. Held: This proof is not sufficient to justify the jury in finding for the plaintiff.

In the case of *Bell vs. Crawford*, 8 Grat., 110, decided July, 1851, it was held: A promise which will remove the bar of the statute of limitations must be a promise to pay a debt; and a promise to settle with the claimant is not sufficient.

If a part payment will take a case out of the statute, it must be a payment upon the specific debt, and not a payment upon account.

In the case of *Tazewell's Executor vs. Whittle's Administrator*, 13 Grat., 329, decided May 23, 1856, it was held: That the creditor has furnished the executor, at his request, with a statement of his debt which the executor does not object to, will not remove the bar of the statute.

In the case of *Dinguid vs. Schoolfield*, 32 Grat., 803, decided February 19, 1880, it was held: A deposition of a maker of a note given and signed by him, in a case in which the obligee was not a party for the purpose of obtaining a credit for it as to be paid by him, and for which he was allowed such a credit in that case, is such an acknowledgement of the debt by him as will defeat the plea of the statute of limitation in an action on the note by the obligee against him.

In the case of *Shepherd vs. Thompson*, 122 U. S. S. C. Reports, 231, decided May, 27, 1887, it was held: A promissory note, secured by mortgage of the same date, is not taken out of the statute of limitations, as against the debtor, by a writing signed by him by which "in consideration of the indebtedness described in the mortgage, a claim of his against the government and its proceeds are "pledged and made applicable to the payment of said indebtedness, with interest thereon at the rate of eight per cent. per annum until paid," and he promises that those proceeds "shall be applied to the payment of said indebtedness, with interest as aforesaid," or to so much thereof as "those proceeds" are sufficient to pay.

In the case of *Sweitzer vs. Noffsinger*, 82 Va., 518, decided November 11, 1886, it was held: New promise to remove the bar must be determinate and unequivocal, and by one against whom the right to maintain an action has accrued. Acknowledgment from which promise may be implied must be unqualified.

This is the case cited from 10 Va. Law Journal, 732.

In the case of *Morris vs. Lyon*, 84 Va., 331, decided January 19, 1888. In an action of detinue defendant pleaded that the cause of action did not accrue within five years next before action brought; plaintiff replied, admitting averment of plea, but averring subsequent acknowledgment of title in plaintiff made within five years. Defendant demurred to this replication. Held: The demurrer was properly sustained.

SECTION 2923.

In the case of *Kayser vs. Disher*, 9 Leigh, 357, decided April, 1838, it was held: An action at law by a legatee against an executor for a legacy, or the executor's promise to pay it, must be brought against the executor in his individual, not his representative character, and the judgment in such case must be *de bonis propriis*.

If in a declaration in assumpsit against an executor there be one count against him in his representative, and the others against him in his individual character, this is a misjoinder of action, fatal on general demurrer.

In the case of *Seig (Administrator) vs. Accord's Executor*, 21 Grat., 365, decided August, 1871, it was held: A debt which is barred by the statute of limitations at the death of the debtor cannot be revived by the promise of the personal representative to pay it.

Where they are two joint administrators, or executors, to one of whom the deceased was indebted in his lifetime for money loaned so long before the death of the debtor that at the time of his death it was barred by the statute, the debt cannot be revived by the admission of the other administrator or executor that the money had been loaned and was due.

In the case of *Smith vs. Pattie*, 81 Va., 654, decided April 15, 1886, it was held: Where the administrator is sole heir and distributee of his intestate, and there are judgments against him individually which attached to the intestate's estate as soon as it descended upon his said heir and distributee, and their debts against the intestate, which are barred by the statute of limitations, the administrator cannot revive those debts and repel the bar by any promise in writing or otherwise, but is bound to plead the statutes against those debts; and if he refuses or fails to do so, it is the right of the judgment creditor, by reason of his interest in the fund, to interpose the plea.

SECTION 2924.

In the case of *Johntson (Trustee) etc., vs. Wilson's Administrator, et als.*, 29 Grat., 379, decided November, 1877, it was held: A devise of real estate for the payment of debts will not effect the operation of the statute of limitations upon such debts,

whether they be barred at the testator's death or not, unless the contrary intention on his part plainly appears.

SECTION 2927.

In the case of *Newby's Administrators vs. Blakely*, 3 H. & M., 57, decided October, 1808, it was held: A plaintiff in detinue, who, after having five years peaceable possession of a slave acquired without force or fraud, loses that possession, may regain it on the mere ground of his previous possession, on the same ground that a defendant may protect himself on that length of possession under the act of limitations.

But such recovery will not affect the rights of others not parties to the suit.

In the case of *Spotswood vs. Dandridge*, 4 H. & M. 139, decided October, 1809, it was held: To prevent length of time barring a claim on the ground that the possession of the defendant was fiduciary, such possession must have been fiduciary as to the plaintiff, or those under whom he claims. Its being fiduciary as to any other person is not sufficient.

An executor having delivered certain slaves to legatees as their property under the will, a subsequent action of detinue against him for other slaves which testator held in the same right is not sufficient, though prosecuted to a judgment, to prevent the act of limitations from running, both at law and in equity, in favor of the legatees.

In the case of *Redwood vs. Riddick et ux.*, 4 Munf., 222, decided March 3, 1814, it was held: A trustee cannot take advantage of the act of limitations against the claim of the *cestui que trust*, or of person claiming under him.

In the case of *Elam vs. Bass's Executors*, 4 Munf., 301, decided November 12, 1814, it was held: The defendant in detinue may protect himself on the plea of *non detinet* (without pleading the act of limitations) by proving that he and those under whom he claims had possession of the property in controversy more than five years before the emanation of the writ. And such evidence cannot be rebutted by the plaintiff's proving that before the five years had elapsed he brought a suit in chancery to recover the same property (which suit was dismissed on the ground that his claim was exclusively cognizable at law), and that within one year after such dismissal he took out the writ in detinue.

In the case of *Cook vs. Darby*, 4 Munf., 444, decided October 18, 1815, it was held: The act of limitations may be pleaded in bar to an action against a common carrier for fraudulently embezzling goods entrusted to his care.

It seems that a plea of "the act of limitations" in those words only, to which the plaintiff replies generally, is good after verdict.

In the case of *Garland vs. Enos*, 4 Munf., 504, decided November 22, 1815, it was held: A testator (after directing his debts and some legacies to be paid) bequeathed the residue of his estate to his children, equally to be divided among them, with a proviso, that if either of his daughters should die without lawful heir, her part should be equally divided among the survivors of his children. One of the daughters took possession of certain slaves in her share, and having married, died without any child. For more than five years after her death her husband continued to hold and use the slaves as his own, without any demand being made by the surviving children of the testator. His possession was considered adverse to their title; and a purchase from him was protected by the act of limitations.

In the case of *Hudson vs. Hudson's Administrator et als.*, 6 Munf., 352, decided April 2, 1819, it was held: If a widow, holding by virtue of her husband's will, certain slaves for life, with power to dispose of them afterwards among his children as she should think proper, bequeath them to trustees for the benefit of one only of those children, such child must be considered as holding the slaves under her will, adversely in relation to the other children, and therefore may be protected by the act of limitations from a claim in their behalf.

In a case where it is necessary to plead the act of limitations, it ought, in order to form a bar, to be specially pleaded, or at least, insisted on, that is, term prescribed by the statute should be particularly (if not formally) pleaded or relied on, to let in the plaintiff to show in his replication, that, within that term, an original had been sued out, if the fact were so, and thus to avoid the bar.

A possession of slaves commencing during the infancy of a plaintiff cannot operate a title in favor of a defendant, until it has continued five years after such infancy has ceased.

When the act of limitations once begins to run, it runs over all the mesne acts, such as coverture, infancy, etc.

In the case of *Vaiden vs. Bell*, 3 Rand., 448, decided October, 1825, it was held: Where the characters of administrator and distributee unite in the same person, who holds possession of personal property in the former character for more than five years, his rights as distributee will not be barred by the statute of limitations.

In the case of *Lynch vs. Thomas*, 3 Leigh, 682, decided May, 1832. Testator bequeathes a slave to an infant son, and then that his wife shall hold the slave bequeathed to his son till he shall attain to full age. Held: The act of limitation never could begin to run against the claim and title of the son to the slave and her increase till he attained to full age.

In the case of *Rice vs. White*, 4 Leigh, 474, decided April,

1833. In an act for deceit in a sale of a chattel, there is a plea of the statute of limitations, a general replication thereto, and issue thereon joined. Held: The cause of action accrued at the time of the deceit practiced, and the limitations begin to run immediately.

It seems that if the fraud was not discovered till some time after it was practiced, and within the time of limitation, this would suffice to take the case out of the statute; but to enable the plaintiff to avail himself of such matter, he must plead it especially in his replication.

The case of *Ragland vs. Owen* has been reported since the publication of the Code in the 84 Va., 227, but does not affect this point at all.

In the case of *McClanahan vs. Western Lunatic Asylum*, 88 Va., 466, decided December 3, 1891, it was held: The maxim *nullum tempus occurit regi* is not applicable to a corporation having power to sue and be sued, though the State be an incorporator thereof, but such corporator is entitled and is amenable to all legal defences which pertain to natural persons.

SECTION 2929.

In the case of *Wilson vs. Buchanan*, 7 Grat., 334 and 343, decided April 28, 1851. W., being largely indebted in proportion to his property, made a gift of slaves to his married daughter, and her husband remained in possession of them for eight years. Judgment having been recovered on some of these debts, and also on other debts contracted since the gift, B. became the surety of W. in the forthcoming bond, and was compelled to pay the money. He then recovered judgment against W. for the amount so paid by him, and all of the property of W. having been then sold by the directions of B., his executions were levied on the slaves given by W. to his daughter and their increase. Held: The slaves were liable to satisfy the debt of B.

In the case of *Snoddy vs. Haskins*, 12 Grat., 363, decided May 14, 1855, it was held: This statute does not apply to cases of actual fraud.

In the case of *Williams vs. Blakey (Commissioner)*, 76 Va., 254.

Limitations.—Code 1873, Chapter 146, Section 16, providing that suit to set aside voluntary conveyance must be brought within five years, refers to suits by creditors to annul voluntary conveyances by their debtor to *third persons* in fraud of such creditor's rights, and not to suit by commissioner to vacate a deed executed by him, upon the ground of fraud or under the misrepresentations of the grantee.

In the case of *Bickle et als. vs. Chrisman's Administratrix, etc.*, 76 Va., 678.

Voluntary Conveyances.—Limitations.—Case at Bar.—In 1870 C. assigned *bona fide*, but for no consideration deemed valuable in law, in trust for his wife, two land bonds of about seven thousand dollars each. The assignment was never recorded. In 1871 trustee invested these bonds in a farm for Mrs. C. In 1878, C. having died, B., assignee of H. and other creditors of C. (whose cause of action did not accrue until March, 1877), filed bill to subject the farm to payment of their debts, on the ground that the assignment of the bonds wherewith the farm was purchased was not on consideration deemed valuable in law. Mrs. C. pleaded the limitation. Held:

1. The suit to avoid the assignment was barred.
2. The statute begins to run from the date of the execution of the deed, and not, as usual under our statutes, from the time the right of action accrued.
3. The exceptions to the operation of this statute must be found in the statute itself: "The doctrine of an inherent equity creating an exception, when the statute makes none, being now universally exploded."

In the case of *Welsh vs. Solenberger*, 85 Va., 441, decided November 8, 1888, it was held: In absence of fraud, suit by creditors to annul conveyance to a husband in trust for his wife, on the ground that the consideration was paid by him, is barred by five years.

SECTION 2930.

In the case of *Goodwin vs. McCluer*, 3 Grat., 291, decided July, 1846, it was held: A court of equity will not entertain a bill to repeal a patent, filed more than ten years after the patent was issued.

SECTION 2931.

In the case of *Baird vs. Bland et als.*, 3 Munf., 570, decided January 20, 1812, it was held: If parents in their lifetime be deprived of slaves and depart this life leaving children under age, the act of limitations does not run against the children until they attain the age of twenty-one years.

In the case of *Blakley vs. Newby's Administrators*, 6 Munf., 64, decided January 27, 1818, it was held: A plaintiff suing for slaves as administrator of his wife is not barred by a decision against him in her lifetime, in a suit to which she was not a party; the ground of that decision having been, under the acts of limitations, that the opposite party had obtained a legal title to the slaves by five years possession, commencing during the coverture; during which, also, the right of the wife accrued; and the husband having never had possession in his character as husband.

In the case of *Hudson vs. Hudson's Administrator et als.*, 6

Munf., 352, decided April 2, 1819, it was held: A possession of slaves commencing during the infancy of a plaintiff cannot operate a title in favor of a defendant, until it has continued five years after such infancy has ceased.

In the case of *Hansford vs. Elliott*, 9 Leigh, 79, decided December, 1837, it was held: Persons claiming rights of personal property, being under disability of infancy or coverture when their rights accrue, may prosecute any remedy in equity they are entitled to, by *prochein ami*, at any time while the disability continues, no matter how long; or in their proper persons, within five years after the disability removed; the right to such remedy being within the saving clause of the statute of limitations.

In the case of *Parsons vs. McCracken*, 9 Leigh, 495, decided July, 1838. A female slave is bequeathed by a father to his daughter, but the name of the slave having been altered after it was first written, it is doubtful whether the bequest is of Harriet or Helen. The executors considering Harriet to have been the slave intended, deliver her to the daughter. She is of equal value with Helen, and, indeed, preferred by the daughter, who, though not of age, accepts her, and hires her out till Harriet dies. Helen is delivered to another legatee and sold by him. After about twenty years from the time that the slaves were delivered to the legatees, and more than five years from the time that the daughter attained full age, a bill in equity is brought by her husband and herself to recover Helen and her children. Held: The length of time, and the acquiescence of the daughter in the manner of executing the will, are sufficient grounds for dismissing the bill.

It seems, if a party claim the benefit of the saving for infants and *femes covert* in an act of limitations, no other disability is available than the one which existed when the right of action accrued.

In the case of *Blackwell's Administrators vs. Bragg (Trustee) et als.*, 78 Va., 529, decided April 17, 1884, it was held: If party claims benefit of saving for infants and *femes covert* in statute of limitations, no other disability is available than the one which existed when right of action accrued. One cannot be mounted on another so as to present continuous obstruction, therefore the disability of marriage cannot be tacked on to that of infancy. *Quoad*, two or more disabilities co-existing in the same person when his right of action accrues, the rule is different, and he is not obliged to act until the last is removed.

When the statute begins to run, no new disability can stop its running.

SECTION 2932.

In the case of *Clark vs. Hardiman*, 2 Leigh, 347, decided Oc-

tober, 1830. H. holds certain slaves during his lifetime. After his death his widow claims these slaves as her own property, and holds adversary possession of them for more than five years; then administration of H.'s estate is committed to the sheriff, who gets possession of the slaves, and a creditor of H., who had recovered judgment against the sheriff, administrator levies an execution on one of them, which is sold to satisfy the same in detinue by the widow against the purchaser. Held: That the statute of limitations did not enure to give the widow a title to the slaves, since it did not begin to run till an administrator of her husband's estate was appointed.

See the case of *Hansford vs. Elliott*, 9 Leigh, 79, cited *ante*, Section 2931.

SECTION 2933.

In the case of *Holladay, Executor of Littlepage vs. Littlepage*, 2 Munf., 316, decided June 19, 1811, it was held: A mutual understanding and agreement between a debtor and creditor that suit shall not be brought upon an account until the debtor shall have gone to Europe and returned, is a good bar to the act of limitations during his absence from this country, and may be given in evidence to prevent the court's expunging from such account items appearing to have been due five years before his death.

In the case of *Kitty vs. Fitzhugh*, 4 Rand., 600, decided January, 1827, it was held: If a slave be taken from the possession of his owner by fraud or violence, unaccompanied by any *bona fide* claim of property, no length of time will bar the action of the true owner.

In the case of *Rankin vs. Bradford et als.*, 1 Leigh, 163, decided March, 1829, it was held: E. C. bequeathed four slaves to C. C. and F. T., trustees, in trust, to apply the profits to maintenance of testator's daughter, J. B., and her husband S. K. B. and their children, during lives of daughter and husband and of survivor, remainder to the children of the daughter by that husband. Both trustees declined the trust. No trustee was substituted. The executor delivered the slaves to B., her husband being then in Europe, where he died. B. then married V., who in 1798, sold R. all the trust slaves for his wife's life, R. having notice of the trust. R. removed them from Fredericksburg to Augusta, held some there, gave away some, sold others; the second husband died in 1806; upon bill in chancery by Mrs. V. and her children by B. against R., praying discovery of names, etc., of the slaves and their increase, restoration of them and account of profits, and (on a charge that R. would remove the property out of the State) an injunction to restrain him from doing so; and R. not pleading to the jurisdiction. Decreed:

1. R. had no right to hold the slaves even during Mrs. V.'s

life, as they were a trust subject, and the profits applicable to her and her children; though *quære* how far her interest passed by her second husband's sale to R.

2. The court of chancery had jurisdiction of the case; because the charges in the bill of the necessity of a discovery, and of the design to remove the slave out of use, saved the bill from being demurrable, and if that charge were only colorable, R. should have pleaded to the jurisdiction, and chiefly because the slaves were a trust subject, represented by no trustee who could sue at law, and which equity alone could apply to the purposes of the trust.

3. R. could not protect himself under the statute of limitations, because he bought with notice of the trust, and so was charged with it, and because his removal of the slaves to a distant county, thus keeping owners in ignorance where they were, was an obstruction to the assertion of their rights of action, precluding him from pleading the statute.

In the case of *Shields (Administrator), etc., of Waller et als. vs. Anderson, Administrator of Byrd, etc.*, 3 Leigh, 729, decided May, 1832, it was held: To a bill in equity by a creditor for relief against a fraudulent conveyance of his debtor, the act of limitation, if well pleaded in bar, would, it seems, run only from the time when the fraud was discovered.

See the case of *Rice vs. White*, 4 Leigh, 474, decided April, 1833, *ante*, Section 2927.

In the case of *Bowles (Executor), vs. Elmore's Administratrix*, 7 Grat., 385, decided May 5, 1851. In September, 1837, the administratrix of E. sued the executor of B. in debt on a promissory note dated June, 1817. The executor pleaded the statute of limitations; and the administratrix replied that after making the note, B. having become the bail of E., they, in October, 1818, entered into a covenant by which it was agreed that E. should deliver to B. the note of B., who was to hold it until the liability of B. as bail was ended, and then he was to re-deliver it to E. That pending the suit E. died in February, 1832, and that there was no administration on his estate until August, 1836. There was a demurrer to the replication, which was sustained, because there was no profert of the covenant. The plaintiff was then allowed to amend the replication by adding the profert of the covenant, and the defendant again demurred. Held: The statute of limitations did not run from the time the covenant was executed until the liability of B. as bail ceased.

In the case of *Ficklin's Executor vs. Carrington*, 31 Grat., 219, decided December 12, 1878, it was held: Where a debtor who resides in the State removes, after contracting the debt, to another State, the removal is itself an obstruction to the prose-

cution of a suit by the creditor to recover the debt, and the statute of limitations will not run against the debt whilst the debtor resides out of the State.

See the case of *Bickle et als. vs. Christman's Executor*, 76 Va., 678, *ante*, Section 2929.

The case of *Ragland vs. Owen*, has, since the publication of the Code, appeared in 84 Va., 227, but does not affect this section.

SECTION 2934.

In the case of *Brown's Executor vs. Putney*, 1 Wash., 302, decided at the fall term, 1794. The plaintiff allowed four years to elapse after abatement, on return of no inhabitant. Held: He would have been entitled to the benefit of the proviso in the act of limitations under the equity thereof, if he had recommenced his suit within a year after the former suit was abated.

In the case of *Bogle et als. vs. Conway's Executors*, 3 Call, 1, decided April 24, 1801, it was held: If in assumpsit the defendant plead the act of limitations and the plaintiff would avoid the plea by a former suit having been brought in time, he must reply to the former suit specially; he cannot give it in evidence under a general replication to the plea.

In the case of *Callis vs. Wadley*, 2 Munf., 511, decided December 5, 1811, it was held: It is no answer to the bar set up by the plea of limitations that the plaintiff sued out a writ for the same cause of action within the time prescribed by the act, which writ was executed and returned, and went off the docket for want of formality.

In the case of *Gray's Administratrix vs. Berryman*, 4 Munf., 181, decided March 2, 1813, it was held: If a bill in chancery be dismissed on the ground that the plaintiff's claim is exclusively cognizable at law, he cannot plead the pendency of such suit in chancery to prevent the act of limitations from being a bar to his subsequent recovery at law.

See the case of *Elam vs. Bass's Executors*, 4 Munf., 301, *ante*, Section 2927.

SECTION 2935.

In the case of *Tunstall's Administrator vs. Withers et als.*, 86 Va., 892, decided May 8, 1890, it was held: Though action at law to recover purchase-money be barred, yet suit in equity to enforce the vendor's lien is not affected by any time insufficient to raise presumption of payment.

SECTION 2936.

See the references given to Section 4204.

In the case of *Johnston vs. Gill et als.*, 27 Grat., 587, decided July 19, 1876, it was held, p. 595: The stay law suspended the

statute of limitations as to suits to set aside fraudulent conveyances.

In the case of *Campbell et als. vs. Holt*, 115 U. S., S. C. Reports, 620, decided December 7, 1885, it was held: The repeal of a statute of limitations of actions on personal debts does not, as applied to a debtor, the right of action against whom is already barred, deprive him of his property in violation of the Fourteenth Amendment of the Constitution of the United States.

SECTION 2937.

In the case of *Le Vasser vs. Washburn*, 11 Grat., 572, decided July, 1854, it was held, pp. 576-'78: Time does not run against the Commonwealth.

Though an adversary possession of land had commenced to run against the true owner, yet upon the forfeiture of the land to the Commonwealth, under the delinquent land laws, the possession, until the land is sold by the Commonwealth, is no longer adversary against her, or her grantee claiming under a conveyance from a commissioner of delinquent lands.

TITLE XLIII.

CHAPTER CXL.

SECTION 2939.

In *Ex Parte Marx*, 86 Va., 40, decided April 18, 1889, it was held: The fine prescribed for violating the Sabbath, is recoverable before a justice and by a civil warrant. The constitutional rights to trial by jury does not extend to such an offence.

In the case of *Western Union Telegraph Company vs. Pettyjohn*, 88 Va., 296, decided July 19, 1891, it was held: The penalty of one hundred dollars, imposed by Section 1292 upon telegraph companies for failure to deliver a dispatch, being a fine, a justice of the peace has not jurisdiction of any claim to recover the same, as it exceeds twenty dollars.

When the cause of action is not within the jurisdiction granted by law to the tribunal, the court will dismiss the suit at any time when the fact is brought to its notice.

SECTION 2952.

In the case of *Hendricks vs. Shoemaker*, 3 Grat., 197, decided July, 1846, it was held: One joint notice to the constable and his sureties, upon default of the constable in several cases, is sufficient; and the justice should give a separate and distinct judgment in each case.

SECTION 2953.

In the case of *Smith vs. The Governor*, 2 Rob., 229, decided July, 1843, it was held: In an action against a constable and the sureties in his official bond for failing to pay over debts intrusted to the constable, and received by him from the debtors, the receipt of the constable for the debts, signed in his official character, is *prima facie* evidence, as well against the securities as against the constable, of the receipt of the money, provided six months have elapsed between the date of the receipt and the commencement of the action. But the fact that the receipt of the constable was signed in his official character must appear in some way on the face of the paper itself; if it do not, the party claiming under the receipt cannot obtain the benefit of the act by oral testimony of the character in which the receipt was signed.

In the case of *McNeale vs. Governor for Clarke*, 3 Grat., 299, decided July, 1846, it was held: The receipt of a constable for a debt, claim, or execution, is evidence against the constable and his sureties that the debt, etc., has come to his hands, though such receipt does not purport to be given in his official character.

If such receipt purports upon its face to have been given in his official character, and six months have elapsed from the date thereof before the commencement of the action, such receipt is *prima facie* evidence of the receipt of the money by the constable when the debt, claim, or execution was placed in his hands to be warranted for, and was such as might have been recovered upon by warrant.

If such a receipt of a constable in his official character is for a debt or claim other than such an execution, it need not be expressed, but ought to be intended, unless the contrary appears, that it was placed in the constable's hands to be warranted for, and that it might have been recovered by warrant; but if the receipt is for an execution, it ought to be intended, unless the contrary appears, that it was placed in his hands not to be warranted upon, but to be levied according to law.

If such receipt of the constable in his official character appears upon its face to have been given for an execution in which the relator in the action is not the plaintiff, though he may be equitably entitled to the money, or to have been given for any other debt or claim upon which the relator could not have maintained a warrant in his own name, then the receipt is not admissible evidence to sustain the action of such relator.

If from the receipt of the constable in his official character it does not appear who was the plaintiff in the execution, or in the case of any other debt or claim who was the creditor entitled to maintain a warrant in his own name, then it shall be intended that the person to whom such receipt was given was

such plaintiff or such creditor, unless the contrary is made to appear by proper evidence.

A receipt of a constable for such claims as are properly placed in a constable's hands to be collected according to law, signed by him, with initials appended to his name, which stand for constable of his county, sufficiently indicate the official character of the deceased.

A constable is an officer appointed for the whole county, and though he is prohibited by law, under a penalty, from executing warrants and levying exactions out of his particular precinct, yet his official acts in any part of the county are valid, and he and his sureties in his official bond responsible therefor.

CHAPTER CXLI.

SECTION 2959.

In the case of *Pulliam, etc., vs. Aler*, 15 Grat., 54, decided January, 1859, it was held: An attachment may be issued under the first section of the Code, Chapter 151, p. 600, after the action has been commenced, if it be done before the abatement of the suit by the return of the officer.

An attachment is not defective because it does not designate any person in whose possession property or effects of the absent debtor may be found.

Though the service of an attachment upon garnishees and the return thereon be irregular, yet if the garnishees appear to the action and defend it, without objecting to the irregularity, they cannot afterwards make the objection in the appellate court.

Money is left with a person, who is a member of a firm, on a special deposit, and in his absence it is entered on the books of the firm to the credit of the depositor, and paid out by the firm for their own uses, they paying the depositor's check upon it, by checks in their name upon the bank, and then an attachment is served upon the firm as garnishees in a suit against the depositor, the summons being served on the other members of the firm. The attachment binds the money in the hands of the firm.

In the case of *Benn vs. Hatcher et als.*, 81 Va., 25, decided April 30, 1885, it was held, pp. 33-'6: The affidavit whereon an attachment is issued in a pending suit need not describe the affiant as the plaintiff, or as the attorney in fact of the plaintiff.

In the case of *J. and H. Brien vs. Pittman & Co.*, 12 Leigh, 380, decided November, 1841. In proceeding by foreign attachment in chancery. Held: Error to decree for plaintiff without affidavit of defendant's non-residence.

Error to decree sale of lands, without requiring bond with

surety from plaintiff, in double the reported value of the lands, with condition for performing future orders or decrees.

In the case of *Anderson vs. Johnson*, 32 Grat., 558, decided November, 1879, it was held: If in a suit in equity against an absent defendant to attach his property for the satisfaction of a debt it appears from the bill that the court has jurisdiction of the case, it is not necessary that the affidavit should state that the defendant has property in the county where the suit is brought, but it is sufficient if it states that he has property and effects in any county of the State.

If in such case the affidavit is defective, the remedy is by motion to quash the attachment.

If it appears that a copy of the attachment was served on the defendant sixty days before the decree for the sale of the land attached, the decree for the sale may be made without requiring the bond provided for in the statute. Code of 1873, Chapter 148, Section 24, p. 1015.

The certificate of M., describing himself as a justice of the peace of the county of B. in the State of Ohio, that P., a deputy sheriff of said county and State, had made oath before him, the said M., of a delivery to the defendant of a copy of the summons and attachment not objected to in the court below, cannot be objected to in the appellate court.

Under the statute, Code 1873, Chapter 148, Section 27, a defendant in a foreign attachment suit may appear at any time pending the suit, and have the cause reheard tendering the security for the costs. And the proviso to the statute which excepts from the operation of the act a case in which defendant was served with a copy of the attachment, or with process in the suit, issued more than sixty days before the decree, only refers to such a service in the proceedings in the suit and out of the State; and a service out of the State and out of the suit can have no greater effect than so great an order of publication duly posted and published.

Where persons claiming the property attached or some interest in it, are admitted as parties in the cause, their claim is to be tried by a jury empanelled for the purpose, as provided by the statute, Code of 1873, Chapter 148, Section 25, and it is error for the court to pass upon the claim without the intervention of a jury.

Where, on the motion of the defendant in an attachment case, the plaintiff, who is a non-resident of the State, is ordered to give security for the cost of the suit within sixty days, and fails to do so, his bill should be dismissed; and it is error to proceed to hear and decide the cause.

On reversing the decree and remanding the cause, the appellate court will not direct the suit to be dismissed at once for the

failure of the plaintiff to give security for costs, but will direct that he is allowed a reasonable time to comply with the order.

In the case of *Clowser vs. Hall*, 80 Va., 864, decided October 8, 1885, it was held: Every averment in an affidavit to support an attachment under Code 1873, Chapter 148, Section 1, must be stated as a fact, absolutely, and upon affiant's own knowledge, and not upon belief, or information and belief.

For reference to 81 Va., 23, 35-'6, see *Benn vs. Hatcher et als.*, *supra*, this section.

In the case of *Kelso vs. Blackburn*, 3 Leigh, 323, decided December, 1831, it was held: In a bill in chancery against a debtor as an absent debtor or defendant, and other defendants resident, holding lands by voluntary or fraudulent conveyances from the debtor, to have a decree against the debtor for the debt, and against the home defendants to subject the lands to the debt, the bill, in order to give the court jurisdiction under the statute concerning attachments and suit against absent defendants, must distinctly aver the non-residence of the debtor, and if the home defendants in their answers say that the debtor is a resident, though they do not plead that matter in abatement to the jurisdiction, the plaintiff, to sustain the jurisdiction and prove the fact of the debtor's residence abroad, and if his non-residence be not distinctly averred in the bill, or, if so, denied by the home defendants, be not proved, the court has no jurisdiction, and a decree for the plaintiff will be reversed on that ground.

In the case of *The Bank of the United States Incorporated by Pennsylvania et als. vs. The Merchants' Bank of Baltimore*, 1 Rob., 573 (2d edition, 605). Under the act in 1 Rev. Code, 1819, Chapter 123, p. 474, directing the method of proceeding in courts of equity against absent debtors, a creditor of a corporation created by another State may maintain a suit in equity against such corporation as a defendant out of this Commonwealth, where there are persons within the same who have in their hands effects of, or are indebted to, such absent defendant; or may maintain a suit in equity against such corporation as an absent defendant, where it has lands or tenements within the Commonwealth.

In the case of *Clark vs. Ward et als.*, 12 Grat., 440, decided May 22, 1855, it was held: W., living in Virginia, determines to remove to another State; and in pursuance of that purpose leaves the place where he has resided, and proceeds directly to the place where he intends to reside. He is a non-resident of the State in the sense of the attachment law directly he commences his removal, and before he gets beyond the limits of the State.

In the case of *Long vs. Ryan et als.*, 30 Grat., 718 and 720,

decided September, 1878. There is a wide distinction between domicile and a residence. To constitute a domicile two things must concur: *First*, residence; *Second*, the intention to remain there for an unlimited time. Residence is, to have a permanent abode for the time being as contradistinguished from a mere temporary locality of existence. What is the meaning of the word residence as used in any particular statute must be decided upon its particular circumstances. The word is often used to express a different meaning according to the subject-matter. The word residence in the statute in relation to attachments is to be construed as meaning the act of abiding or dwelling in a place for some continuance of time.

While on the one hand the casual or temporary sojourn of a person in the State, whether on business or pleasure, does not make him a resident of the State within the meaning of the attachment law, especially if his personal domicile is elsewhere, so on the other hand it is not essential that he should come into the State with the intention to remain here permanently to constitute him a resident.

R., domiciled in Washington, obtains a contract upon the W. & S. Railroad to construct three sections of the road, and he may be employed to build culverts and bridges in such time as the engineer of the road may fix. He rents out his house in Washington, removes his family to a place on the route of the road and keeps house. Before the work is finished or the time for completing it has arrived, an attachment is sued out against his effects. Held: He was a resident of the State, and the attachment quashed.

In the case of *Pilson (Trustee) vs. Bushong et als.*, 29 Grat., 229, decided October 11, 1877, it was held, p. 240: To become citizens of another State, they must change their domicile. Residence with no present intention of removing constitutes domicile. Mere change of place is not change of domicile. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. To constitute a new domicile two things must concur: *First*, residence in a new locality; *Second*, the intention to remain there. Until the new domicile is acquired the old one remains; and whenever a change of domicile is alleged, the burden of proving it rests on the party alleging it. These principles are said to be axiomatic in the law on the subject.

For the reference to 30 Grat., 718, 720, see *supra*, case of *Long vs. Ryan et als.*

In the case of *Porter vs. Young*, 85 Va., 49, decided May 17, 1888, it was held: Under this section debts due non-resident debtor by open account may be attached in the hands of resident garnishees.

In the case of *Burrus, Son & Co. vs. Trant & Bro.*, 88 Va., 980, decided April 7, 1892, it was held: The burden of proof is on the attaching creditors to show the existence and truth of the alleged grounds of their attachment.

SECTION 2961.

In the case of *Barnett vs. Darnielle*, 3 Call, 413 (2d edition, 358), decided May 16, 1803, it was held: A magistrate's attachment against an absconding debtor can only issue from the county where he resided or is actually found at the time of issuing it.

In the case of *W. & D. Kyle & Co. vs. Connelly*, 3 Leigh, 719, decided May, 1832, it was held: One member of a mercantile house to which a debt has been contracted, but has not yet fallen due, is competent to make complaint on oath and sue out an attachment against the debtor under the provisions of the statute.

Though the statute requires that such complaint shall be made on oath as the foundation of the process, it does not require that the fact of the complaint, having been verified by oath, shall be certified by the justices and made part of the record. If on the trial objection be made that the attachment was made without complaint verified by oath, the fact that the oath was administered may be proved; if no objection be made on that ground, it is too late to take such objection in an appellate court.

In the case of *Jones & Ford vs. Anderson et als.*, 7 Leigh, 308, decided March, 1836. An attachment against an absconding debtor is sued out in the name of a partnership for a debt due a partnership; the bond taken is the bond of F., one of the partners, with surety, reciting that F. has obtained the attachment, and conditioned that if he shall be cast in the suit he shall pay all costs and damages which shall be recovered against him. Held: The bond is naught, and the attachment is therefore illegal and void.

An attachment against an absconding debtor must be regular on its face, and a defect appearing thereon cannot be supplied by averment.

SECTION 2962.

In the case of *Johnson vs. Garland*, 9 Leigh, 149, decided January, 1838, it was held: The lessor is not entitled to an attachment for rent not yet due, before the commencement of the term for which the rent is to be paid.

If such attachment for rent not yet due be issued before the commencement of the term, and levied on the goods of the lessee, and the lessee thereupon enter into a recognizance to pay the rent, the lessee may, notwithstanding the recognizance, move

the court to which process is returned to quash the attachment for irregularity, and on such motion the court ought to quash the attachment, and the recognizance likewise, which was founded upon it.

SECTION 2964.

In the case of *McKim vs. Fulton*, 6 Call, 106, decided April, 1806, it was held: The endorsement by the clerk of the court of chancery that the suit is brought to attach the effects of the absent defendant is sufficient to restrain the application of them to any other use until the plaintiff's demand is satisfied.

In the case of *Williamson et als. vs. Bowie et als.*, 6 Munf., 176, decided March 13, 1818, it was held: Agreeably to the practice of this State, a *subpœna* in chancery with an endorsement thereon "to stop the debts and effects of the absent defendants in the hands of the defendants within the State," mentioning their names, to satisfy a debt due from the absent defendants to the plaintiff, operates from the time of the service of that process on the defendants within the State as an attachment to stop the payment by them of moneys due from them to the absent defendants, and to inhibit a transfer thereof from the said absent defendants to other persons.

An attachment in chancery lies to secure a debt payable at a subsequent day, or to relieve the endorser of a note which has not become payable at the date of such attachment, which binds the property in the hands of the garnishee from the time of its service, so as to inhibit the absent defendants making a transfer thereof, even for the benefit of a creditor whose claim is already due and payable. A creditor residing in Maryland may sue out an attachment in chancery in Virginia against his debtor residing also in Maryland, and others residing in Virginia indebted to, or having in their hands effects of, such debtor.

In the case of *Moore et als. vs. Holt*, 10 Grat., 284, decided July, 1853, it was held: Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands, and afterwards other creditors sue out an attachment at law against the same party as an absconding debtor, which is served upon the same garnishee; and before the foreign attachment is ready for hearing, they obtain judgment and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale.

It is not necessary that a plaintiff in a foreign attachment shall file with the clerk an affidavit of the non-residence of his debtor before the process is issued, in order to constitute with it, with the endorsement in the nature of an attachment, a lien when served.

The endorsement in the nature of an attachment does not

authorize the officer serving it to take the effects out of the hands of the garnishee or to require him to give security to have them forthcoming, nor does it operate as an injunction, so as to subject a party to the penalty of a contempt for disobedience. If the plaintiff desires such an order of the court as will effect these purposes, he must file the affidavit according to the terms of the act. It is not necessary to state in the endorsement on the *subpoena* the character or amount of the claims for which the attachment is issued. This is to be done in the bill.

The decree states that the order of publication against the absent defendant had been duly published. It is to be taken in an appellate court that everything required by the statute was done.

A guarantor of a debt may maintain a foreign attachment against his principal before he has paid the debt.

In the case of *Cirode vs. Buchanan's Administrators*, 22 Grat., 205, decided June 12, 1872. In February, 1867, B., administrator *de bonis non* of J., files his bill, in which he sets out a money decree of an Alabama court against S.: that S. is a non-resident of the State; that he owns land here, which he describes, and asks that it may be sold for the payment of his debt; but he does not pray for an attachment, nor is an attachment sued out, nor an endorsement on the process of the object of the suit. In July, 1868, S. is declared a bankrupt in Tennessee, and his assignee, C., makes himself a party to the suit, and claims the land or its proceeds, it having been sold. Held: The bill stating a good cause for an attachment suit, the affidavit required by the statute may be made at any time before another person obtains a right, and the endorsement on the *subpoena* is not necessary to render his attachment valid.

If an endorsement was necessary, the order of publication was in the nature of process, and B. is entitled to the proceeds of the property as against C., the assignee in bankruptcy.

In the case of *Batchelder et als. vs. White*, 80 Va., 103, decided January 15, 1885, it was held: Neither under Section 2, Chapter 175, nor under Section 11, Chapter 148, Code 1873, can a suit in the nature of a foreign attachment be maintained, unless the claim asserted be actually due. Unless the bill avers that a debt is due the plaintiff from one who is a non-resident of this State, and who has estate and effects in this State, it is demurrable.

In the case of *Culbertson's Representatives vs. Stevens et als.*, 82 Va., 406, decided September 23, 1886, it was held: The levy of the attachment, as shown by the officer's return on the non-resident defendant's property, is the foundation of the suit. If the property attached be not the defendant's property, the court is without jurisdiction.

In the case of *Wingo, Ellett & Crump vs. Purdy & Co.*, 87 Va., 472, decided March 5, 1891, it was held: Attachments cannot be maintained on undue debts, on the ground that the debtors are non-residents, unless they have disposed or are about to dispose, fraudulently, of their effects. And upon abatement the court cannot retain the suit and grant relief, but must dismiss the bill.

SECTION 2967.

In the case of *Clark vs. Ward et als.*, 12 Grat., 440, decided May 22, 1855, it was held: A creditor, secured by a deed of trust with others, sues out a foreign attachment against his debtor, and seeks to subject the property conveyed in the deed to the payment of his debt, in preference to the other creditors secured by the deed, but he fails. This does not preclude him from his right to claim under the deed his ratable proportion of the trust fund.

The endorsement on the process of attachment not mentioning or describing real estate, the attachment does not operate upon any such estate.

The attachment is served upon trustees in a deed of trust for the payment of certain debts, and among them are the debts due to the plaintiff in the attachment. There could therefore be no surplus in the hands of the trustees until the plaintiff's debts were paid, and consequently there can be no surplus in their hands liable to his attachment.

The creditor having stated in his bill and having proved that his debtor had assigned to him certain railroad stocks and a bond secured by a deed of trust as security for one of his debts, and the deed conveying all the debtor's stocks and debts to the trustees, though they disclaimed any right to or possession of the stocks and bond assigned to the plaintiff, they are intrusted for the creditors to see that the fund assigned to the plaintiff is properly applied to the satisfaction of his debt; and, therefore, though there is nothing in their hands upon which the attachment can operate, the bill should not be dismissed, but the court should proceed to have the assigned property properly disposed of and applied, and to give the plaintiff relief according to his rights under the deed.

See the case of *Pulliam, etc., vs. Aler*, 15 Grat., 54, *ante*, Section 2959.

In the case of *Cirode vs. Buchanan's Administrators*, 22 Grat., 205, decided June 12, 1872, it was held, p. 217: In order to constitute an attachment lien upon any property there must be a claim in some form to subject the property to the payment of the debt demanded in the action or suit. If there be no such claim in the pleadings in the action or suit itself, then an attachment must be issued, which may be levied upon any estate, real

or personal, of the defendant, or so much thereof as is sufficient to pay the amount for which it issues, and the plaintiff shall have a lien from the time of the levying of such attachment as aforesaid.

In the case of *Chesapeake & Ohio Railroad Company vs. Paine & Co.*, 29 Grat., 502, decided November, 1877, it was held: The shares of a stockholder in a joint stock company, incorporated by and conducting its operations, in whole or in part, in this estate, are such estate as is liable to be attached in a proceeding instituted for that purpose by one of the creditors of such stockholder and such estate, may properly be considered, for the purpose of such proceeding, as in the possession of the corporation in which the shares are held, and such corporation may properly be summoned as a garnishee in the case. Of such a proceeding a court of law has jurisdiction as well as a court of equity.

Where along with the answer of the corporation in such proceeding an affidavit is filed, alleging that some third person claims the said stock, and that the corporation claims no interest therein, nor colludes with such claimant, but is ready to dispose of the stock as the court shall direct, the court should require such third person to appear and state the nature of his claim, and maintain or relinquish the same.

If, in such proceeding, the stock should appear to be liable to the lien of the attachment, it ought to be sold for the satisfaction of the same under an order of the court made for that purpose in the attachment proceeding, but it is error for the court to render a judgment against the garnisheed corporation for the value of the stock, unless it appears that the lien of the attaching creditor on the stock was lost by the act of the corporation.

See the case of *Culbertson's Representatives vs. Stevens*, 82 Va., 406, *ante*, Section 2964.

In the case of *Dorrier et als. vs. Masters et als.*, 83 Va., 459, decided June, 1887, it was held: Attachment may be levied on any visible or tangible effects of non-resident debtor in his actual or constructive possession, in the common law mode, as in the case of an execution. If those effects, whether visible and tangible or not, are in a third person's possession, they may be sufficiently levied on by delivering a copy of the attachment to such person; but they cannot be seized and taken possession of, unless the creditor has given a bond with security in a penalty at least double the amount sued for, the giving of which bond is optional with the creditor, who acquires a lien by the levy without the seizure.

To constitute an effectual levy it is not essential that an officer make an actual seizure. If he have the goods in his actual

view and power, and note on the writ the fact of his levy thereon, this will in general suffice.

In the case of *Robertson vs. Hoge*, 83 Va., 124, decided April, 1887, it was held: Return of officer must show sufficient levy of the attachment, otherwise the court has no jurisdiction. The return must show that the attachment was levied upon the property as the property of the defendant, in order to make a valid levy on real estate. And in attachment proceedings in equity against a non-resident, under a return, the officer's return, that he "served the summons on ——— by delivering a copy to him," and that "he resided on the premises within described," does not show a valid levy.

This is the case cited from 11 Va. Law Journal, 502.

SECTION 2968.

In the case of *Smith vs. Pearce*, 6 Munf., 585, decided April 1, 1820, it was held: If the claim of a plaintiff in an attachment against an absconding debtor be stated as for a certain sum due by negotiable note, with interest from the day when such note should have been paid, and the bond for prosecuting the attachment describe it as sued out for the sum of money mentioned therein, saying nothing of interest, the variance is not material.

Special bail to replevy the attachments and effects, and a plea to the action, ought to be received in behalf of the defendant upon an attachment issued against him as an absconding debtor, notwithstanding he did not, when solemnly called, appear in person, or by attorney; such bail and plea being offered at the term to which the attachment is returned executed, and before the judgment upon it is pronounced.

In the case of *Dickinson (Administrator, etc.) vs. McCraw*, 4 Rand., 158, decided March, 1826, it was held: In an action on an attachment bond, by which the obligor was bound to pay all costs and damages which may accrue to the obligee in consequence of suing out the attachment, it is not necessary that they should be previously assessed in some other action to justify an action on the bond. In an action on an attachment bond it is not sufficient to allege in the declaration that the defendant "did not pay all such costs and damages as have accrued," etc.; but it must be expressly averred that costs and damages had been actually sustained.

See the case of *Jones & Ford vs. Anderson*, 7 Leigh, 308, cited *ante*, Section 2961.

In the case of *Davis vs. Commonwealth, for Leon*, 13 Grat., 139, decided February 29, 1856, it was held: The bond authorized by the act in relation to attachments is not a general indemnifying bond; but where the attachment issues against the

effects of the defendant generally, he alone can sue upon the bond; and where the attachment is issued against specific property, only the defendant, or the owner of such property, can sue upon the bond. Where the attachment is issued against the effects of the defendant generally, and is levied upon the property of a third person, such third person has no remedy upon the attachment bond.

See the case of *Dorrier vs. Masters*, 83 Va., 459, cited *ante*, Section 2967.

In the case of *Kenefects vs. Caulfield*, 88 Va., 122, decided June 25, 1891, it was held: Where the sheriff is not directed to take possession of the property attached, no bond is required.

SECTION 2969.

In the case of *Offtendinger vs. Ford et als.*, 86 Va., 917, decided May 8, 1890, it was held: The return must show that the attachment was levied on the property of the defendant, in order to make it valid.

SECTION 2971.

In the case of *Tazewell's Executor vs. Barrett & Co.*, 4 H. & M., 259, decided October, 1809, it was held: After a *bona fide* assignment of a bond, and notice thereof to the obligor, he cannot be restrained by an attachment in chancery at the suit of a creditor of the obligor from paying the debt to the assignee, notwithstanding the *subpœna*, with the usual endorsement by the clerk, was served upon him before he received such notice, and afterwards (but before he answered the bill) the court made an order restraining him from paying the debt which he owed the defendant. Therefore, in this case, the obligor (though previously served with the *subpœna*), having received notice of the assignment shortly after the bond became payable, and failing for nearly six years to answer the bill, which was filed before the notice was given, was not allowed (in a suit against him by the assignee) any deduction of interest between the day when the bond became payable and that when the restraining order was set aside.

In the case of *Wilson vs. Davisson*, 5 Munf., 178, decided October 16, 1816, it was held: In debt by the assignee of a bond, it is not sufficient plea that before notice of the assignment the effects of the assignor were attached in the defendant's hands, and a decree entered that he should pay the debt to the attaching creditor, etc., and that accordingly he had made such payment, it appearing by the pleading that the bond was assigned before the attachment was instituted and suit brought upon it by the assignee before payment was made.

In the case of *Erskin & Eichelberger vs. Staley et als.*, 12 Leigh, 406, decided November, 1841. Creditors of an absent

debtor sue out a foreign attachment in chancery against him and a home defendant, having in his possession specific goods of the absent debtor, as well as bonds, notes, etc., to collect for him as his agent, and this process is served on the garnishee; other creditors of the same debtor, having brought an action at law against him, sue out his attachment against his estate to force his appearance, and this attachment, after the foreign attachment had been served on the garnishee, is levied on the same specific goods which were in the garnishee's hands at the time the foreign attachment was served on him; judgment being recovered in the action at law, pending the foreign attachment in chancery, the court of law orders a sale of the specified goods on which the attachment at law was levied; and the creditors in the action at law being about to have a sale, under the order of a court of law, of the goods on which their attachment was levied, the creditors in the foreign attachment in chancery obtain an injunction to inhibit that sale, claiming a prior lien on the goods by virtue of their attachment previously served on the garnishee. Held: Upon the construction of the statute, 1 Rev. Code, Chapter 123:

1. That the creditors in the foreign attachment, by the service thereof on the garnishee and from the date of such service, acquired a lien on the effects of the absent debtor in the garnishee's hands; and of this lien neither the absent debtor nor the garnishee, by any act of theirs, nor any third person by an attachment or other process of law subsequently levied, could deprive them.

2. Therefore the creditors in the foreign attachment, if they shall get a decree, will be entitled to priority for satisfaction thereof out of the attached effects over the creditors claiming under the attachment at law subsequently levied.

3. And the remedy by way of bill of injunction, to which the creditors in the foreign attachment had recourse, was the proper remedy to protect their rights. In the proceeding by way of attachment in chancery, a *subpoena* against the absent debtor and the garnishee, with a restraining order endorsed by the clerk served on the garnishee, is, according to the settled practice, as effectual to attach the effects of the absent debtor in the garnishee's hands as a formal order of the court to the same purpose would be.

In the case of *Jennings et als vs. Montague*, 2 Grat., 350, decided October, 1845, it was held: The statute does not authorize the court to interfere with or defeat the vested rights of creditors, or *bona fide* alienees or incumbrancers, which attached upon the property prior to the institution of such proceedings for divorce, and when the property was the absolute property of the husband.

An attachment against the effects of the husband as an absconding debtor, levied before the institution of a suit by the wife for a divorce, entitles the attaching creditors to be satisfied out of the attached effects, in preference to the claim of the wife.

In the case of *Richeson vs. Richeson et als.*, 2 Grat., 497, decided January, 1846. In May, 1835, a *subpœna* in chancery is sued out against an absent debtor and home defendants, returnable to July rules. The *subpœna* is returned executed against the home defendants, but the date of its service upon them is not stated. After the issue of the *subpœna*, but before the return day thereof, the debtor executes a deed to secure certain creditors, which is duly recorded. Held: The attachment is to be postponed to the deed.

The bill filed by the attaching creditor sets up a claim as vendor of a tract of land conveyed in the deed for the purchase-money. Held: The lien of the deed has preference.

In the case of *Caperton vs. McCorkle & Adams*, 5 Grat., 177, decided July, 1848, it was held: Two attachments against an absconding debtor are levied on the same property. The first levied is quashed by the county court, but upon appeal this judgment is reversed. Pending the appeal an order is made in the second attachment case for a sale of the property, and it is sold, and the proceeds are paid over to the creditor in the second attachment.

An action for money had and received will lie by the first attaching creditor against the creditor in the second attachment.

In the case of *Farmers' Bank vs. Day et als.*, 6 Grat., 360, decided October, 1849, it was held: Among attaching creditors proceeding by foreign attachment, the creditor whose *subpœna* is first sued out and served is entitled to priority of satisfaction.

But the attachment only operates as a lien upon the debts and effects of the absent debtor in the hands of the home defendants against whom and upon whom it is served.

In the case of *Haffey, etc., vs. Miller, etc.*, 6 Grat., 454, decided October, 1849. In a foreign attachment the defendant holds lands of the absent debtor upon a lease. Held: The service of the attachment upon the home defendant only binds the rent due at the time the attachment was served, and does not bind the rents accruing subsequently.

In the case of *Vance vs. McLaughlin*, 8 Grat., 289, decided October, 1851, it was held: A wife's interest as legatee in her father's estate in the hands of the executor may be subjected by the creditor of her husband by a proceeding by foreign attachment when the husband resides out of the State.

Though the service of the process upon the executor creates a lien upon the wife's interest in favor of the creditor, yet if the husband dies pending the proceedings, leaving his wife surviv-

ing him, the lien of the creditor is defeated, and the property belongs to his wife.

See the case of *Schofield vs. Cox et als.*, 8 Grat., 533, cited *post*, Section 2982.

In the case of *Rollo (Assignee) vs. Andes Insurance Company*, 23 Grat., 509, decided June, 1873, it was held: The treasurer of the State, who holds bonds of a foreign insurance company doing business in this State under the act of February 3, 1866, as amended by the act of March 3, 1871, is not liable to be summoned as garnishee by a foreign creditor of the insurance company.

A public officer of the State cannot be held liable by attachment at the suit of an individual for funds in his hands clothed with a trust under the authority of a public law.

Under the act of February 3, 1866, when a foreign insurance company shall cease to do business in the State, and its liabilities, fixed or contingent, to citizens of the State shall have been satisfied or terminated, the treasurer is authorized to deliver such company the bonds and other securities deposited with him. Though the company has ceased business in the State, and its liabilities to citizens of the State have been satisfied or terminated, the bonds in the hands of the treasurer cannot be attached by a foreign creditor, but they must be delivered by the treasurer to the company.

In the case of *Gregg vs. Sloan et als.*, 76 Va., 497.

Trust Deeds.—Attachments.—Priorities.—Debtors in North Carolina grant all their property, including choses in action, due from their debtors in Virginia, and secured on land here. After recordation of deed in North Carolina, but before its recordation in Virginia, a creditor having in Virginia attached the choses and the land securing them, in contest for priority, held: The deed, though unrecorded in Virginia, being prior to the attachment, prevails over it.

In the case of *Bickle et als. vs. Chrisman's Administratrix et als.*, 76 Va., 678, decided September 28, 1882, it was held, pp. 691-'92: It is well settled that process of garnishment at law will not lie against personal representative.

SECTION 2975.

The reference here to 3 Leigh, 719, is an error.

SECTION 2976.

In the case of *Templeman vs. Fauntleroy*, 3 Rand., 434, decided June, 1825, it was held: Where a foreign attachment is sued out against an absent debtor and a resident garnishee, in a case equitable in its nature, it is competent to the court of chancery to decree between the debtor and the garnishee what may be due from the latter to the former, after satisfying the

claims of the plaintiff. But the evidence in such case must arise from the pleadings and proofs between plaintiff and defendants.

Although a defendant is restrained from paying money by attachment, he ought, nevertheless, to pay interest during the time he was so restrained if he continues to hold the money.

In the case of *Kelly vs. Linkerhoger*, 8 Grat., 104, decided July, 1851, it was held: In a proceeding by foreign attachment the home defendant denies that he has any effects of the absent debtor in his hands. He says that a tract of land which had belonged to the absent debtor had been purchased by himself and been paid for; and he in fact held the receipt of the absent debtor for the amount of the purchase-money. As, however, he did not pretend he had paid the amount in money, and as the accounts which he endeavored to establish were not proved to the satisfaction of the commissioner and the court, the land was held liable.

In such case, upon appeal from an interlocutory decree for the sale of the land, the appellate court will not reverse the decree because the court did not decree against the absent debtor, or direct the giving security as provided by law in behalf of absent debtors. The final decree may provide for these things.

In the case of *B. & O. R. R. Co. vs. Gallahue's Administrators*, 14 Grat., 563, decided August 28, 1858, it was held: The estimates of work done by a contractor for a railroad company are made up to the twentieth of each month, when they are considered due, though not paid for some days afterward. As the price of the work done by the contractor after the twentieth may be forfeited to the company for several causes before the twentieth of the next month, no debt is due from the company to the contractor until the twentieth arrives, and therefore, an attachment being served on the company on the fourteenth day of the month, there is nothing then in its hands due to the contractor which may be attached, though in fact no forfeiture occurs, and on the following twentieth of the month the amount of the estimate may be due.

See the case of *Pulliam, etc., vs. Aler*, 15 Grat., 54, *ante*, Section 2959.

See the case of *C. & O. R. R. Co. vs. Paine & Co.*, 29 Grat., 502, cited *ante*, Section 2967.

In the case of *Withers vs. Fuller et als.*, 30 Grat., 547, decided August, 1878, it was held: An attaching creditor can have no judgment against a garnishee until he has first established his claim against his debtor. The county court has no jurisdiction, at a monthly term of the court, to render a judgment in favor of an attaching creditor against his debtor. Such a judgment is not only voidable, but it is absolutely void, and cannot be the foundation for any subsequent proceeding. A county

court may, at its monthly term, provide for the preservation of attached effects; and, a garnishee having admitted his indebtedness to the debtor, the court may order him to pay his debt to a receiver appointed by the court; and a payment to the receiver by the garnishee is a valid payment and a discharge of his indebtedness as to the attaching creditor.

For the reference to 76 Va., 678-691-'92, see the case of *Bickle et als. vs. Christman's Administratrix*, cited *ante*, Section 2971.

SECTION 2979.

In the case of *Petty vs. The Frick Company*, 86 Va., 501, decided February 13, 1890, it was held: Where, before an attachment was returned "executed," an order of publication was made, and the order was not posted by the clerk at the front door of the courthouse on the first day of the court next after it was entered, the attachment should be abated.

SECTION 2981.

In the case of *Mantz vs. Hendley*, 2 H. & M., 308, decided April 16, 1808, it was held: An attachment irregularly issued ought to be quashed *ex officio* by the court to which it is returned, though bail be not given, nor any plea filed, by the defendant; and, in like manner, the court ought to quash it on error in arrest of judgment after pleading and a verdict for the plaintiff. A plea in abatement to an attachment ought not to conclude with praying judgment, if the plaintiff ought to have and maintain his attachment and action, but only that the attachment be quashed.

A general demurrer to a plea in abatement ought to be sustained, though the plea be defective in form only. The plea that the defendant never absconded is a plea in abatement.

In the case of *Jones & Ford vs. Anderson and Another*, 7 Leigh, 308, decided March, 1836, it was held: An attachment against an absconding debtor must be regular on its face, and a defect appearing thereon cannot be supplied by averment.

See the case of *Johnson vs. Garland*, 9 Leigh, 149, cited *ante*, Section 2962.

In the case of *Clafin & Co. vs. Steenback & Co.*, 18 Grat., 842, decided June, 1868, it was held: Where an attachment has been sued out under Section 2 of Chapter 151 of the Code, edition of 1860, in a suit pending in a county or corporation court, though the defendant has given a forthcoming bond, the court has jurisdiction at a monthly term of the court to abate the attachment. On a motion to abate an attachment on the ground that it was issued on false suggestions and without sufficient cause, the plaintiff declining to express any wish for a jury, and the defendant expressing a wish that a jury might be

dispensed with, and that the court should hear and decide the case, the court should hear and decide it without a jury.

Though in an action for maliciously suing out an attachment the plaintiff cannot recover if it appears that the defendant, in suing out the attachment, acted *bona fide* and upon such apparent grounds as would justify him in believing that the facts really existed which would authorize its issue, yet upon a motion under Section 22, Chapter 151, of the Code, to abate the attachment on the ground that it has been issued on false suggestions or without sufficient cause, the question is, whether upon all the evidence there was reasonable ground or probable cause to believe that the defendant was doing the act which would authorize the attachment, and not whether the facts as they appeared to the affiant, though only a small part of the facts of the case, afforded him reasonable ground for such a belief.

In the case of *Wright vs. Rambo*, 21 Grat., 158, decided June, 1871, it was held: Upon a motion by the defendant to abate an attachment which had been sued out against his property by the plaintiff, the *onus* is on the plaintiff to show that the attachment was issued on sufficient cause, and he may therefore be required to introduce his evidence first.

Where a case is heard by the court without a jury, an appellate court will not reverse the judgment, though the court below may have erred in requiring the plaintiff to introduce his evidence first. In such case it is a matter of perfect indifference in what order the evidence is heard.

Upon a motion by the defendant to abate an attachment which has been sued out against his property by the plaintiff, the admissions and declarations of the wife of the defendant are not admissible in evidence for the plaintiff to prove the intention of the defendant to move with his property from the State, unless they were a part of the *res gestæ* of an act which was evidence and which they might reasonably tend to explain. Upon such a motion the defendant's intention and declarations as to leaving the State, after the date of the attachment, are not admissible as evidence.

In the case of *Sublett & Cary vs. Wood*, 76 Va., 318.

1. Attachment.—Grounds.—This remedy is justified, not by the belief of the affiant, however honestly entertained upon reasonable grounds, that the fact sworn to in the affidavit exists, but by the existence of that fact.

2. *Idem*.—*Onus probandi* that attachment was issued on sufficient cause rests on the plaintiff, and he should introduce his evidence first when defendant moves an abatement.

In the case of *Dunlap vs. Dillard & McCorkle, etc.*, 77 Va., 847, decided October 18, 1883, it was held: The judgment in vacation, under said Section 6, refusing to quash or dismiss the

attachment, is not final, and does not supersede the defendant's right to make defence at the trial in term against the attachment in any respect, under Sections 21, 22 and 23 of said chapter.

SECTION 2982.

In the case of *George vs. Blue*, 3 Call, 455 (2d edition, 394), decided October 22, 1803, it was held: In an attachment against an absconding debtor judgment should be first entered against the debtor, and then the garnishee should be ordered to pay it. If the attachment demands only a specific amount and costs, the court cannot give judgment for interest.

In the case of *Gibson vs. White & Co.*, 3 Munf., 94, decided March, 1812, it was held: In a suit in chancery against a defendant who is out of this country, and another who is within the same, having in his hands effects of, or otherwise indebted to, such absentee, a decree cannot be entered against the defendant in this country until by legal and regular proceedings the plaintiff has established his claim against the absentee.

In such case, if the defendant in this country appear not to be a debtor of the absentee, but to hold effects belonging to him by a title not effectual against creditors, or without any title at all, he should be considered personally responsible only for so much as he may have consumed or appropriated to his own use, so as not to be forthcoming, or for the profits he may have received; but for that amount a decree may be made against him personally in the first place, holding the property in his hands ultimately bound if he be insolvent; and for the balance of the plaintiff's claim the court may proceed in the first place against the property itself, either by considering such defendant a trustee for the use of creditors and directing a sale unless the debt be paid by a given day, or by sequestering it as the property of the absentee.

In the case of *Watts vs. Kinney*, 3 Leigh, 272, decided November, 1831. Upon a foreign attachment in chancery to subject lands of the absent debtor to a debt claimed by an attaching creditor, payable in instalments, some of which have and others have not fallen due at the time of the decree. Held: The court ought not to direct the sale of the subject to satisfy more than the instalments already due, but should order a sale to satisfy what is due, and hold the creditor's attachment a lien on the subject, for the instalments afterwards to fall due.

The reference to 3 Leigh, 719, is an error.

The reference to 1 Grat., 96, is an error.

In the case of *Williamson vs. Gayle*, 7 Grat., 152, decided November 18, 1850, it was held: The attaching creditor, having established his debt, is entitled to a personal decree against the absent debtor, though the whole property attached is exhausted in paying the debt of the home defendant.

In the case of *Schofield vs. Cox et als.*, 8 Grat., 533, decided January, 1852. A., living out of the State, D. sues out a foreign attachment against him, and attaches the one-third of the land which was not sold to B. and also the debt due from B. to A., the attachment being issued after the assignment to C. Held: As between the attaching creditor and the assignee, the latter has the preference.

The whole land being sold together, the one-third and so much of the two-thirds of the purchase-money as is necessary will be applied to discharge the first encumbrance, and the balance will be applied to pay the assignee.

The attaching creditor, proving his debt, is entitled to a personal decree against his absent debtor, though the property attached may be adjudged to the assignee.

In the case of *O'Brien et als. vs. Stephens et als.*, 11 Grat., 610, decided July, 1854, it was held: If an absent defendant does not appear in the cause, there cannot be a personal decree against him, but the attached effects can alone be subjected; but if he does appear, there may be a personal decree only against him, or there may be both a personal decree and a decree subjecting the attached effects.

If the absent debtor appears, and the attachment has not been sued out or levied, there may still be a personal decree against him; or the plaintiff may, after the debtor's appearance, make the affidavit, sue out an attachment, and have it levied on the effects of the debtor, and have them subjected.

See the case of *Withers vs. Fuller*, 30 Grat., 547, cited *ante*, Section 2976.

SECTION 2983.

See the case of *Anderson vs. Johnson*, 32 Grat., 558, *ante*, Section 2959.

SECTION 2984.

In the case of *McCluny & Co. vs. Jackson*, 6 Grat., 96, decided July, 1849, it was held: A subsequent attaching creditor may appear to the first attachment, and either in his own name or in the name of the absconding debtor, contest the right of the first attaching creditor to recover.

See the case of *Moore et als. vs. Holt*, 10 Grat., 284, cited *ante*, Section 2964.

In the case of *C. & O. R. R. Co. vs. Paine & Co.*, 29 Grat., 502, decided November, 1877, it was held: Where, along with the answer of the corporation in such proceeding, an affidavit is filed, alleging that some third person claims the said stock, and that the corporation claims no interest therein, nor colludes with such claimant, but is ready to dispose of the stock as the court shall direct, the court should require such third person to appear and state the nature of his claim and maintain or relinquish the same.

In the case of *Anderson vs. Johnson*, 32 Grat., 558, decided December 18, 1879, it was held: Where persons claiming the property attached, or some interest in it, are admitted as parties in the cause, their claim is to be tried by a jury empaneled for the purpose, as provided by the statute, and it is error for the court to pass upon the claim without the intervention of a jury.

In the case of *Starke vs. Scott et als.*, 78 Va., 180, decided December 13, 1883, it was held: When petitioner claims the attached property, the proper issue to be tried is, "Whether or not petitioner has any title to, lien on, or interest in the attached property or its proceeds.

SECTION 2986.

In the case of *Platt vs. Howland*, 10 Leigh, 507 (2d edition, 531), decided December, 1839, it was held: In a suit in equity against an absent defendant alleged to be indebted to the plaintiff, and a home defendant having effects in his hands, the plaintiff should prove himself in a legal manner to be a creditor of the absent defendant; but if a decree be rendered without such proof, the absent defendant cannot obtain redress by appealing from the decree; he must seek it in the mode prescribed by the statute, that is, he must appear in the court which pronounced the decree, and petition to have the cause reheard. Upon the absent defendant giving security for payment of costs, he will be admitted to answer the bill, but the court will not set aside the decree as soon as the answer is filed. After issue is joined, the parties on both sides will have an opportunity of examining their witnesses, the cause will be matured for rehearing, and upon a rehearing such decree will be made as may be just and right.

In the case of *Rootes (Executor) vs. Tompkins (Trustee)*, 3 Grat., 98, decided April, 1846, it was held: The statute directing the decree against an absent debtor to stand absolutely confirmed against the absent debtor, who shall not within seven years appear and petition to have the cause reheard, only applies to so much of such decree as operated upon the estate or effects of such absent debtor, subject to the jurisdiction of the courts of this Commonwealth.

In the case of *Barbee & Co. vs. Pannill, etc.*, 6 Grat., 442, decided October 1849, it was held: An absent defendant, against whom a decree has been made, cannot appeal from the decree. His only remedy is that provided by the statute.

In the case of *Lenow vs. Lenow*, 8 Grat., 349, decided January, 1852. A proceeding by foreign attachment is instituted against two persons as jointly indebted to the plaintiff. One of them appears and answers the bill, but the other is regularly proceeded against as an absent debtor, and there is a joint decree

against both defendants. Held: That the absent defendant who did not appear cannot appeal.

But the decree being a joint decree, and being erroneous, the appellate court will, upon the appeal of the absent defendant who did not appear and answer, reverse the decree as to both.

In the case of *Anderson vs. Johnson et als.*, 32 Grat., 558, decided November, 1879, it was held: Under the statute, Code of 1873, Chapter 148, Section 27, a defendant in a foreign attachment suit may appear at any time pending the suit, and have the cause reheard, tendering security for the costs. And have the proviso of the statute, which excepts from the operation of the act a case in which the defendant was served with a copy of the attachment, or with process in the suit, issued more than sixty days before the date of the decree, only refers to such a service in the proceeding in the suit, and not to a service out of the suit and out of the State; and a service out of the suit and out of the State can have no greater effect than, if so great as an order of publication, duly posted and published.

In the case of *Smith vs. Life Association of America*, 76 Va., 380.

Removal of Causes.—Non-resident Defendant.—Case Re-opened.—Non-resident insurance company is sued by a citizen of Virginia on a contract made outside of the State. On affidavit that defendant is a non-resident corporation, having effects in P. county, in this State, attachment is sued out to subject the effects to plaintiff's claim, and order of publication made and executed. Neither process in the suit nor copy of attachment is served on defendant. Judgment is rendered April, 1878; against defendant. In September, 1878, defendant petitioned the court to re-open and rehear the case. Case being re-opened, defendant filed petition setting forth that amount in dispute was over five hundred dollars, and controversy between citizens of different States, tendered the usual bond with security, and prayed the removal of the cause to the Circuit Court of the United States for the eastern district of Virginia. Held:

1. Suit not against foreign corporation doing business in Virginia under Code 1873, Chapter 166, Section 7, but under Chapter 148, Sections 1 and 20.

2. Under Chapter 148, Sections 27, defendant was entitled to have the case re-opened and reheard.

3. Under laws of United States, defendant was also entitled to the removal as prayed for, the motion therefor having been made at first term, at which the cause might have been tried.

In the case of *Smith & Wimsatt vs. Chilton (Assignee)*, 77 Va., 535, decided May 10, 1883, it was held: Defendants in foreign attachment may appear pending the suit, tender security for costs and have it reheard. The exception of a defendant

served with a copy of the attachment, or with process in the suit does not refer to service thereof outside the proceedings in the suit or outside of the State ; and such service can have no greater effect than an order of publication duly posted and published. This rule applies to acknowledgments of such services made outside the State.

SECTION 2989.

In the case of *Magill vs. Sauer*, 20 Grat., 540, decided March, 1871, it was held: Upon a decree in favor of an attaching creditor, and an appeal therefrom, the appellant gives an appeal bond. The giving of this bond does not release the attachment.

SECTION 2990.

See the references given to Section 3495.

In the case of *W. & D. Kyle & Co. vs. Connelly*, 3 Leigh, 719, decided May, 1832, it was held: As one member of a mercantile house to which a debt has been contracted is competent to sue out an attachment for the house against the debtor, so that person is the proper one to execute the attachment bond required by the statute. And the bond of the partner suing out the attachment, with surety, conditioned that that partner shall pay all costs if the house be cast in the suit, and all damages that shall be adjudged against him for suing out the attachment, is a good bond.

In the case of *Jones & Ford vs. Anderson et al.*, 7 Leigh, 308, decided in March, 1836: An attachment against an absconding debtor is sued out in the name of a partnership; the bond taken is the bond of F., one of the partners, with surety, reciting that F. has obtained the attachment, and conditioned that, if he be cast in the suit, he shall pay all costs and damages which shall be recovered against him. Held: The bond is naught, and the attachment is, therefore, illegal and void.

In the case of *McCluny & Co. vs. Jackson*, 6 Grat., 96, decided July, 1849, it was held: An attachment being sued out by one member of a firm for a debt due to the firm, in the name of the firm, it is proper that the bond executed by the partner who sues out the attachment and by his surety, should bind the obligors to be answerable for the failure of the firm to prosecute their attachment with success.

SECTION 2991.

In the case of *Levy vs. Arnsthall*, 10 Grat., 641, decided in January, 1854, it was held: The act which authorizes a plaintiff in an action to authorize security in certain cases from the defendant, constitutes the relation of principal and bail between the defendant and his surety; and it is the right of the surety to surrender the principal.

In the case of *Forbes and Allers vs. Hagman*, 75 Va., 168, decided January 13, 1881: F. and A., partners, living in Baltimore, carry on a business near Richmond by their general agent, M. M. brings an action in the name of F. & A. against H. & G., partners, claiming that they are indebted to the plaintiffs; and, upon affidavit by M. under the statute, A. & G. are held to bail, and, not being able to give it, they are held in prison until the trial, when the plaintiffs are non-suited. H. & G. then bring their separate actions against F. & A. for malicious arrest and imprisonment. It seems that F. & A. had no knowledge of the arrest and imprisonment until the parties were in prison, when F., coming to Richmond, was informed of the fact by M., when he made no inquest as to the grounds of the arrest, and gave no directions for their release. Held:

1. This was a virtual ratification and adoption of what had been done by the agent, and the principals, F. & A., are responsible for the consequences of the agent's act.

2. Under the statute, to authorize the holding of the parties to bail, M. must have believed, when he made his affidavit, that the facts sworn to therein were true, that is, that the plaintiffs in their suit had right of action against the defendants in that suit for the amount stated in the affidavit, and that there was probable cause for believing that the said defendants were about to quit the State, unless forthwith apprehended; and, taking him for a man of common prudence, he must have been justified in so believing from the circumstances then known to him. It was not necessary that the facts should be actually true, but it is necessary that he should have believed them to be true, and that, as a prudent man, under the circumstances then known to him, he was warranted in entertaining that belief.

3. M., the agent, had been instructed by his principals to take no legal steps in regard to any of their matters without first consulting and advising with W., their regular attorney in Richmond; and he did consult the counsel, and acted on his instructions. It is true that a party in some cases may act on the advice of counsel *bona fide* sought and obtained, without incurring liability for damages as for tort, even though the counsel might have been mistaken in the law; but to justify him something more than the mere advice must be made to appear. The statement of facts must be shown on which the advice was given, and it must be a full, correct, and honest statement by the defendants of all the material facts known to them, without reference to their understanding of the case.

4. In this action malice may be inferred for want of probable cause, though it is said that it is not a necessary inference. It is always a question for the jury under all the circumstances of the case. But the term malice is not to be considered in the

sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. The improper motive, or want of improper motive, inferrible for a wrongful act based upon no reasonable ground, constitutes of itself all the malice deemed essential in law to the maintenance of the action. An instruction by the court that the plaintiff was not entitled to recover without satisfactory proof that the arrest was made without probable cause and with malice. But if they shall believe that at the time of instituting the suit and of the suing out of the *capias*, the defendants had no reasonable and proper cause for believing, etc., that the plaintiff was about to leave the State unless he was forthwith apprehended, the jury may infer malice from their action; and, if they think such inference a reasonable one from all the evidence, they should find for the plaintiff. Held:

1. The using of the word "reasonable" as well as "probable" is not error.

2. The words "they should find for the plaintiff" must be construed as based, not on the finding of malice only, but on the finding also of the non-existence of probable cause.

3. The legal malice may exist, though the party making the oath may not have wilfully sworn falsely.

SECTION 2995.

In the case of *Levy vs. Arnsthall*, 10 Grat., 641, decided January, 1854, it was held: The act which authorizes the plaintiff to file interrogatories to a defendant in custody, and authorizes the court, upon notice to the plaintiff or his attorney, to discharge a defendant from custody, applies to a defendant in custody of his bail, as well as a defendant in jail.

TITLE XLIV.

CHAPTER CXLII.

SECTION 2998.

In the case of *Storrs vs. Payne*, 4 H. & M., 506, decided by the Superior Court of Chancery for Richmond, February, 1810, it was held: A sheriff may file a bill of interpleader to settle the rights of property taken in execution, to which there are conflicting claims, but an injunction will not be awarded to stay any suit against him in case of his selling the property; because the law provides him an ample remedy.

In the case of *Beers, Booth & St. John vs. Spooner*, 9 Leigh, 153, decided January, 1838. S. files a bill of interpleader against

A. and B., in order that it may be litigated and determined between them which is entitled to a sum of money in S.'s hands, and the bill is filed in consequence of a demand made on S. by B. for the money. The court holding that A. was entitled to the money in question, decreed that B. should pay A. his costs of suit, and decree affirmed.

In the case of *Townes vs. Birchett*, 12 Leigh, 173, decided April, 1841, it was held: Where auctioneers are stockholders and trustees of proceeds of sales by them made, bound to pay them to one or the other of two parties, upon conditions agreed upon, equity has jurisdiction to relieve, on a bill by one of the claimants against the auctioneers and the other claimant.

In the case of *George et als. vs. Pilcher et als.*, 28 Grat., 299 and 304-'5, decided March, 1877. The plaintiff in a suit of interpleader continues to be a substantial and necessary party until he has fully rendered the debt, duty or other thing required of him.

P. filed a bill of interpleader in the Circuit Court of Richmond against various persons made parties defendants, of whom some were citizens and residents of Virginia, others of Pennsylvania, and others of States other than either Virginia or Pennsylvania. The defendants, who were citizens and residents of Pennsylvania, answered the bill, and at the same time filed their petition in due form for the removal of the cause from the State to the Federal Court. Held: Whether P. is regarded as a substantial or as a mere nominal party, there is no right of removal either under the act of Congress of March 2, 1867, or of July 27, 1866.

See the case of *C. & O. R. R. Co. vs. Paine*, 29 Grat., 502, cited, *ante*, Section 2984.

In the case of *First National Bank of Alexandria vs. Turnbull & Co.*, 32 Grat., 695, decided January, 1880. A. being the owner of a cotton factory, enters into a covenant under seal with T., which is duly admitted to record, which, reciting a previous deed of trust by A. to secure advancements made or to be made by T. to A., witnesses that in consideration of the premises and of the advances already made and to be thereafter made by T. for the purchase of cotton or for other expenditures connected with the manufacture of cotton goods at A.'s factory, the said A. covenants to deliver to the said T. each yard of cotton goods manufactured by him at the said factory; and T. covenants that he will, from time to time, advance such sums of money as may be required for the purchase of cotton manufactured in said factory, and that he will advance further sums of money as may be required to pay hands and necessary expenses incurred in running the machinery in said factory, etc.; and it was further agreed between the parties that the said A. shall sell no goods

manufactured in the said factory, unless upon a receipt of written authority from T. to that effect, specifying the amount of goods to be sold, the price and terms of sale, and approving the credit of the purchaser; and T. shall receive five per cent. for commissions and guarantee on the entire product of said factory, whether sold by T. or A. by the authority of T. as aforesaid; and T. is to have the same security under the said deed of trust as if this covenant had been executed at the same time as the deed. Held: A creditor of A. having levied his execution on the said raw cotton, cotton yarn, and cotton cloth, T. may interplead and set up his title to the property under the covenant.

SECTION 2999.

In the case of *Baird vs. Rice*, 1 Call, 18 (2d edition, 15), decided October 14, 1797. A. recovered judgment against B., and C., his surety. A. issued execution thereon, which was levied on the property of B. The plaintiff, A., receiving part of the money, gave B. further time for the balance, and ordered the officer to restore the goods to B. Held: That by this procedure the judgment was discharged at law, and C., the surety, was discharged in equity, in which he was protected against a second execution, by an injunction.

SECTION 3001.

In the case of *Carrington vs. Anderson*, 5 Munf., 32, decided February 7, 1816, it was held: Any person claiming the property sold under an execution, may prosecute an action of debt on the bond of indemnity, in the name of the sheriff or other officer to whom it is given, without proving that any damage has been sustained by such officer.

In the case of *Saunders vs. Pate et als.*, 4 Rand., 8, decided January, 1826. *Quære*: Whether the purchaser of property sold under execution can have the benefit of an indemnifying bond, given to the sheriff, on the principle of substitution?

In the case of *Hamilton vs. Shrewbury*, 4 Rand., 427, decided August, 1826, it was held: A fair purchaser under a sheriff's sale, without knowledge of any improper conduct on the part of the office, acquires a valid title to the property purchased, and the remedy of the party injured is by action of law for damages against the sheriff. The same remedy applies where a sheriff has improperly refused a forthcoming bond when he ought to have received it.

In the case of *Jacob Martin (Constable, etc.) vs. Sturm et als.*, 5 Rand., 693, decided by the General Court, November, 1827, it was held: A constable is not authorized to take the indemnifying bond prescribed, when he levies an execution issued by a single magistrate on a judgment for a small debt.

In the case of *Dabney vs. Catlett*, 12 Leigh, 394, decided November, 1841. Sheriff on seizure of chattels under a *fi. fa.* takes an indemnifying bond, with condition to save sheriff harmless, and to pay and satisfy any person claiming title to the property all damages he may sustain by the seizure and sale, omitting to provide also that the obligors shall warrant the property sold under the execution to the purchaser thereof at the sheriff's sale. Held: The bond is defective and not good as a statutory bond, but it is good at common law, and the sheriff may maintain an action on it for indemnity against damages recovered against him by the owner of the property seized and sold.

The reference to 12 Leigh, 634, is to an appended note to the same case of *Dabney vs. Catlett*, p. 394, above cited.

In the case of *Aylett vs. Roane*, 1 Grat., 282, decided November, 1844. Upon a sale of property under an execution, the sheriff takes a bond of indemnity, with conditions according to the statute to indemnify the sheriff, and to pay and satisfy to any person claiming title to the property all damages sustained in consequence of the seizure and sale thereof, but it does not contain a provision for the protection of the purchaser of the property as required by statute. In an action by a claimant of the property against the sheriff. Held: This is a good statutory bond, and protects the sheriff from the action of the claimant of the property.

In the case of *Davis vs. Davis*, 2 Grat., 363, decided October, 1845. In an action against a constable for taking the property of the plaintiff upon three executions against a third person: The constable filed a special plea, in which he set up an indemnifying bond executed by the plaintiff in the executions. The plaintiff craved oyer of the bond, and demurred to the plea; and it was held: That it is not necessary to set out the judgments in the plea. That though the executions appeared on their face to be issued by a justice of Hardy county, yet having in fact been issued by a justice of Hampshire when they were levied, and this being averred in the plea, they are valid, and give authority to the officer to execute them. That it is not necessary to set out the executions in the indemnifying bond. That one indemnifying bond may be taken in several executions. That a firm being plaintiffs in the executions, the bond executed by one of the firm, in the partnership name, is a good bond of the person so executing it. That the reciting in the bond of the names of the plaintiffs in the execution by their partnership name, is sufficient.

In the case of *Huffman vs. Leffell's Executor, etc.*, 32 Grat., 41, decided July, 1879. In July, 1870, D., deputy for H., sheriff of Craig county, had in his hands a writ of *fi. fa.* in favor of L. against M. He went to the house of M. to levy it,

when M. claimed the benefit of the homestead exemption, and claimed his personal property to the extent it would go. The law to carry the homestead exemption of the constitution of Virginia into effect had just been passed, and neither the deputy sheriff or the debtor, M., knew the form in which the exemption could be claimed, although M. insisted on his right to claim it. D. then notified L. of M.'s claim of homestead, and demanded of him an indemnifying bond before levying the *fi. fa.*, which L. declined to give. The debt was lost by the failure to levy. On a suit by L. against H., sheriff, and his sureties, to recover the debt in the execution with interests and costs. Held: The deputy was excusable for not levying and selling under the circumstances after L. had failed to give the indemnifying bond demanded of him; and therefore L. cannot recover against H. and his sureties on his official bond the debt thus lost by the failure to levy.

In the case of *Sage et als. vs. Dickinson et als.*, 33 Grat., 361, decided July, 1880. A judgment is obtained in 1870 on a contract entered into prior to the present Constitution of Virginia, and in the same year an execution issued thereon, placed in the hands of the deputy sheriff and levied on property of the judgment debtor, who gives a forthcoming bond, and has the property forthcoming on the day and place of the sale. The debtor then claims the property as exempt under the homestead provision of the Constitution and statute of Virginia, and the deputy sheriff releases the property to him, without requiring an indemnifying bond of the creditor, or even notifying him of the claim of homestead set up by the debtor. In a suit by the creditor against the sheriff and his sureties to recover the value of the property lost by the conduct of the deputy. Held: The sheriff and his sureties are liable.

When an officer surrenders property he has seized under execution, he does it at his peril, and the burden of establishing that it is not liable to levy is on him.

SECTION 3003.

In the case of *McClunn vs. Steel*, 2 Va. Cases, 256, decided by the General Court, it was held: A constable, sheriff or other officer, who sells property taken under execution, is not protected from an action of trespass by the claimant unless the indemnifying bond taken by him conforms in all respects to the statute, and particularly contains the clause inserted for the benefit of the person claiming title to the property.

In the case of *Stone vs. Pointer*, 5 Munf., 287, decided December 7, 1816, it was held: The sheriff having received the bond of indemnity is bound to sell the property taken in execution, whether it belong to the debtor or not.

In the case of *Garlands vs. Jacobs, etc.*, 2 Leigh, 651, decided November, 1830, it was held: An indemnifying bond given to a sheriff can only be put in suit at the relation of the person having the legal title to the property taken in execution and sold by the sheriff, not at the relation of any person having an equitable right therein.

In the case of *Couch vs. Miller*, 2 Leigh, 545, decided February, 1831, it was held: Upon a motion to quash a forthcoming bond for defects apparent on the face of the execution on which it was taken, an appellate court will regard the execution as part of the record, though not made so by any express order to that effect.

In the case of *Forkner vs. Stuart, etc.*, 6 Grat., 197, decided July, 1849, it was held: In an action on an indemnifying bond the relator claims the title to the property sold under a sale made by one partner without the consent or knowledge of the other of partnership property. The relator may recover for the undivided interest of the partner who made the sale, under a general allegation in the declaration of his ownership of the property.

CHAPTER CXLIII.

SECTION 3006.

In the case of *Coupland vs. Anderson*, 2 Call, 106 (2d edition, 86), decided October 25, 1799, it was held: If there be a reference by rule of court in a suit depending to four arbitrators, or any three, and afterwards two others be added, if two of the first named arbitrators and one of the last make an award, it is sufficient, and a majority of the whole is not required.

If the plaintiff be bail for the defendant at the time of the reference in a depending suit, the failure of the arbitrators to award concerning that undertaking will not vitiate the award.

The court may give costs, though the award does not mention them.

In the case of *Britton vs. Williams's Devisees*, 6 Munf., 453, decided December 15, 1819, it was held: Although infants are bound by judgments had under the superintendence and protection of the court, yet, where the case is referred to arbitrators, whereby they are deprived of that protection, a submission, even by rule of court, ought not to be sanctioned, even though the award be in their favor; for, as the awards are in the nature of judgments, and are to be final and conclusive, which cannot be where one party has a right to avoid them, it follows that a submission by infants, although with adults, cannot be obligatory on either party.

In the case of *Smith et als. vs. Smith, etc.*, 4 Rand., 95, decided February, 1826, it was held: Equity has jurisdiction to

decree specific execution of an award where the remedy at law is inadequate. Where some only of several distributees submit their interests to arbitration, the award will be binding on the parties to the submission, so far as their interests are concerned. When parties submit a question of law alone to arbitration, the award is binding, though contrary to law.

In the case of *Wheatley vs. Martin's Administrator*, 6 Leigh, 62, decided February, 1835, it was held: A submission to arbitration, by rule of court, of a controversy in a suit pending is not within the statute of awards, and so the court may proceed to judgment on the award at the same term to which it is returned. After submission to arbitration, by rule of court, plaintiff dies, and suit is revived by his administrator; the administrator of plaintiff and the defendant proceed in the arbitration without any new submission, and an award is made. Held: The death of the plaintiff did not avoid the submission, and the award under it is good.

In the case of *Sutton vs. Dickinson*, 9 Leigh, 142, decided December, 1837: Submission to arbitrators of matters in difference in a suit pending; award professing to be made, and appearing to be in fact made, pursuant to the submission, but not stating expressly that the arbitration was confined to the matters in difference in the suit; and this award was held good.

In the case of *Martin vs. Martin*, 12 Leigh, 495, decided January, 1842: S. brings detinue against J. for one slave, and J. brings detinue against S. for three slaves, and J. brings also an action of debt against S., and the parties agree to refer all matters in difference in the three suits to two arbitrators and their umpire, whose awards, or the awards of their umpire, are to be made the judgments of the court; which submission is made a rule of court; the arbitrators proceed to arbitrate the two actions of detinue, and make an award therein without arbitrating the action of debt; in their award the date of the submission is not recited, and the submission is recited as referring to arbitration the two actions of detinue only; and the award in J.'s action of detinue against S. gives J. the three slaves demanded in his declaration, and two other slaves, the increase of a female slave demanded, born after the action was brought. Held: Neither the omission to state the date of the submission in the award, nor the recital of the submission as referring to the two actions of detinue only, nor the failure to proceed to arbitration of the action of debt, is a good ground of objection to the award under the terms of this submission.

In the case of *Corbin et als. vs. Adams et als.*, 76 Va., 58. Equitable Jurisdiction: Submission Annulled.—Testator willed his property to four of his ten children. These four had claims against his estate for services, and their consent to an order

vacating the will was given upon condition that their claims be paid out of the estate. The amount was to be ascertained by three disinterested persons selected by the parties. The arbitration did not occur, because the parties did not agree on the arbitrators, mainly by the fault of others than the claimants. The latter then, considering the agreement ended and the order vacating the will a nullity, filed their bill asking for an issue *devisavit vel non*. The verdict was for the will. It was approved, and the agreement was annulled by the court. Held:

1. The will being established, and the claimants being the only devisees and owners of the estate, there was nothing to arbitrate, and the court did right in annulling the agreement in order to terminate the litigation.

2. Submission not consummated. Agreement to arbitrate is no bar to suit at law or in equity, and no foundation for a decree of specific performance.

3. Submission—Breach—Remedy.—Only remedy for refusal to comply with agreement to arbitrate is by action for damages, the measure of recovery being the costs and expenses incurred, unless there be a bond with penalty attached, in the nature of liquidated damages.

4. Submission—Award.—After the agreement has been consummated by an award, it is different, the award binding the parties, and only impeachable on grounds which would invalidate any other judgment.

In the case of *Doyle vs. Patterson*, 84 Va., 800, decided April 26, 1888. A disputed account was submitted to two arbitrators or an umpire. An award is signed by the latter and one of the two arbitrators. The other arbitrator refused to sign it and withdrew. Held: The award is binding on the parties.

SECTION 3007.

In the case of *Porter vs. Harris*, 4 Call, 485, decided April, 1802, it was held: If there be an order of reference by consent, and it be afterwards set aside without its being shown at whose instance, or for what cause it was done, and no exception be taken at the time, the court of appeals will affirm the judgment afterwards rendered upon a verdict subsequently obtained.

In the case of *Long vs. Long*, 5 Call, 431, decided April, 1805, it was held: After reference to arbitrators of a matter in court by consent of parties, and award made and set aside, either party, may, at any time before the next award, rescind the order of reference and discharge the arbitrators from proceeding to a decision.

SECTION 3009.

In the case of *Schermer vs. Beale*, 1 Wash., 11, decided at the spring term, 1791, it was held: The reasons for obstructing

or setting aside awards, according to the best construction of the statutes, are either some illegality or injustice apparent on the face of them or for misbehavior in the arbitrators.

In the case of *Pleasants, Shore & Co., and Anderson vs. Ross*, 1 Wash., 156, decided at the spring term, 1793, it was held: Affidavits may be introduced, but they must tend to prove partiality or misbehavior in the arbitrators and not mistake in law or fact.

In the case of *Smallwood vs. Mercer & Hansborough*, 1 Wash., 290, decided at the fall term, 1794, it was held: Where no award is made by the arbitrators in the time limited by the arbitration bond, no contract made contingent upon the result of such award will be enforced by a court of equity.

In the case of *Leftwitch et als. vs. Stovall*, 1 Wash., 303, decided at the fall term, 1794. The award was objected to on the ground that it exceeded the powers of the arbitrators, because the award was for tobacco when the writ demanded money. Held: The award need not follow the writ, but it is proper inasmuch as it is not contrary to the submission.

In the case of *Mitchell vs. Kelly*, 1 Call, 380 (2d edition, 330), decided October 30, 1798. The question whether the act of Assembly relating to awards applies to orders of reference during the progress of suits was raised, but the court refused to decide, as it was immaterial to the issue. It was held not necessary that the award should lie in court two terms before judgment if the party offers exceptions, for that is a waiver.

In the case of *Holcomb vs. Flournoy*, 2 Call, 433 (2d edition, 365), decided October 29, 1800, it was held: An award will not be overturned on the statement of the evidence which was given before the arbitrators; there must be legal grounds.

In the case of *Ross vs. Overton*, 3 Call, 309 (2d edition, 268), decided November 8, 1802, it was held: The court will not interfere to set aside an award on the ground of the arbitrators having mistaken the law in a doubtful case.

In the case of *Taylor's Administrator vs. Nicolson*, 1 H. & M., 67, decided October 24, 1806, it was held: No calculations or grounds for an award which are not incorporated in it, or annexed to it at the time of delivery, are to be regarded or received as reasons or grounds to avoid it. If an award which is good in other respects contains a matter not mentioned in the submission, it shall not thereby be vitiated, but the additional matter ought to be rejected as surplusage.

In the case of *Morris vs. Ross*, 2 H. & M., 408, decided May 3, 1808, it was held: An award ought not to be set aside either in a court of law or equity on the ground of a mistake in the judgment of the arbitrators, unless that mistake be very palpable; a mere difference of opinion between the court and the

arbitrators in a doubtful case not being sufficient to authorize such interference.

In the case of *Fletcher vs. Pollard*, 2 H. & M., 544, decided May 20, 1808, it was held: If pending a suit in chancery brought by one of three mercantile partners against the other two for a settlement of the accounts of the co-parcenary, the plaintiff and one of the defendants agree to refer all matters in controversy between them to arbitrators (whose award is to be the decree of the court), according to which agreement an order of reference is made, and the arbitrators make a report that they had examined and stated the books of the co-parcenary, and award the payment of certain sums by the other defendant as the only debtor to the plaintiff and to the defendant who agreed to the reference, and state that the payments already made by that defendant discharge him from any farther claim of the plaintiff on account of the co-parcenary, such report ought to be considered as an award, and sufficiently final and good between the parties who agreed to the reference.

In the case of *Brickhouse vs. Hunter, Banks & Co.*, 4 H. & M., 363, decided October, 1809, it was held: Although consent of parties cannot give jurisdiction to a court of equity, yet (after an injunction granted improperly), if the parties refer all matters of difference between them in that suit to certain arbitrators mutually chosen, consenting that their award may be made a decree of the court, such consent is binding; the whole case, including the question of law, being thereby transferred from the court to the arbitrators. An award is not the less certain and final because the arbitrators refer to a report previously made by a commissioner in chancery, and declared (in general terms) their concurrence with it, instead of specifying the particulars or substance thereof in the award itself; nor because they submit to the court the propriety of their award in point of law, and, as a guide for the court in deciding upon it, state the grounds and reasons thereof.

In the case of *Hollingsworth vs. Lupton and Wife*, 4 Munf., 114, decided December 4, 1813, it was held: If a dispute concerning the division of a tract of land under a will be submitted to arbitration in general terms, and an award be made stating that "from the proofs adduced to the arbitrators, from the tenor of the will and evident intention of the testator," one of the parties is entitled to a certain number of acres, to be divided from the rest by a specified line, and the other to the residue of the tract, such award (being free from objection in other respects) is valid, notwithstanding the line established by it is different from the dividing line mentioned in the will.

In the case of *Ligon vs. Ford*, 5 Munf., 10, decided January 17, 1816, it was held: An action of *crim. con.* being referred to

arbitration by rule of court, if the arbitrators refuse to hear testimony offered by the defendant impeaching the credit of the plaintiff's witnesses, or touching the deportment of the plaintiff's wife before her alleged seduction, this is such misconduct as vitiates their award, and the court ought not to decline hearing proof of such misconduct.

In the case of *Manlove vs. Thrift*, 5 Munf., 493, decided March 20, 1817, it was held: If, pending a suit, the parties by an order of court refer the matter in dispute to arbitrators, whose award is to be made the judgment of the court, and afterwards by an agreement under seal appoint a substitute for one of them, agreeing that an award to be made by the remaining referees and such substitute shall be entered as the judgment of the court, such award may be so entered without any previous order of court confirming the appointment of such substitute.

In the case of *Richards vs. Brockenbrough's Administrators*, 1 Rand., 449, decided May, 1823, it was held: Where parties enter into arbitration bond, referring a certain matter in dispute to arbitrators who are to make their award by a certain day, and, if they should not agree, to an umpire chosen by them; upon which the arbitrators, finding that they cannot agree, choose an umpire, who makes his umpirage before the day appointed for the arbitrators to make their award, such umpirage will be good.

An award which inaccurately requires the surety in the arbitration bond to pay money as well as the principal will nevertheless be sustained; such a clause will only be regarded as surplusage. Everything is to be presumed in favor of an award.

In the case of *Miller vs. Kennedy*, 3 Rand., 2, decided November, 1825, it was held: It is not universally true that notice should be given of the time and place of making an award. But if notice be necessary, the defendant cannot avail himself of want of it where the submission has been by the mere act of the parties, nor of corruption or partiality in the arbitrator, nor of any other extrinsic circumstance whatever, in an action on the award, or on a submission bond, but his only redress is in a court of equity. *Aliter* if the submission be by order of court.

In the case of *Head vs. Muir & Long*, 3 Rand., 122, decided January, 1825, it was held: A court of equity ought not to set aside an award for objections which might have availed in a court of law, and which a party failed to urge there without a good excuse for the omission.

An award cannot be set aside either in law or equity, except for errors apparent on its face, misconduct in the arbitrators, some palpable mistake, or fraud in one of the parties.

In the case of *Smith et als. vs. Smith, etc.*, 4 Rand., 95, decided February, 1826, it was held: When parties submit a ques-

tion of law alone to arbitration, the award is binding, though contrary to law.

Awards are to be construed liberally, and, therefore, the terms "heirs at law," in an award respecting personal estate, may be construed to mean "all of a testator's children living, and the child or children who died in his lifetime."

Equity has jurisdiction to decree specific execution of an award where the remedy at law is inadequate.

In the case of *Rison vs. Berry*, 4 Rand., 275, decided May, 1826, it was held: Where a submission is made of all matters in difference between two parties, in a particular suit then pending, to two persons and such umpire as they shall choose, and their award to be made the judgment of the court, and the arbitrators and umpire act together and make a joint award, such award will be good. Although the award does not state that the third person who signed the award has been chosen by the arbitrators as umpire, yet that fact may be proved by other evidence. If the third person who signed the award was a mere stranger, this would not vitiate the award.

In the case of *Graham's Administrators vs. Pense*, 6 Rand., 529, decided October, 1828, it was held: Although the submission of a case to arbitration, where a suit is depending in a court of law, does not come within the provisions of the statute concerning awards, yet the court (in which the submission is made a rule of court) has a general superintendence over the award made by virtue of such submission, and may annul it for misbehavior of the arbitrators, mistakes apparent on its face, etc. It is unnecessary in such case to resort to a court of equity to annul it.

Two arbitrators meet to decide a case referred to them on the day appointed, and continue the case for good cause shown by the defendant. On the same day they determine that they will no longer act as arbitrators, and give notice of their declension to the parties; but on being pressed by the plaintiff they are prevailed on by him to act again, and authorize the plaintiff to give notice to the defendant of the time and place for arbitration; the defendant on the day, and at the place, protests against their power to act, and refuses to submit his case or his evidence to them. The arbitrators, however, proceed to make up an award on the plaintiff's *ex parte* evidence. This is such misbehavior as should annul the award.

In the case of *May vs. Yancey*, 4 Leigh, 362, decided March, 1833. Award of arbitrators is sought to be set aside on the ground that the conduct of the arbitrators had the effect of a surprise on one of the parties, and so was misconduct, though no partiality or corruption was imputed to them.

In the case of *Lee vs. Fatillo*, 4 Leigh, 436, decided April,

1833. Award of arbitrators is set aside on the ground of circumstances in their conduct amounting to misbehavior, though not to corruption, and resulting in injustice to one of the parties.

In the case of *Wheatley vs. Martin's Administrator*, 6 Leigh, 62, decided February, 1835. Submission to the arbitration of three or any two; two join in the award, giving notice of the award concluded and being about to be returned, to the third, who does not join in it. Held: This is no objection to the validity of the award.

A court of equity will not set aside an award for objections which, if available at all, were available at law, but which the party did not avail himself of at law, there being no surprise proved, though it is alleged, and no fraud proved or alleged. It is equally the rule of equity as of law, that the reasons for setting aside an award must appear on its face, or there must be misbehavior in the arbitrators, or some palpable mistake.

See the case of *Martin vs. Martin*, 12 Leigh, 495, cited *ante*, Section 3006.

In the case of *Byars vs. Thompson*, 12 Leigh, 550, decided August, 1841. The award mis-recites the date of the submission to be the 18th of July instead of the 14th of September, 1821. Held: This mis-recital does not invalidate the award made in other respects pursuant to the submission.

It is not necessary to the validity of an award that it should be delivered, unless it is expressly provided by the submission that delivery shall be necessary to its validity.

Arbitrators, in their award, reserve to themselves a right to reconsider a claim which they allow the party against whom they award, and then complete the award without reconsidering this claim. Held: The reservation is void, and the award good for the sum awarded. In an action of debt for the penalty of an arbitration bond, the declaration sets out the submission, and so much of the award as entitles the plaintiff to his action. Held: It is not necessary in such case that the declaration should set out the whole award.

In the case of *Pollard vs. Lumpkin*, 6 Grat., 398, decided October, 1849, it was held: There being no mistake on the part of the arbitrators as to the nature or contents of the award, when it was signed and published by them as their award, though one of the arbitrators, after the termination of his authority, may think that the principles by which it was governed should have led him to a different result, such evidence is not of itself sufficient to set aside the award on the ground of mistake, such mistake not appearing on the face of the award, or from any paper or document connected with or referred to therein, and all mistake being denied by the other arbitrator.

In the case of *Bassel's Administrators vs. Cunningham's Ad-*

ministrators, 9 Grat., 684, decided March, 7, 1853. Six causes are referred by order of the court to D. and L., and in case of disagreement between them, then to T. as the umpire to decide such difference, for their arbitrament and award, which, when made by them or their umpire, and duly certified by them, are to be entered as the judgment of the court. Upon the disagreement of the arbitrators D. and L., the whole matter is to be adjudged by the umpire T., and his decision is valid and conclusive, though he differs from both the arbitrators.

The arbitrators and umpire sit together and hear the evidence, of which a note is taken by one for the benefit of all. Upon the disagreement of the arbitrators the umpire makes his award, in which he does not refer to any of the evidence, or state the principles or facts upon which it is based; but in sending his award to the clerk of the court in which the causes are pending he sends with it all the papers and the note of the evidence taken before the arbitrators. These papers and evidence are not a part of the award, or connected with it, so that they may be considered upon a motion to set aside the award.

The arbitrators differing in opinion, each made out his own report of his opinion upon the different questions arising in the clause, and in this there was no error, though, if it was error in them, it would not affect the validity of the award made by the umpire. Evidence offered before the arbitrators and umpire was excepted to, but it was heard, reserving the question of its competency until they were ready to decide the case. The question was not formally acted on, but the arbitrators having been the counsel in the cause, and the umpire a distinguished lawyer, it will be presumed in the absence of evidence to the contrary, that as both arbitrators and umpire were selected in part for their high legal attainments, all improper testimony was discarded from their consideration in making their decisions.

A mere mistake of date from which interest upon a particular debt is to run, obvious on the face of the award, is not ground for setting it aside; the party in whose favor it is, consenting that it shall be corrected in the judgment entered upon the award.

An error of judgment on the part of the umpire in regard to the facts is not ground for setting aside the award.

In the case of *Lunsford vs. Smith*, 12 Grat., 554, decided September 7, 1855, it was held: Certain legal questions are submitted by parties to a controversy to an arbitrator, and they agree to be bound by his award. Upon a suit being afterwards instituted by one of the parties against the other in relation to the subject-matter of the submission, the award of the arbitrator deciding the questions submitted to him is the law of the case.

In the case of *Crane's Guardian vs. Crane*, 21 Grat., 579, de-

cided December 13, 1871, it was held: There cannot be an appeal from the award of an arbitrator, unless it be made the judgment or decree of the court from which it is taken; and the mere copy of the award in the proceedings of the court, though they be signed by the judge, does not make it a judgment or decree of the court.

In the case of *Moore vs. Luckless's Next of Kin*, 23 Grat., 160, decided January, 1873, it was held: Under the statute an award cannot be set aside in a common law court, except for error apparent on the face of the award, or unless it has been procured by corruption or other undue means or misbehavior in the arbitrators.

In the case of *Forrer vs. Coffman et als.*, 23 Grat., 871, decided September, 1873, it was held: Arbitrators are required to return their award by a certain day under their hand and seals. They prepare their award, and the day before they are required to return it one of them hands it to the counsel of the plaintiff. He sees that they have omitted the seals, and he returns it to them, and requests that they will add the seals and insert the word "seal" in the body of the instrument. This they do, and then deliver it on the day to which they are limited by the submission. The award is valid.

In the case of *Willoughby vs. Thomas*, 24 Grat., 521, decided March, 1874, it was held: If an arbitrator, intending to decide the questions submitted to him according to law, states in his award two propositions of law, one of which is erroneous, and the other is correct upon the facts as he may consider them to be, a court, in passing upon the validity of the award, will presume that his award is based upon the latter; and the court cannot inquire whether he took a correct view of the facts.

In the case of *Pollock's Administrator vs. Sutherlin*, 25 Grat., 78, decided April 23, 1874, it was held: Upon the question whether an award is within the terms of the subscription, all fair presumptions shall be made in favor of the award; and if on any fair presumption the award may be brought within the submission, it shall be sustained.

In the case of *Adams vs. Hubbard*, 25 Grat., 129, decided June 17, 1874. An injunction to a judgment is obtained, and whilst it is pending, the matter in dispute is referred to arbitrators, who, after reading the pleadings and depositions, and hearing oral evidence, including that of the parties, make an award that the injunction be dissolved. On a motion to set aside the award on the ground of after-discovered evidence, held: The rules governing courts of equity in awarding new trials in actions at law on the ground of after-discovered evidence apply equally to motions to set aside an award on that ground. Where all the evidence that was before the arbitrators is not before the

court on the motion to set aside the award, the motion must fail. Though the evidence in the cause before the reference was made might have warranted the court to direct a new trial, yet the award is in fact a new trial, and the party is not entitled to another trial on that evidence.

In the case of *Lynchburg Female Orphan Asylum vs. Ford*, 25 Grat., 566, decided December, 1874. F. contracts to make, burn, and deliver to L. a certain quantity and quality of bricks, 80 per cent. of the price to be paid when they are ready for delivery, according to kiln measure, the remaining 20 per cent. to be paid when the bricks are laid in the wall of the building which L. proposes to erect. The bricks have been made and the 80 per cent. paid, but they are still in the kiln, when the architect of L. rejects a large portion of them as not being of the quality contracted for. The quality of the bricks is the subject of difference, but in their submission to arbitration they say, "whereas certain differences have arisen as to the qualities of the bricks manufactured under said contract, and as to the construction of said contract." Held: The latter clause will be held to refer to the construction in relation to the qualities of the bricks; and the arbitrators awarding the payment by L. to F. of the 20 per cent. reserved is beyond the submission. The submission is not to be extended by the counsel of F. arguing in the presence of the counsel of L. that it embraces the question of the payment of the reserved 20 per cent. That part of the award in relation to the quality of the bricks being entirely distinct and not dependent upon that part directing the payment of the reserved 20 per cent., that part may be sustained, whilst the latter part is set aside.

In the case of *City of Portsmouth vs. Norfolk County*, 31 Grat., 727, decided March, 1879. The county of Norfolk and the city of Portsmouth, in March, 1877, enter into an agreement by which they submit all matters in dispute between them to the arbitration of R. H. Baker, of the city of Norfolk, and J. R. Kilby, of Nansemond county, men of high standing as men and lawyers. The agreement states the subjects of dispute under fourteen heads, and they include suits both at law and in equity, questions of law and fact, questions in relation to lands, docks, ferries, and money, and the parties waive the plea of the statute of limitations, and all other technical pleas which would interfere in any manner with the award of the arbitrators except upon the very right and justice of the case as to all matters in controversy, the award to be entered of record in the Circuit Court of the county of Norfolk, and the Court of Hustings for the city of Portsmouth. In June, 1877, the arbitrators made their award, passing upon each of the subjects submitted to them. Upon a summons to the city of Portsmouth to show cause

against entering the award as the judgment of the Circuit Court of Norfolk county, the city of Portsmouth filed numerous exceptions to the award, which were overruled by the court. Upon appeal, held: It is manifest from all the papers in the case that the arbitrators intended to settle all matters of law and fact upon the very right and justice of the case. But conceding that they intended to decide according to law, and that they have not done so in every instance, it does not follow that the award is invalid. The court does not set aside an award merely because it may differ with an arbitrator as to the law of the case.

Where the merits in law and in fact are referred to an arbitrator of competent knowledge, and there is not any question reserved by him, the court will not open the award unless something can be alleged amounting to a perverse misconstruction of the law, or misconduct on the part of the arbitrator.

Where arbitrators mean to decide according to law, and they mistake the law in a palpable material point, the award will be set aside; but their decision upon a doubtful point of law, or in case where the question of law is designedly left to their judgment, that will generally be held conclusive. It must appear they grossly mistook the law; and the court will not interfere merely because it would have given a different decision in the particular case. It does not appear that the arbitrators have committed any very material palpable errors in the various points decided by them.

In the case of *Shipman vs. Fletcher*, 82 Va., 601, decided December 2, 1886, it was held: An award will be set aside on the ground of circumstances in the conduct of the arbitrators which amount to a misbehavior and result in injury to one of the parties.

Small irregularities are often fatal to an award, and *a fortiori* are such instances of misconduct as are exhibited by the arbitrators when they exclude both parties against the consent of one during the examination of the witnesses or other evidence, or the arguments of the counsel, or when they employ others to examine the books and papers of the accounts of the parties, and to report conclusions, which, without examining the vouchers, the arbitrators adopt, and make those conclusions the basis of the award. This is the case cited from 11 Va. Law Journal, 95.

SECTION 3010.

In the case of *Thompson's Administrator vs. Thompson's Executor*, 6 Munf., 514, decided March 4, 1820, it was held: The deputy of a sheriff, to whom administration of the estate of a deceased person has been committed, is not authorized to submit to arbitration a suit revived in the name of the sheriff as

administrator to which the deceased in his lifetime was a party.

In the case of *Wheatley vs. Martin's Administrator*, 6 Leigh, 62, decided February, 1835, it was held: An executor has a right to submit any claim, for or against his testator's estate, to arbitration; and the award made pursuant to such commission binds the estate; but if injustice be thereby done the testator's estate the executor may be chargeable therefor, as for a devastavit.

In the case of *Nelson's Administrator vs. Cornwell*, 11 Grat., 724, decided October, 1854, it was held: An executor making an improvident submission to award as to a part of his testator's estate which has been specifically bequeathed, and the result of the submission being that the property is left in his hands as his own property, and he is compelled to pay for it, the legatee is not precluded by the award from recovering the specific property.

TITLE XLV.

CHAPTER CXLIV.

SECTION 3012.

See the references given to Sections 3058, 3080, 3086, 3094, and 3218.

CHAPTER CXLV.

In the case of *The Commonwealth vs. Birchett*, 2 Va. Cases, 51, decided by the General Court, it was held: An information in the nature of a *quo warranto*, though in form a criminal proceeding, yet is in substance a civil proceeding for the trial of a civil right, and therefore the statute which limits the prosecution of informations on any penal law to one year does not apply to such information.

In the case of *The Commonwealth vs. James River Improvement Company*, 2 Va. Cases, 190, decided by the General Court, it was held: An information in the nature of a writ of *quo warranto*, is the proper remedy by which to try and decide whether the James River Company's charter ought to be nullified and vacated, or whether it has forfeited its privilege of receiving tolls.

The Commonwealth being a stockholder in a corporation and partner with individual stockholders is no reason why she should not, in her sovereign capacity, proceed by way of information in the nature of a writ of *quo warranto* against the corporation for the purpose either of destroying its character or depriving it of any of its franchises.

The information aforesaid will lie against a corporation *eo nomine* to try whether the said company has forfeited its franchise of being a corporation, as well as of its other franchises and liberties.

Where the Commonwealth proceeds by an information in the nature of a *quo warranto* against a corporation in the superior court of law in which the president and directors of the corporation reside, she has jurisdiction to grant the rule and try the cause, although the acts of violation of duty, which are the grounds of the proceeding may have been committed in other countries.

In the case of *Royal vs. Thomas*, 28 Grat., 130, decided February 1, 1877, it was held: Under the Constitution and statutes of Virginia a party who has aided and assisted in a duel fought with deadly weapons may be removed from office by a proceeding by *quo warranto*, or, if that writ be not in use, by information in the nature of a *quo warranto*, though he has not been convicted of the offence in any criminal proceeding against him.

In the *Bland and Giles County Judge* case, 33 Grat., 443, decided July, 1880. In December, 1874, E. was elected by the legislature judge of the county courts of G. and B. counties, and on the twelfth of the same month he was commissioned as such, the commission stating that he was elected to fill the unexpired term of his predecessor. In December, 1879, W. was elected judge of the same counties, and was commissioned as such on the 20th of the same month. Without objection on the part of E., W. entered at once upon the duties of the office, and E. qualified as an attorney, and practiced in both of the courts over which W. presided, until the April term, 1880, when, the court of appeals having decided that the terms of all the county judges in Virginia, whether elected to fill vacancies or not, commenced on the first day of January next following their appointment, and were for the whole term of six years, as fixed by the Constitution, E. appeared and protested that he was the lawful judge. This claim W. refused to recognize, principally on the ground that E., by acquiescing in the assumption of the office by W. and becoming a practicing attorney in this court, held an office incompatible with the office of judge, and by this conduct had forfeited and abandoned his said office. On *quo warranto* by E. against W., held: E. was entitled to the office, and the fact that he only yielded to the legislative and executive construction of the Constitution until the question was settled by the Supreme Court was no abandonment or forfeiture of his office. An attorney-at-law is not an officer. An office is terminated *proprio vigore* by resignation, expiration of term, and removal by competent authority. But in other cases the office is not determined *ipso facto* by the occurrence of the cause. There

must be a judgment of a motion after judicial ascertainment of the fact, which may be by indictment or information, by writ of *quo warranto*, or by impeachment. The writ of *quo warranto* is not abolished in Virginia, and the circuit courts have jurisdiction of the same. W., having waived the filing of an information in the court below, cannot be heard to complain of any irregularity on this ground in the appellate court.

In the case of *Pixley et als. vs. Roanoke Navigation Co. et als.*, 75 Va., 320, decided March 17, 1881, it was held: A court of equity has no jurisdiction to restrain a navigation company from collecting tolls on the streams to which the charter refers, on the ground that the company had failed to improve the streams as their charter prescribed, or to keep them in order. The only mode of proceeding against a corporation in such case is by *quo warranto* at the suit of the Commonwealth.

In the case of *Kilpatrick et als. vs. Smith et als.*, 77 Va., 347, decided March 29, 1883: Where title to office is the point in controversy, the remedy is not by injunction, but, at law, by information in the nature of *quo warranto*. In 1870 the board of education appointed E. and five others trustees for the city of Portsmouth—three for each ward. The city council failed to divide them into three classes. They continued until June, 1882, when the city council created a new board of school trustees. In July, 1882, the board of education appointed K. and eleven others trustees—three for each ward, the wards having been increased to four—for said city, who duly qualified and entered upon their duties. In August, 1882, E. and the five other appointees of the city council obtained from the judge of the hustings court of Portsmouth an injunction inhibiting K. and his co-trustees from acting as members of the school board of Portsmouth, etc. Defendants demurred and answered. The hustings court, on the 28th of December, 1882, hearing the cause, overruled the demurrer, and perpetuated the injunction. On appeal to this court, it was held:

1. As this question involved the question of title to office, an injunction was not the proper remedy, and the demurrer to the bill should have been sustained and the bill dismissed.

2. The appointment of E. and his five associates by the city council was without authority of law, and was void.

3. The appointment of K. and his eleven co-trustees by the board of education was pursuant to law, and was valid.

SECTION 3023.

See references to Sections 3058, 3080, and 3217.

CHAPTER CXLVI.

SECTION 3029.

In the case of *Armstrong vs. Stone et ux.*, 9 Grat., 102, decided August 2, 1852, it was held: The petition for a writ of *habeas corpus* to obtain possession of a child may be in the name of the infant by its next friend, or in the name of the person claiming the possession; and when it is the mother of the child that is claiming the possession, and she is a married woman, it may be in the names of her husband and herself. The proper office of the writ of *habeas corpus* is to release from illegal restraint; and when the party is of years of discretion and *sui juris*, nothing more is done than to discharge him; but if he be not of an age to determine for himself, the court or judge must decide for him, and make an order for his being placed in the proper custody; and to enable it to do so, must determine to whom the right to the custody belongs. The father being dead, the mother is entitled to the custody as of right, and she does not lose this right by a second marriage; but when she is seeking by the writ of *habeas corpus* to have the child placed in her custody, the court may exercise its discretion, and determine whether, under all the circumstances, it is best for the infant that he should be assigned to the custody of the mother.

In the case of *Leftwich vs. The Commonwealth*, 20 Grat., 716, decided November, 1870, it was held: When a prisoner has been taken to the penitentiary before the judgment against him is reversed by the court of appeals, that court will bring him before them by *habeas corpus*, and discharge him.

In the case of *Jones vs. The Commonwealth*, 20 Grat., 848, decided March, 1871, it was held: The prisoner being in the penitentiary, he will be brought before the appellate court by writ of *habeas corpus*, and committed to the sheriff of the county of Henrico, to be taken back to the county from whence he was sent.

The reference to 19 Grat., 676, is an error.

The case of *Meredith, ex parte*, 33 Grat., 119, was a case of *habeas corpus*, but as it was only for the purpose of determining who was county judge in a certain county it is no authority.

In the case of *Ex Parte Rollins*, 80 Va., 314, decided March 19, 1885, it was held: The remedy for mere errors in proceedings of courts of competent jurisdiction is by writ of error or appeal, and not by writ of *habeas corpus*.

In the case of *Coffee vs. Black*, 82 Va., 567, decided November 18, 1886, it was held: A case where at the death of the mother the father transferred his daughter, then three years old, to her mother's sister, who reared her properly and made her happy, and was desirous and able to continue so to do, and the

child was loth to leave her aunt. After several years, the father, by writ of *habeas corpus*, sought to recover custody. It appeared that the change was calculated not to promote the child's welfare. On appeal, held: Under the circumstances the situation of the child should not be changed, and the writ should be dismissed. This is the case cited from 11 Va. Law Journal, 103.

SECTION 3035.

In the case of *Ex Parte Marx*, 86 Va., 40, decided April 18, 1889, it was held: This section providing for affidavits refers only to the illegality, not the irregularity, of the prisoner's detention, and does not authorize a review of the sufficiency. A writ of *habeas corpus* is not a writ of error, which is the remedy for mere errors in proceedings of courts of competent jurisdiction.

TITLE XLVI.

CHAPTER CXLVII.

SECTION 3045.

In the case of *Read vs. Commonwealth*, 22 Grat., 924, decided December 11, 1872, it was held, p. 952-'54: Sunday is not to be counted as one of the days of the term of a court.

SECTION 3046.

See the references given to Sections 3218 and 4016.

SECTION 3047.

In the case of *Ayres (Administrator) et als. vs. Burke et als.*, 82 Va., 338, decided September 16, 1886, it was held: After judgment is barred, if it be revived by *scire facias* through collusion between creditor and debtor, a court of equity, in a suit to enforce the liens against the debtor's estate, will not give effect to the revival so as to affect the rights of other lien creditors of said debtor, though it be effectual against himself.

SECTION 3049.

In the case of *Smith vs. The Commonwealth*, 75 Va., 904, decided November, 1881, it was held: This act is constitutional.

In the case of *Gresham vs. Ewell (Judge)*, 85 Va., 1, decided June 6, 1888. The county judge of one county presided at the trial of a cause in another county without entering upon record that the regular judge (personally present) was in his opinion so situated as to make it improper for him to preside. Held: The judgment is void, and its enforcement should be restrained by a writ of prohibition.

SECTION 3054.

In the case of *Cluverius vs. The Commonwealth*, 81 Va., 787, decided May 6, 1886, it was held: Under this section corporation courts have the authority to continue a term from day to day into the next succeeding month, and to change accordingly the day for the commencement of the succeeding term.

SECTION 3055.

In the case of *Tremaine vs. The Commonwealth*, 25 Grat., 987, decided January 14, 1875, it was held: Under this section corporation courts in cities and towns having a population of more than five thousand have the same jurisdiction to try offences committed within their respective limits as circuit and county courts had, and the act of April 2, 1873, to regulate and define the jurisdiction of the county and circuit courts, does not apply to or affect the jurisdiction of said corporation courts.

CHAPTER CXLVIII.

SECTION 3060.

In the case of *Patton vs. Hoge*, 22 Grat., 443, decided July 15, 1872. A point raised in the cause was, that a circuit court could not enter a decree at a special term, though the cause was ready for hearing at the previous regular term, and was not then heard, unless by the consent of the parties. Held: The decree was valid.

In the case of *Harman vs. Copenhaver*, 89 Va., 836, decided April 13, 1893. Where the judge's warrant appointing a special term was duly posted in accordance with Code, this section, the presumption is that all of the provisions of that section were complied with according to the rule in such cases, that all acts are presumed to have been rightly and regularly done. Besides, the provision that the clerk shall inform the attorney for the Commonwealth and the sheriff or sergeant of such appointment is directory merely, and his failure so to do held not to affect the validity of the proceedings at such special term.

SECTION 3062.

In the case of *Harman vs. Copenhaver*, 89 Va., 836, decided April 13, 1893. A decree was entered at a special term confirming a report of sale filed before the commencement of the preceding regular term, and which could have been acted on at that term. Held: No error.

CHAPTER CXLIX.

SECTION 3069.

In the case of *Hunter's Executrix vs. Vaughn et als.*, 24 Grat., 400, decided January, 1874, it was held: Where the trustees in

a deed recorded in the clerk's office in Richmond have died or removed out of the State, or refuse to act, the Circuit Court of the city of Richmond has jurisdiction to appoint a trustee in the place of such trustees.

SECTION 3073.

In the case of *Cluverius vs. The Commonwealth*, 81 Va., 787, decided May 6, 1886, it was held: Corporation courts have the authority to continue a term from day to day into the next succeeding month, and to change accordingly the day for the commencement of the succeeding term.

SECTION 3079.

In the case of *Morriss vs. Virginia Insurance Company*, 85 Va., 588, decided December 13, 1888. Section 3427 provides that any chancery cause may, by consent, be submitted to the judge of the court wherein pending for determination in vacation. This section authorizes, in certain events, the judge of the Hustings Court of the city of Richmond to perform any duty required by law of the judge of the chancery court. Where such cause pending in the chancery court of said city was, by consent (the infant defendants being represented by guardian *ad litem*), submitted, July 8, 1873, to the judge thereof for decree in vacation, and a decree beneficial to said infants was entered in vacation by the judge of said hustings court, acting as judge of said chancery court. Held: The judge of the hustings court, sitting as the judge of the said chancery court, was the judge of the latter court, and the decree valid.

CHAPTER CL.

SECTION 3086.

In the case of *Gresham vs. Ewell (Judge)*, 84 Va., 784, decided April 26, 1888, the court held: This court has no jurisdiction to award a writ of prohibition to a county court.

In the case of *Clay vs. Ballard*, 87 Va., 787, decided May 5, 1891, it was held: This section was intended to define the remedy of *mandamus* as it exists at common law, and does not, nor does the fact that the said section gives similar authority to the circuit courts, restrict the jurisdiction of this court to award the writ in all cases in which it may be necessary to prevent a failure of justice.

CHAPTER CLI.

SECTION 3111.

See references to Section 4203.

SECTION 3114.

The reference to 20 Grat., 136, is an error.

In the case of *Snodgrass vs. The Commonwealth*, 89 Va., 679, decided February 16, 1893, it was held: It is not necessary under this section of the Code to read the court orders in court each day, but it is sufficient if they are drawn up and read at the conclusion of the trial during that term.

SECTION 3122.

In the case of *Langhorne vs. Waller's Executor*, 76 Va., 213.

1. Courts.—Failure to Sit.—When a court fails to sit on any day to which it may have adjourned, all matters ready for the court to act upon, if it had been held on such day, shall be in the same condition, and have the same effect, as if continued to the next day of the same term that the court may sit.

2. Idem.—Idem.—Case at Bar.—Corporation court of L. adjourned from 20th to 23d of December; failed to sit on 23d, but sat before 4 o'clock of the third day after the 23d, and tried and entered judgment in a cause which at a previous day of the term had been set for trial on the day last referred to for convenience and by agreement of counsel. Held: The court had a right to sit and try and determine the cause before 4 o'clock on the 26th of December, and the judgment entered by it that day is valid.

SECTION 3124.

In the case of *Wilkinson vs. Hendrick*, 5 Call, 12, decided April, 1804, it was held: In a judgment on a forthcoming bond, if the record states that the cause was continued until the next day, but does not mention that the defendant was called, it is not error, if the defendant on the day of the judgment prays an appeal and gives bond, in court to prosecute it.

In the case of *Amis vs. Koger*, 7 Leigh, 221, decided February, 1836. Notice is given by K. to A. of a motion to be made at June term of a county court for money paid by K. as A.'s security. The motion is continued without A.'s consent from June term to August term, passing by the intermediate July term. Held: This was a discontinuance, and a judgment subsequently rendered for the plaintiff on the same notice is therefore erroneous.

In the case of *Clerk vs. The Commonwealth*, 21 Grat., 777, decided June 16, 1871, it was held, p. 781: A county court has authority under this section to render a judgment at the August term upon a verdict entered at the July term, though no order of continuance be entered.

In the case of *Van Gunden vs. Kane*, 88 Va., 591, decided January 14, 1892, it was held: Under this section it was in the power of the court at its July term to enter judgment *nunc pro tunc*, which it had omitted on the verdict at its April term.

SECTION 3126.

In the case of *Cluverius vs. The Commonwealth*, 81 Va., 787, decided May 6, 1886, it was held: Corporation courts have authority to continue a term from day to day into the next succeeding month, and to change accordingly the day for the commencement of the succeeding term.

CHAPTER CLII.

SECTION 3139.

In the case of *Booth vs. The Commonwealth*, 16 Grat., 519, decided April 10, 1861, it was held: Persons over sixty years of age are not disqualified from serving on grand juries, though they are exempt from the service if they choose to claim the exemption.

SECTION 3140.

In the case of *Miller vs. The Commonwealth*, 80 Va., 33, decided January 9, 1885, it was held: Where a roll of a volunteer military company is filed with the clerk of the court, the members thereof are exempt from summons for jury duty, and, if summoned, need not attend to make their excuses.

SECTION 3155.

In the case of *Hodges vs. The Commonwealth*, 89 Va., 265, decided July 6, 1892, it was held: Where, after a verdict of murder in the second degree, a juror, on a motion to set aside the verdict on the ground of previously-expressed opinion, admitted that he might have said that the prisoner would be, but denied saying that she should be, hung, and said that he did not then know that he had been put on the *venire*; that he had never expressed an opinion as to her guilt or innocence, and that his sympathies were with her, and that he at first favored fixing her imprisonment at the lowest term; it was held: The motion was properly overruled.

SECTION 3156.

In the case of *Parsons vs. Harper*, 16 Grat., 64, decided August 28, 1860, it was held: An irregularity in forming a jury must be objected to before the jury is sworn, unless the party is shown to have been injured by it.

In the case of *Poindexter vs. The Commonwealth*, 33 Grat., 766, decided January 8, 1880, it was held (pp. 791-'92): The objection to a juror that he was not a competent juror, because he had not paid his capitation tax of the previous year, comes too late after a verdict of conviction in a criminal trial, and is not good ground for setting aside the verdict and granting a new trial to the prisoner.

In the case of *Spurgeon vs. The Commonwealth*, 86 Va., 652,

decided March 13, 1890, it was held: In criminal cases wherein judgment was rendered before passage of act of January 18, 1888 (this section), failure of record to show affirmatively that the jury was regularly summoned is error, whereof advantage may be taken in the appellate court, though no objection was raised in the court below.

In the case of *Jones vs. The Commonwealth*, 87 Va., 63, decided November 13, 1890, it was held: This section, to cure irregularity in writ of *venire facias*, etc., applies only to civil and misdemeanor cases; and the act of January, 1888 (Acts 1887-1888), does not apply to a felony case where there is no *venire facias* at all.

SECTION 3166.

In the case of *Mays vs. The Commonwealth*, 82 Va., 550, decided November 8, 1886, it was held: The defendant in a criminal prosecution cannot waive a trial by jury and submit all matters of law and fact to the determination of the court, there being in this State no statute authorizing an issue joined upon a plea of not guilty in such prosecution in a court of record to be tried otherwise than by a jury.

This is the case referred to in 11 Virginia Law Journal, 88.

In the case of *Ford vs. The Commonwealth*, 82 Va., 553, decided November 18, 1886, it was held: In this State defendant cannot waive trial by jury in a criminal prosecution in a court of record.

SECTION 3167.

In the case of *Baltimore & Ohio Railroad Company vs. Polly, Woods & Co.*, 14 Grat., 447, decided August 9, 1858, it was held, p. 471: In an action by a contractor on a railroad against the company for work and labor, the plaintiffs having offered evidence tending to show that certain excavation which was a part of the work in controversy was of solid rock, and the defendant having offered evidence tending to show the contrary, the defendant moved the court to have the jury taken to view the premises, they being about thirty miles off on the line of the road, and offered to send the jury on the train of the company, and to defray the expenses. The court having overruled the motion, the appellate court cannot say the court below erred, unless it appears from the record that a view was necessary to a just decision, and that does not so appear.

SECTION 3168.

In the case of *Price's Executor vs. Fugua's Administrators*, 1 H. & M., 385, decided July, 1807, it was held: A new trial ought not to be granted on the affidavit of two of the jurors that they were influenced in their verdict by information given by one of their own body in the jury room.

In the case of *Atlantic & Danville Railroad Company vs. Peake*, 87 Va., 130, decided December 4, 1890, it was held: Remarks of juror during trial, even if reprehensible, cannot be taken advantage of after verdict; and for a juror to say upon hearing a fact testified by a witness, "Yes sir; I know all about it. That is so," is only in obedience to this section, declaring that "a juror, knowing anything relative to a fact in issue, shall disclose the same in open court."

TITLE XLVII.

CHAPTER CLIII.

CHAPTER CLIV.

SECTION 3193.

In the case of *Benjamin Watkins Leigh*, 1 Munf., 468, decided November 16, 1810, it was held: The practice of the law is not an office or place under the Commonwealth. An attorney-at-law is not bound, as a requisite to his admission to the bar of any court, to take the oath prescribed by the third section of the act to suppress dueling.

SECTION 3196.

Ex Parte Fisher, 6 Leigh, 619, decided by the General Court December, 1835. By the provisions of the statute, a court cannot for malpractice of an attorney or counsellor, committed in its presence, suspend the license of the party offending in a summary way, but must direct an information to be filed against him, and inflict the punishment on the verdict found on such information.

SECTION 3198.

In the case of *Wells vs. The Commonwealth*, 21 Grat., 500, decided November, 1871, it was held: An appeal may be made to the court of appeals from the judgment of a circuit court imposing a fine upon a person for a contempt of the court in aiding to obstruct the execution of a decree of the court.

Where a rule is made upon a person to show cause why he should not be punished for a contempt of the court in aiding to obstruct the execution of a decree of the court, he purges himself of the contempt by answering under oath that in what he had done he acted as counsel in good faith, without design, wish, or expectation of committing any contempt of, or offering disrespect to, the court.

The duty of an attorney to his client cannot conflict with his obligation to demean himself honestly in the practice of the law, or to be faithful in his country. But if he acts in good

faith and demeans himself honestly, he is not responsible for an error in judgment.

SECTION 3199.

In the case of *Ex Parte Collins*, 2 Va. Cases, 222, decided by the General Court, it was held: The clerk of a superior court of law cannot be permitted to practice as attorney in the court of which he is clerk, notwithstanding his license to practice in all the courts of the Commonwealth.

SECTION 3200.

In the case of *Stephens vs. White*, 2 Wash., 260 (1st edition, p. 203), decided at October term, 1796, it was held: To hold an attorney responsible in damages for mismanagement of a cause, it is necessary to show gross negligence.

It is also necessary to show that he was employed at a time when he might have made the suit good by proper skill, and is not liable for the acts of a predecessor or colleague not employed by himself.

In the case of *Tailor vs. Armistead*, 3 Call, 200 (2d edition, 171), decided May 7, 1802, it was held: To recover 15 per cent. damages under this section it is necessary to show not only the receipt of the money, but also a demand for the payment of the same.

In the case of *Rootes vs. Stone*, 2 Leigh, 650, decided April, 1831. An attorney at law is employed to collect debts, and some of them are lost to his client through his negligence. Held: The attorney is chargeable for the principal of the debts lost, but not with interest thereon.

In the case of *Pidgeon vs. Williams's Administrators*, 21 Grat., 251, decided August, 1871, it was held: Attorneys at law are liable as ordinary bailees for money collected for their clients.

An attorney receiving in February, 1862, Confederate currency, which was then the only currency, and very little depreciated, is not liable to his client for receiving such money, he not having forbade it.

An attorney receiving Confederate currency for a debt due to his client, deducts his fees from the amount, and deposits the balance in a bank of good credit, not in his own name, but to "collection account," an account in which he deposits all money collected by him for his clients, and on the book of the bank the name of the client is written opposite the name of the sum deposited for him. The client not calling for his money until the end of the war, when the bank has failed, the attorney is not liable for it.

The client living in Maryland, but the place of his residence being unknown to the attorney, though the client comes to the

town where the attorney lives occasionally during the war, when the Federal forces have possession of it, but does not call upon the attorney, nor does he let him know he is there. Held: The attorney is not liable for failing to give him notice that the money has been collected.

In the case of *Tanner vs. Bennett's Administrator*, 33 Grat., 251, decided April, 1880. T. died in 1863, and his estate was committed to B., sheriff of P., as administrator with the will annexed. Among the assets was a bond of F., who lived in P. E. county, to T. for one thousand seven hundred and eighty-five dollars, executed November 2, 1857. In 1863 B. sent this bond to H., a lawyer living in P. E. county, for collection by suit or otherwise. F. had in possession a considerable estate, real and personal, but he was largely indebted, and H., as well as other counsel who had claims against F., apprehended that if he was sued he would convey his estate to secure preferred creditors; and therefore H. did not bring suit upon the bond until 1866. Several suits were brought against F. in January, 1866, and he sold and conveyed his land in payment of debts mentioned in the deed, and soon after went into bankruptcy, paying nothing. Held: Neither B. nor his counsel was guilty of negligence; and B.'s estate is not responsible for the debt.

In the case of *Tuley vs. Barton*, 79 Va., 387, decided September 25, 1884, it was held: Attorney's receipt for claims for collection may be so far added to by parol testimony as to show a contemporaneous additional contract on the part of attorney to receive the claims as collateral security for debts due him from client. But the liability of attorney or transferee is only for the exercise of due diligence to collect those claims; and in neither capacity is he responsible for their loss, unless such loss be occasioned by his negligence.

In the case of *Hudson vs. Johnson*, 1 Wash., 10, decided at the spring term, 1791, it was held: Payment to an attorney-at-law under the custom of the country is good, though made after the action brought.

In the case of *Branch vs. Burnley et als.*, 1 Call, 147 (2d edition, 127), decided November 6, 1797, it was held: An attorney-at-law may receive the money recovered from the defendant, and his receipt will discharge the judgment.

In the case of *Herbert vs. Alexander*, 2 Call, 499 (2d edition, 418), decided October 20, 1800, it was held: An attorney-at-law only represents the plaintiff or defendant in court to do such acts as the plaintiff or defendant, if in the court, might do himself; but he has no right to enter into private or executory contracts.

The powers of an attorney do not extend to the making of any collateral agreement.

In the case of *Wilson vs. Stokes and Betts*, 4 Munf., 455, decided October, 1815, it was held: It seems that since the attorney-at-law, who prosecutes a suit and obtains judgment, has full power to receive the money recovered when levied by execution, a demand made by him of the sheriff by whom it is levied is sufficient to authorize a motion against such sheriff for non-payment.

In the case of *Jas. Smock vs. Laurence T. Dade*, 5 Rand., 639, decided by the General Court, November, 1826, it was held: An attorney-at-law has no right to receive a bond from the debtor in discharge of his client's claim, without the assent of the client. If he does, he is the agent not of the plaintiff, but of the defendant, and the plaintiff may still proceed against the defendant.

In the case of *Wilkinson & Co. vs. Holloway*, 7 Leigh, 277, decided February, 1836. An attorney-at-law employed to collect a debt may receive payment in money, but has no authority to accept anything else in satisfaction.

Therefore, where an attorney employed to collect a debt discounts from it a debt he himself owes the debtor, and takes for the balance the debtor's assignment of a bond of third persons, the creditor is not bound by such arrangement.

An attorney-at-law employed to collect a debt takes in satisfaction thereof the debtor's assignment to the creditor of a bond of third persons held by the debtor, and institutes a suit on the assigned bond against the obligors; the creditor prosecutes the suit, which is long pending, and pays the costs therein incurred. Held: The creditor does not thereby ratify the act of the attorney in commuting the original debt; and the recovery against the obligors in the assigned bond having proved unavailing, the debtor's liability still continues.

In the case of *Smith's Administrators vs. Lambert*, 7 Grat., 138, decided November 18, 1850. An attorney-at-law receives a claim for collection, and he brings suit upon it and obtains a judgment. The debtor then puts into his hands the bond of a third person for about the amount that is due on the judgment, and the attorney gives him a receipt by which he says that he has received the bond on which he is to bring suit, and after paying himself his fee and commission is to apply the balance to the credit of the judgment. The attorney receives the money on the bond, but does not pay it over to the creditor. Held: This is a valid payment by the judgment-debtor.

In the case of *Hill et als. vs. Bowyer et als.*, 18 Grat., 364, decided April, 1868, it was held, p. 378: A defendant upon whom process has been served, who wholly neglects his defence, or contents himself with merely writing to a lawyer who practices in the court to defend him, without giving him any information

about his defence, or inquiring whether he is attending to the case, is not entitled to relief against a decree by default, on the ground of surprise, however grossly unjust the decree may be.

In the case of *Holland et ux. vs. Trotter*, 22 Grat., 136, decided April 10, 1872, it was held, p. 143: Where the defendant at law has been prevented from making his defence by the assurances or promises of the counsel of the plaintiff, the court will relieve him.

In the case of *Wilson et ux. vs. Smith*, 22 Grat., 493, decided August 28, 1872, it was held: In a suit for partition of real estate by W. against S. W. dies and the suit is revived in the name of his widow and infant son. The counsel employed by W. will be presumed, in the absence of evidence to the contrary, to be continued as counsel in the cause; and a decree for a sale of the property entered upon a consent of the counsel is a valid decree, and the sale under the decree will be sustained.

In the case of *Johnson vs. Gibbons*, 27 Grat., 632, decided July, 1876, it was held: In 1860 attorneys-at-law receive two notes and give a receipt which says: "Received for collection," and describing them, says: "On the above notes we are about to bring suit, and prosecute them to judgment, and to have a fee of five dollars in each case." Though the clause of the receipt may be construed to relieve them from the obligation to collect, and from the corresponding compensation or commission for collecting, it cannot be construed to deny to them the authority to collect, or to limit them to the function of prosecuting the claims to judgment.

Judgments having been recovered in the cases, and executions issued, which were stayed, the debtor in 1862 pays to the attorneys two thousand six hundred dollars in part of these debts, the payment being in Confederate money, neither the attorneys nor the debtor having any notice that the creditor was unwilling to receive Confederate money, and the attorneys write immediately to the creditor that they have this money for him; and he, holding that the attorneys had no authority to collect the money, does not reply to their letter, and neither attorneys nor debtor hear of any objection to their receipt of the money until 1874. The creditor is concluded by his failure to give his attorneys notice of the objection to their receiving the money.

SECTION 3201.

In the case of *Yates & Ayres vs. Robertson & Berkley*, 80 Va., 475, decided May 7, 1885, it was held: The clerk of the court cannot tax against the losing party in a suit other than the fees prescribed by statute. But contracts, expressed or implied, between attorney and client for fees, are not limited as to the amount, and may be enforced as other contracts. A client

cannot refuse to pay his attorney his fees, though that attorney be practicing without license.

In the case of *Thomas vs. Turner's Administrator et als.*, 87 Va., 1, decided November 6, 1890, it was held: This section, enacting that "in any contract made with an attorney, other or higher fees shall be valid, and may be enforced in like manner with other contracts," does not apply to an agreement made after the relation of attorney and client is established.

In the case of *Rixey (Trustee) vs. Peare Bros. & Co.*, 89 Va., 113, it was held: An agreement in a note to pay an attorney's fees for collection is a penalty, and not enforceable.

SECTION 3202.

In the case of *Citizens' National Bank of Charlottesville vs. Manoni*, 76 Va., 802. *Judicial Sales—Costs—Fees of Counsel.*—When property is sold under a decree of court to satisfy liens thereon, out of the proceeds must be paid the taxed costs, but not more than the legal fee to the plaintiff's counsel. If an allowance beyond the usual fee for counsel representing the creditors be proper, and it be paid out of the proceeds, it should be credited ratably on the liens, so as not to tax the debtor with it.

In the case of *Doswell vs. Anderson*, 1 Patton & Heath, 185, decided January, 1855, it was questioned: Whether the trust subject is liable beyond the profits for fees of counsel employed by *cestui que trust* and trustee.

In the case of *Gurnee vs. Bausemer & Co.*, 80 Va., 867, decided October 8, 1885. B. & Co. held judgments against M. binding on land of his surety, W., aliened to G. In a suit of *Band vs. M.*, funds were recovered to pay M.'s debts. A decree was entered requiring those participating in said funds to pay 25 per cent. of their claims for fees allowed plaintiff's counsel. B. & Co. participated, received the amounts of their judgments, less said 25 per cent., and receipted in full. Later, B. & Co. claimed that their judgments were subsisting liens on W.'s land aliened to G., who was no party to the suit, to the extent of said 25 per cent.; and the court below directed the receiver to collect said 25 per cent. of G. On appeal it was held: Release of the principal, M., was the release of his surety, W., and the judgment-liens were discharged *in toto*. Creditors have no legal right to be reimbursed by their debtors for counsel-fees contracted by them. G. being no party to the suit, the decree was a nullity *quoad* him.

CHAPTER CLV.

TITLE XLVIII.
CHAPTER CLVI.

SECTION 3207.

See references to Section 3224.

In the case of *Segouine vs. the Auditor of Public Accounts*, 4 Munf., 398, decided March 13, 1815, it was held: A notice that a motion will be made for a judgment against a sheriff for the amount of his receipt for sundry executions for fines, "as appears by a copy of said receipt," is sufficient, without mentioning the aggregate sum due, the separate amount of each execution, or the time when delivered to the sheriff. And a judgment thereupon for the aggregate sum due, without distinguishing the amount of each execution, will be sustained if conformable to law in other respects.

A notice is sufficient if delivered to a free white person above sixteen years of age, in whose house the party for whom it is intended is a boarder, though not a permanent resident.

In the case of *Barksdale vs. Neal*, 16 Grat., 314, decided March 5, 1862, it was held: A return upon a summons "executed in person," signed by the deputy-sheriff with his own name and that of his principal, shows that the summons was actually served on the defendants; and therefore if it is defective the defect can only be taken advantage of by plea in abatement.

In the case of *Goolsby, etc., vs. St. John*, 25 Grat., 146, decided June, 1874. In 1866 S. sues G. & R., partners, in debt. The sheriff returns on the process executed on G., leaving a copy at the house with his sister, and on R., leaving a copy at his house with his wife. On his return there is an office judgment confirmed. The stay-law prevents an execution on this judgment, but there is a judgment upon notice for a year's interest upon the judgment in 1867, and also in 1868. In 1870 execution is issued on the judgment, when G. & R. enjoin it on the ground that a credit of one hundred dollars endorsed on the note should have been six hundred dollars, and that the process was not properly served, and they had no notice of the suit. S. demurs to the bill for want of equity. Held: G. & R. having had notice of the judgment within the time limited for a motion to quash it, they had a remedy at law by motion to quash the sheriff's return, and therefore they are not entitled to relief in equity.

In the case of *McVeigh vs. The Bank of the Old Dominion*, 26 Grat., 785, decided November 18, 1875, it was held: The statute directing how notices may be given does not apply to a notice of the dishonor of negotiable paper.

In the case of *Smithson vs. Briggs*, 33 Grat., 180, decided April, 1880. In an action of ejectment, the officer returns upon the rule to plead, "G. W. Smithson not being found at his usual place of abode, a true copy of the within rule was left at his residence with his daughter, who is over the age of sixteen years, and purport explained to her, this 28th day of August, 1871." Held: It will be presumed that the word "residence" was used as synonymous with "his usual place of abode," and that the daughter was a member of defendant's family, and the notice was sufficient.

In the case of *Clay et als. vs. Walter & Co.*, 79 Va., 92, decided May 1, 1884, it was held, p. 97: Whatever the design of the grantor, a settlement on a woman in contemplation and in consideration of marriage is valid, unless her knowledge of his intended fraud is clearly and satisfactorily proved. Service, by creditors of grantor of written notice on the grantee, before the marriage, of his fraudulent design in making the settlement, cannot affect her constructively with notice of such design; but her actual knowledge of, and participation in, that fraudulent design must be clearly established by proof.

The reference to 11 Virginia Law Journal, 627, is an error, as nothing in point there appears.

In the case of *Drew vs. Anderson*, 1 Call, 51 (2d edition, 44), decided November 16, 1797, it was held: If notice, which is the act of the parties and not of counsel, be general, it is to be favorably expounded, and applied to the truth of the case as far as it will bear; but if it descends to particulars, it must be correct as to them.

In the case of *Graves vs. Webb*, 1 Call, 444 (2d edition, 385), decided November 2, 1798, it was held: If the notice apprise the defendant of the grounds of the motion, it is sufficient.

In the case of *Lemoigne vs. Montgomery*, 5 Call, 528, decided October, 1805, it was held: If the notice on a forthcoming bond be signed by the plaintiff, it is sufficient, although it omit to state to whom the bond is made payable, as the defendant in such a case has no reason to presume that the plaintiff means to move upon a bond not given to himself.

For reference to 4 Munf., 398, see *supra*, this section.

In the case of *Cooke vs. The Patriotic Bank of Washington*, 1 Leigh, 433, decided October, 1829. In a notice of a motion to be made on a forthcoming bond, the bond is described by mistake as executed by John, when it was, in fact, executed by George M. Cooke. It was held: Variance material, and notice insufficient.

In the case of *Hendricks vs. Shoemaker*, 3 Grat., 197, decided July, 1846, it was held: One joint notice to the constable and his sureties, upon defaults of the constable in several cases, is

sufficient, and the justice should give a separate and distinct judgment in each case.

In the case of *Booth vs. Kinsey*, 8 Grat., 560, decided April, 1852. A debtor in execution executes a forthcoming bond to the creditor, and a third person and the obligee execute the bond with the debtor, as his sureties. The bond being forfeited, the obligee gives notice to the principal obligor and the other surety of a motion of award of execution upon the bond against them, but the notice does not mention the obligee as co-obligor. Held: The notice is not defective for failing to mention the obligee as a co-obligor.

In the case of *Monteith (Sheriff) et als. vs. The Commonwealth*, 15 Grat., 172, decided April, 1859, it was held: The notice to the sheriff and the sureties being of a motion for a balance of the land, property, and free negro taxes of 1857, and the judgment being for a balance due upon these and also upon the license tax, this is error, for which the judgment will be reversed in the appellate court.

In the case of *Board of Supervisors of Washington County vs. Dunn et als.*, 27 Grat., 608, decided June, 1876, it was held: A notice by the supervisors of a county to D., late sheriff, and his sureties, that they will move the county court at its November term to render judgment against them for the sum of \$4,840.03, the same being the amount of said D.'s deficiencies and default for the county's levy for the year 1869 that went into D.'s hands as sheriff as aforesaid, and which he had failed to account for, etc., is sufficiently specific and definite to warrant a judgment thereon.

The rules governing notices are, that they are presumed to be the acts of parties, and not of lawyers. They are viewed with great indulgence by the courts, and if the terms of the notice be general, the court will construe it favorably, and will apply it according to the truth of the case, as far as the notice will admit of such application. If it be such that the defendant cannot mistake the object of the motion, it will be sufficient.

In the case of *Carr et als. vs. Mead's Executors et als.; Same vs. Clagett's Executors et als.*, 77 Va., 142 and 158, decided February 18, 1883. In 1871, on the entire stock of goods of S. B., a retail storekeeper, execution of R. F. & Co. was levied by W. B., then sheriff. Thereupon same claimants for the goods on divers pretexts, notably M. and C., who claimed by levy thereon by a former sheriff, under senior executions. Sale was made by W. B., sheriff, who then instituted a chancery suit convening F. R. & Co., M. C., and the other claimants, and had an account of liens and priorities. In 1875 the court decreed that sheriff, W. B., pay out proceeds to M. and to C. their respective claims. Sheriff, W. B., squandered the money and became in-

solvent. In 1879 M. and C. moved the county court of L., wherein sheriff, W. B., qualified for judgment against him and sureties for money each was entitled to. Defendants moved to dismiss for want of jurisdiction, and to quash the notice for want of certainty, and to amend return on the execution, all whereof the county court overruled, but, on motion of plaintiffs, admitted as evidence the chancery record, yet on the merits adjudged for defendants. On error, circuit court affirmed the overruling of defendants' motion and the admitting of the record as evidence, but reversed the judgment on the merits, and adjudged to M. and to C. the sums of money each was entitled to, and costs. On error here, held:

1. The county court of L. had jurisdiction to hear and determine the motions of M. and C. for judgments on the official bond of the sheriff and his sureties.

2. The notice was sufficient.

See references to Section 3249.

In the case of *Fowler vs. Mosher*, 85 Va., 421, decided September 20, 1888. This section provides that notice may be served by delivering a copy to a "member of the family" of the person to be notified. Held: Delivery to a "mere boarder, a stranger to his blood" is not sufficient, and appearing and contesting validity of service is no waiver of defects of notice. *Sed quære*: Is delivery to a servant of the person to be notified sufficient? By this section, return stating that person to be notified was "not at home." Held: Sufficient to authorize service upon member of his family.

SECTION 3209.

In the case of *Virginia Fire and Marine Insurance Company vs. Vaughn*, 88 Va., 832, decided March 10, 1892. Service of summons on defendant's agent having been made within ten days of return-day, and suit having been remanded to rules to be properly matured, and an alias summons having been issued and duly served, it was held: Commencement of suit was the issuance of original summons and saved the suit from being barred by the limitation clause in the policy.

SECTION 3210.

In the case of *Curr et als. vs. Mead's Executrix et als.*, 77 Va., 142, decided February 8, 1883, it was held: To sustain such motion, any notice, however informal, which informs the defendants of the nature and object of the motion is sufficient.

SECTION 3211.

In the case of *Amis vs. Koger*, 7 Leigh, 220, decided February, 1836. Notice is given by K. to M. of a motion to be made at June term of a county court for money paid by K. as

A.'s surety; the motion is continued without A.'s consent from June term to August term, passing by the intermediate July term: Held: This was a discontinuance, and a judgment subsequently rendered for the plaintiff on the same notice is therefore erroneous.

In the case of *Hale vs. Chamberlain*, 13 Grat., 658, decided February 10, 1857, it was held: In a proceeding under the statute to recover money due upon contract by notice, the notice must be returned forty days before the commencement of the term, and put upon the docket of the court, or it cannot be tried at that term.

In the case of *Davis (Sheriff) vs. The Commonwealth*, 16 Grat., 134, decided March 5, 1861, it was held, p. 136: All judgments where there has been no appearance by the defendant are judgments by default, within the meaning of the act.

SECTION 3212.

In the case of *Glassel vs. Delima*, 2 Call, 368 (2d edition, 309), decided October 27, 1800, it was held: On a joint notice to all the obligors in a forthcoming bond the plaintiff may take judgment against one of the defendants.

In the case of *Watkins's Executor vs. Tate*, 3 Call, 521 (2d edition, 451), decided June 28, 1790, it was held: The executors of two deceased joint obligors cannot be joined in the same action.

In the case of *Grymes vs. Pendleton*, 4 Call, 130, decided May, 1788, it was held: The representatives of two deceased persons cannot be joined in the same action, although the undertakings of the testators might have been joint and several.

In the case of *Winston vs. Whitlocke*, 5 Call, 435, decided April, 1805. A. gave a forthcoming bond with W. as security. Judgment was rendered on the bond against A. and a *fi. fa.* issued. Property was taken, but the *fi. fa.* was not returned. Held: These proceedings were no bar to a motion upon the bond against W.

In the case of *Booth vs. Kinsey*, 8 Grat., 560, 565, decided April, 1852. A debtor in execution executes a forthcoming bond to the creditor, and a third person and the obligee execute the bond with the debtor, as his sureties. The bond being forfeited, the obligee gives notice to the principal obligor and the other surety of a motion for award of execution upon the bond against them; but the notice does not mention the obligee as co-obligor. Held: That the bond is a valid bond to bind the other surety, but that he is only liable as a co-surety with the obligee.

That if the principal creditor proves insolvent the surety may be relieved to the extent of one moiety of the debt, either by bill

in equity, or by motion under the statute for the relief of sureties. The notice is not defective for failing to mention the obligee as a co-obligor.

SECTION 3213.

In the case of *Asbury, etc., vs. Calloway, etc.*, 1 Wash., 72, decided at the spring term, 1792, it was held: On a motion on a joint obligation, where one defendant after severance pleads *non est factum*, such plea should be determined by a jury before any judgment in the case be entered.

In the case of *Burke (Administrator), etc., vs. Levy's Executors*, 1 Rand., 1, decided November, 1821, it was held: Where *non est factum* is pleaded to a motion on a forthcoming bond, the court may render judgment without the intervention of a jury, or they may empanel a jury to try the issue at their discretion.

In the case of *McKinster vs. Garrot et als.*, 3 Rand., 554, decided December 1, 1825, it was held: No formal issue need be joined on motion on forthcoming bond, as the pleadings may be *ore tenus*, and the court may pronounce judgment on the evidence.

In the case of *Clafin & Co. vs. Steenbock & Co.*, 18 Grat., 842, decided June, 1868, it was held, p. 846: On a motion to abate an attachment on the ground that it was issued on false suggestions, and without sufficient cause, the plaintiff declining to express any wish for a jury, and the defendant expressing a wish that a jury might be dispensed with, and that the court should hear and decide the case, the court should hear and decide it without a jury.

The reference to 27 Grat., 608, is an error.

In the case of *Dunlap vs. Dillard & McCorkle, etc.; Same vs. Karn & Hickson*, 77 Va., 847, decided October 18, 1883, it was held, p. 855: The power given any circuit court in vacation, under the act of 28th of February, 1866, amending Code 1860, Chapter 151, Section 148, to quash or to dismiss an attachment, conflicts not with, and repeals not, any other provision of that chapter, and was intended to give the defendant a speedy and summary remedy where he has a clear defence, and to have the attachment quashed or dismissed, if in the opinion of the judge it was sued out without sufficient cause.

The judgment in vacation, under said Section 6, refusing to quash or dismiss the attachment, is not final, and does not supersede the defendant's right to make defence at the trial in term against the attachment in any respect under Sections 21, 22, and 23 of said chapter.

The court's order for the defendant's delivery of the attached and replevied property to the sheriff should be reasonable as to the time and place of such delivery.

CHAPTER CLVII.

SECTION 3214.

In the case of *Beirne vs. Rosser & Turner*, 26 Grat., 537, decided September 23, 1875, it was held: R. brings assumpsit against B. in the county of N., and the process is served upon him. B. appears at the rules and files a plea in abatement, that at the time of the service upon him, and at this time, he was not and is not a resident of N., but was and is an inhabitant of, and resides in, M. county, West Virginia. This plea does not give the plaintiff a better writ in this State, and is therefore bad.

In the case of *Warren vs. Saunders*, 27 Grat., 259, decided March 9, 1876. W. sues S. in assumpsit in the county of J., and sends the process to the city of R. where S. resides, and it is served upon S. by the sheriff of R. S. files a plea in abatement stating these facts, but does not say where the cause of action arose. Held: The plea is sufficient in this case, though it does not give the plaintiff a better writ.

W. having demurred to the plea, and the court having sustained the demurrer, when the cause is called for trial S. moves to dismiss the cause from the docket. Held: The motion should have been sustained and the suit dismissed; the statute expressly providing that, when the suit is brought where the cause of action arose, process shall not be directed to an officer of any other county or corporation than that wherein the action is brought.

In the case of *Hull vs. Fields & Thomas*, 76 Va., 594.

Jurisdiction.—Annulment of Conveyance.—Case at Bar.—Under contract made in S. county, H. executed deed conveying real estate therein situated to F. & T. Later, in the circuit court of that county, H. brought suit against F. & T. to rescind the contract and vacate the deed. Summons was not served in that county on either of the defendants, both of whom resided elsewhere. Held: The suit was properly brought in S. county under Code 1873, Chapter 165, Section 1, Clause 3, and Section 2.

See *Warren vs. Saunders*, 27 Grat., 259, *supra*.

In the case of *Rugland vs. Broadnax et als.*, 29 Grat., 401, decided November, 1877, it was held: The Circuit Court of the city of Richmond has no equity jurisdiction except in certain cases specified in the statute, in which the State is interested or some of the officers and boards representing the State are necessary or proper parties; and in such cases its jurisdiction is exclusive.

In the case of *The Commonwealth (by, etc.) vs. Ford et als.*, 29 Grat., 683, decided January, 1878, it was held, p. 694: A judgment in the name of the Commonwealth for W., treasurer of

C. county, founded on a notice in the name of the Commonwealth, proceeding by W., late treasurer of C., against F., the collector of township M., and his sureties upon his official bond, is a judgment in favor of the Commonwealth. On such a judgment the Commonwealth, at the relation of T., auditor of accounts, may maintain a suit against F. and his sureties. The judgment having been recovered in C. county, the suit may be brought in that county. Except in cases where it is otherwise specially provided for, the Commonwealth may prosecute her suits in any of the courts in which other parties may prosecute suits of like character.

In the case of *Blanton (Commissioner) vs. Southern Fertilizer Company et als.*, 77 Va., 335, decided March 29, 1883, it was held: This court has chancery jurisdiction only in cases where it may be necessary or proper to make certain enumerated officers or corporations defendants. The commissioner of agriculture is not one of these.

Chancery has jurisdiction to enjoin illegal acts of an officer attempted *colore officii*. A suit against an officer is not necessarily a suit against the State, *e. g.*, a suit to restrain one from doing unlawful acts under color of an executive office, such as any illegal acts of the commissioner of agriculture.

SECTION 3215.

For the references here given, see *supra*, Section 3214.

CHAPTER CLVIII.

SECTION 3220.

In the case of *Kyles vs. Ford*, 2 Rand., 1, decided November 7, 1823, it was held: It seems that where a *scire facias* against bail is returnable to a rule-day, the day of return and of appearance are the same. If the writ is returnable to the first day of a court, and that happens to be a rule-day, that day is also the appearance-day. But if a *scire facias* is made returnable to a rule-day, and the same day is the first day of the court, the writ is merely void, for in that case it can only be returnable to the first day of the court. Process made returnable to a day which is not a return-day is void; and a *scire facias* cannot be amended.

In the case of *Couch vs. Miller*, 2 Leigh, 545, decided February, 1831. A *fi. fa.* is directed to the sheriff of Campbell, but is delivered to, and levied by, the sergeant of Lynchburg, who takes a forthcoming bond upon it, reciting that the writ had been directed to the sergeant. Held: The writ gave no authority to the sergeant, and no warrant to him to take the forthcoming bond; and that the bond is variant from the execution, and therefore the bond ought to be quashed.

In the case of *Hare vs. Niblo*, 4 Leigh, 359, decided March, 1833. A *capias ad respondendum* is made returnable to the next term generally, instead of the first day of the term, as the statute requires; the writ is executed before the term, and returned to the first day; an office judgment is entered at rules; at the ensuing term defendant moves to quash the writ and all the proceedings on it at rules, on the ground that the writ, being returnable to the term generally, was naught; and the court overrules the motion. Held: The motion was rightly overruled.

In the case of *Hickam vs. Larkey*, 6 Grat., 210, decided July, 1849, it was held: A defendant in an action at law, not having entered his appearance either at rules or in term, has a right, on the calling of the cause, to object that it has not been legally matured for trial. In considering such objection, all the processes, returns, and proceedings are necessarily parts of the record, and are to be looked into. A writ which purports to be a *pluries capias*, but which is without date, and is not attested by the clerk, is wholly null and void as process; and an order based thereon directing a proclamation to issue, and all the subsequent proceedings, are without warrant and illegal.

See the case of *Warren vs. Saunders*, cited *ante*, Section 3214.

SECTION 3224.

The reference to 11 Va. Law Journal, 627, is an error, not in point.

In the case of *Andrews vs. Fitzpatrick*, 89 Va., 438, decided December 1, 1892, it was held: Unless the office of coroner is vacant, or the incumbent under disability, a constable cannot lawfully serve a process directed to the sheriff. Such is no legal service, and should be quashed.

SECTION 3225.

In the case of *The Bank of Virginia vs. Craig*, 6 Leigh, 399, decided May, 1835. Bill filed by the sureties of a guardian, and the president and directors of the Bank of Virginia, not the president, directors and Company of the Bank of Virginia, which is its corporate name; injunction ordered by the court against the guardian, to restrain him from selling his ward's stock in bank; a *subpoena*, with an injunction endorsed by the clerk, to restrain the directors and president of the bank from permitting the guardian to transfer the stock, is served on the president. This process, so served, does not bind the bank; nor is it even notice to the bank, actual or constructive, of the equity asserted by the guardian's sureties in their bill, since the bank in its corporate character is not party to the bill, and the president is not the officer of the bank whose province it is to receive such notice.

In the case of *Mason vs. Farmers' Bank of Petersburg*, 12 Leigh, 84, decided March, 1841. Upon the construction of the statute "authorizing suits against branch banks in this Commonwealth." Held: A suit cannot be maintained against the president and directors of the branch; the suit must still be brought against the principal bank by its corporate name.

In the case of *The Bank of the United States et als. vs. The Merchants' Bank of Baltimore*, 1 Rob., 573 (2d edition, 605). Under the act in 1 Rev. Code 1819, Chapter 123, p. 474, directing the method of proceeding in courts of equity against absent debtors, a creditor of a corporation created by another State may maintain a suit in equity against such corporation as a defendant out of this Commonwealth, where there are persons within the same who have in their hands effects of, or are indebted to, such absent defendant; or may maintain a suit in equity against such corporation as an absent defendant, where it has lands or tenements within the Commonwealth.

In the case of *Baltimore & Ohio Railroad Company vs. Galahue's Administrators*, 12 Grat., 655, decided September 11, 1855, it was held, p. 661: The Baltimore & Ohio Railroad Company is a corporation of the State of Virginia, and although its principal office is in Maryland, and its principal officer resides there, it may be sued in Virginia on contracts made here.

A corporation may be summoned and proceeded against as a garnishee. When the word "person" is used in a statute, corporations as well as natural persons are included for civil purposes. When a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer, under its corporate seal.

The reference to 16 Grat., 314-317, is an error.

In the case of *Fairfax vs. City of Alexandria*, 28 Grat., 16, decided January, 1877, it was held: In a proceeding to confiscate property of a person charged to be in rebellion, the directions of the attorney-general are, that the method of seizure of the property shall be conformed as nearly as may be to the State laws, if there be such. When, therefore, the proceeding is to confiscate debts due from a municipal corporation, the notice to the debtor must be to the mayor or other officer named in Virginia statute; and notice given to the auditor of the corporation is of no effect; and the judgment based upon such notice is null and void.

In the case of *Shenandoah Valley Railroad Company vs. J. T. Griffith et als.*, 76 Va., 913 and 922.

Return.—Appellate Court.—An objection to a defective return of the service of process, made here for the first time, is too late.

In the case of *Dillard vs. Central Virginia Iron Company*, 82

Va., 734, decided January 13, 1887, it was held: Section 3232 applies only to non-resident defendants who are natural persons, and not to corporations nor their agents. Service of process upon corporations must be in this State upon an officer or agent resident here.

In the case of *N. & W. R. R. Co. vs. Cottrell*, 83 Va., 512, decided June 30, 1887, it was held: The service on any corporation, other than a bank of circulation, may be on any agent thereof in the county or corporation in which he resides, or in which the principal office of the company is located, whatever may be the employment of such agent.

SECTION 3227.

In the case of *Raub vs. Otterback*, 89 Va., 645, decided February 16, 1893, it was held: A writ which summoned defendants "before the — of our circuit court" is meaningless. A writ returnable at rules "on the first day of the next term, 1889," that day being the second Monday in June, whereas there was no rule until the third Monday, was invalid.

SECTION 3229.

In the case of *Lee & Fitzhugh vs. Chilton*, 5 Munf., 407, decided February 7, 1817, it was held: On a writ of *scire facias* against bail, a return by the sheriff that the defendant is no inhabitant of his bailiwick, and is not found within the same, is not a sufficient return of *nihil*; but it should be stated, also, that he has nothing in the bailiwick by which he could be summoned.

SECTION 3230.

In the case of *The United States (Incorporated by Pennsylvania and others) vs. The Merchants' Bank of Baltimore*, 1 Rob., 573 (2d edition, 605). Under the act in 1 Revised Code, 1819, Chapter 123, page 474, directing the method of proceeding in courts of equity against absent debtors, a creditor of a corporation created by another State may maintain a suit in equity against such corporation as a defendant out of this Commonwealth, where there are persons within the same who have in their hands effects of, or are indebted to, such absent defendant; or may maintain a suit in equity against such corporation as an absent defendant, where it has lands or tenements within the Commonwealth.

In the case of *The Baltimore & Ohio Railroad Company vs. Gallahue's Administrators*, 12 Grat., 655, decided September 11, 1855, it was held: Where the word "person" is used in a statute, corporations as well as natural persons are included for civil purposes.

In the case of *Dorr's Administrators vs. Rohr et als.*, 82 Va.,

359, decided September 16, 1886, it was held: During the war between the Confederate States and the United States an order of publication executed in Virginia was without legal effect, and was no notice, actual or constructive, upon a resident of New York.

This is the case cited from 10 Virginia Law Journal, 720.

In the case of *The Wytheville Insurance Company vs. Stultz*, 87 Va., 629, decided April 9, 1891, it was held: Where a company that does business both in banking and insurance is sued on a policy in the county where the insured property lies, and there is no agent residing there on whom process may be served, an order of publication is proper.

SECTION 3231.

See the references given to Section 3358.

In the case of *Hunter's Executor and Herndon's Executors vs. Spotswood*, 1 Washington, 145, decided at the fall term, 1792. There was an order of publication, not noted in the record. A certificate was produced from the clerk of the high court of chancery stating that due publication had been made. Held: Insufficient. The order must appear in the record.

In the case of *Myrick (Administrator of Lundie) vs. Adams*, 4 Munf., 366, decided January 30, 1815, it was held: Proof that an order of publication has been inserted in a newspaper for two months is not sufficient. It should also be proved that a copy was posted at the front door of the house in which the court is held.

In the case of *Craig vs. Sebrill*, 9 Grat., 131, decided August 2, 1852, it was held: In a suit in which there is an absent defendant, the decree recites that the cause came on, as to him, upon the bill, etc., and upon order of publication duly executed. This is conclusive that the order was duly made, published in the newspaper, and posted at the front door of the courthouse.

In the case of *Moore et als. vs. Holt*, 10 Grat., 284, decided July, 1853, it was held, p. 291: The decree states that the order of publication against the absent defendant has been duly published. It is to be taken in an appellate court that everything required by the statute was done.

SECTION 3232.

In the case of *Anderson vs. Johnson*, 32 Grat., 558, decided December 18, 1879, it was held: The certificate of M., describing himself as a justice of the peace of the county of B., in the State of Ohio, that P., a deputy-sheriff of said county and State, had made oath before him, the said M., of the delivery to the defendant of the copy of the summons and attachment,

not objected to in the court below, cannot be objected to in the appellate court.

In the case of *Smith & Wimsatt vs. Chilton, Assignee; Boyd M. Smith vs. Same*, 77 Va., 535, decided May 10, 1883. In 1878 C. sued out foreign attachments against S. & W., non-residents, and L., home defendant. The original summons was served on L., and as to S. & W. was returned "S. & W. non-residents." After the return-day another summons was returned endorsed, "Hereby we acknowledge legal service of the within," which acknowledgment was made in the District of Columbia. In 1879 sale of the attached effects was decreed. In 1880, before the decree was executed, S. & W. appeared and petitioned that the cause be reheard. The circuit court dismissed the petitions. Held: The acknowledgment by S. & W. of legal service within the District of Columbia must be treated as equivalent to an order of publication duly posted and published, and no more. Such acknowledgment did not give the court jurisdiction over the persons of the defendants so as to entitle it to render personal decrees against them, but it had the effect of substituted service under Code 1873, Chapter 166, Section 15, and brought these causes within the purview of Section 27, Chapter 148, Code 1873, and entitled the defendants, at any time within five years from the date of the decree, to have the cause reheard. The acknowledgment of the service sixty days before the date of the decrees complained of does not militate against the defendants' right to have the causes reheard.

In the case of *Burwell et als. vs. Burwell's Guardian*, 78 Va., 574, decided January 31, 1884, it was held: Where order of publication has been duly executed against non-resident or unknown defendants, no other notice is required to be given them in any proceedings in court or before a commissioner, or for the purpose of taking depositions, unless specially ordered by the court, if those defendants shall not appear within one month after completion of publication. But if they so appear, then they are entitled to notice in all the subsequent proceedings in the suit.

In the case of *Dillard vs. Central Virginia Iron Company*, 82 Va., 734, decided January 13, 1887, it was held: This section applies only to non-resident defendants who are natural persons, and not to corporations or their agents. Service of process upon corporations must be in this State upon an officer or agent resident here, according to Code, Section 3225. Suit is brought in a county in this State against a corporation domiciled in that county, and process is served upon the president of the company, resident in Philadelphia, by a third party, who make affidavit as required by this section. Held: Such service is insufficient to give the court jurisdiction.

This is the case cited in 11 Virginia Law Journal, 351.

SECTION 3233.

In the case of *Rootes (Executor) vs. Tomkins (Trustee)*, 3 Grat., 98, decided April, 1846, it was held: The statute directing the decree against an absent debtor to stand absolutely confirmed against the absent debtor who shall not within seven years appear and petition to have the cause reheard, only applies to so much of such decree as operated upon the estate or effects of such absent debtor, subject to the jurisdiction of the courts of this Commonwealth. A decree *in personam* against an absent debtor is entitled to all the respect to which any other decree is entitled in all collateral controversies. So if the property is sold under an execution issued thereon, the title to said property cannot be impeached by objections to the form or merits of the decree.

A decree against an absent debtor merges the original cause of action, so far as to enable the plaintiff to rely thereon in any subsequent proceeding to enforce it, as *prima facie* evidence of the demand it establishes, and to repel the statute of limitations except so far as the statute may apply to judgments or decrees.

Such a decree, so far as it reaches beyond the cause or thing subject to the jurisdiction of the court, and purports to operate *in personam* merely, so as to create a personal charge alone, is not of such binding and conclusive character as to preclude all inquiry into the merits thereof, notwithstanding more than seven years have elapsed since it was pronounced; but it may be shown to be erroneous, either upon its face, or by evidence *aliunde*.

Decrees against absent defendants have the same effect as decrees against absent debtors, and so far as the decree operates upon a subject within the jurisdiction of the court, the interests of such absent defendant therein are conclusively bound by the decree, unless he shall appear and petition for a rehearing within seven years. But the limitation of seven years has no application to so much of the decree as acts *in personam*, and establishes a personal demand.

In the case of *James River & Kanawha Company vs. Littlejohn*, 18 Grat., 53, decided October, 1867, it was held: In a suit in which there is an absent defendant, there is a decree against the home defendant, from which he appeals. Pending the appeal, the absent defendant may file his petition in the court below to be permitted to appear and file his answer in the cause, and may have the decree reheard and set aside if it is erroneous as to him.

If upon such rehearing the decree, or so much of it as is the subject of appeal, is wholly set aside, the appeal will generally be dismissed. But if an appeal is taken from the decree on

the rehearing before the dismissal of the first appeal, the appellate court may refuse to dismiss it.

In the case of *Cralle vs. Cralle*, 79 Va., 182, decided May 1, 1884, it was held: Defendants not served with process and not appearing may, if not served with a copy of the judgment more than a year before the end of five years from its date, within such five years have the case reheard; and if so served more than a year before the end of such five years, may do so within a year from such service.

CHAPTER CLIX.

SECTION 3236.

In the case of *Botts vs. Pollard*, 11 Leigh, 433, decided November, 1840, it was held: The rules shall be kept open for all purposes as long as the statute permits.

SECTION 3240.

In the case of *Ross vs. Gill et ux.*, 1 Wash., 87, decided at the spring term, 1792, it was held: The court has no power to direct a non-suit. They may advise it and direct the plaintiff to be called, but if he refuse to suffer a non-suit the court can only enforce their opinion by directing a new trial in case the jury finds against their direction.

The reference to 6 Rand., 674, is an error.

In the case of *Walker vs. Boaz*, 2 Rob., 485, decided November, 1843. A non-suit in a writ of right having been suffered under misapprehension on the part of the demandants and their counsel as to the legal effect of an instruction given at the trial, held: The court in the exercise of a sound discretion should, on the motion of the demandants, have set aside the non-suit, and this not having been done, the judgment overruling, such motion was reversed.

SECTION 3241.

In the case of *Buchanan et als. vs. King's Heirs*, 22 Grat., 414, decided July 13, 1872, it was held: It is the duty of a clerk to dismiss a suit when the process is served and the bill is not filed within the time prescribed by the statute. But if the bill is filed before an order of dismissal is entered, and the defendant answers without insisting upon the dismissal of the suit, and consents to the hearing of the cause, he thereby waives the objection.

SECTION 3242.

In the case of *Brown vs. Belches*, 1 Wash., 9, decided at the spring term, 1791. In an action on the case for a partnership debt there was a return of "no inhabitant," and an abatement

as to him; judgment against the other partner. Judgment affirmed.

SECTION 3243.

In the case of *Shaver vs. White and Dougherty*, 6 Munt., 110, decided February 9, 1818, it was held: Actions may be brought in the courts of this State under contracts entered into, or personal injuries committed, anywhere. In general, it is not necessary to state in the declaration where the contract arose or the injury was committed; but this is sometimes necessary, and then, for the sake of obviating the objection of a variance, or the like, the plaintiff is permitted to state, by a fiction under a *videlicet*, that the place is within the jurisdiction of the court in which the suit is brought; which fiction, being in furtherance of justice, cannot be traversed. In cases in which the plaintiff does not use this fiction, the defendant is not, in general, permitted to aver that the cause of action arose in another country, unless he wishes to justify the act by the laws of that country, or to show thereby that he is not responsible in the particular form of action in question; in which cases the locality of the act forms an essential part of his defence; but such plea does not go to the jurisdiction of the court, but only to the justification of the defendant. It is a principle that, if a party be justified as to a transaction in the country or place in which it is committed, he is justifiable everywhere.

In the case of *Payne vs. Britton's Executor*, 6 Rand., 102, decided January, 1828, it was held: In this State it is not error that the venue is laid in one county, and the action is brought in another, unless the defendant is an inhabitant of another county, and moves to dismiss the suit for that cause.

SECTION 3244.

In the case of *Thornton vs. Smith*, 1 Wash., 81, decided at the spring term, 1792, it was held: The allegation "within the jurisdiction of the court" is necessary, and cannot be supplied by equivalent words; hence the statute.

In the case of *Hughes vs. Clayton et ux.*, 3 Call, 554 (2d edition, 478), it was held: If an administrator brings detinue, he is not bound at the trial to produce the certificate for his obtaining letters of administration, unless he receives notice that it will be required.

In the case of *Hill vs. Pride*, 4 Call, 167, decided October, 1787, in the General Court, it was held: The jurisdiction must be averred in courts of limited authority as well in real as in transitory actions. This ruling, of course, is now reversed by the effect of the statute, which probably was passed because of the decision.

In the case of *Jarrett's Administrators vs. Jarrett*, 7 Leigh,

93, decided January, 1836, it was held: If in an action on a deed plaintiff makes profert of the deed, it is thereby made a part of the declaration; and defendant cannot object to the deed as evidence at the trial on the ground of variance.

In the case of *Sterrett vs. Teaford*, 4 Grat., 84, decided July, 1847, it was held: To take advantage by demurrer of a variance between the declaration and the bond declared on, the defendant must crave oyer of the bond.

In the case of *Smith's Administrator vs. Loyd's Executor*, 16 Grat., 295, decided March 5, 1862, it was held: In action of debt upon a bond, plaintiff, to excuse the non-production of the bond, in answer to oyer craved by the defendant, says the bond is filed in another court; that he applied to that court for it; that his application was opposed by the defendant, and was refused by the court. This is sufficient excuse for not producing the original bond. An excuse for not producing the original bond sued on may be *ore tenus*. In this case the excuse was made in the form of a plea, which is demurred to. The demurrer does not authorize the court to decide upon errors in the declaration.

In considering a demurrer to a declaration, where oyer is craved of the bond sued upon, the court can only look at the declaration and bond, and if words in the bond, without the condition of extraneous facts, are insensible, they will be treated as surplusage. If the bond or deed sued on is not filed with the declaration, and the defendant appears at rules and craves oyer of it, which the plaintiff does not give, and the defendant will not plead without oyer, the clerk may properly take the rules without regard to the craving of oyer, so that the case may be ready to be disposed of at the next term of the court.

SECTION 3248.

In the case of *Moore vs. Mauro*, 4 Rand., 488, decided November, 1826, it was held: Under Section 86 of the act concerning proceedings in civil suits, etc., an account filed in an action of *indebitatus assumpsit*, which gives notice of the character of a claim, is sufficient, although it may be made up of various items of which no notice is given.

In the case of *Fitch vs. Leitch*, 11 Leigh, 471, decided January, 1841. "The plaintiff in assumpsit files with his declaration an account commencing in these words, "1833, January 1, to balance due per account rendered, \$1,405.07," which account he produces at the trial, and a witness is introduced to prove that at the date of this item the plaintiff delivered to the defendant a full bill of account to the amount of \$1,405.07, and that the defendant acknowledged the same, and promised to pay it.

Held: Such proof may be received under the *insimul computasent* count.

In the case of *Robinson & Meem vs. Burks*, 12 Leigh, 378, decided October, 1841, it was held: Under the statute, 1 Rev. Code, Chapter 128, Section 86, an account filed with declaration in assumpsit for goods sold, charging goods sold "per account rendered," with proof that the account was rendered, is sufficient.

In the case of *Minor vs. Minor's Administrators*, 8 Grat., 1, decided July, 1851, it was held: The count in an action of assumpsit by an administrator for money had and received, and the bill of particulars merely states an account in which the defendant is debtor to the administrator for money received, stating a sum certain; the count and the bill of particulars are not sufficient to admit proof of an admission by the defendant that he had received from a third person a certain sum belonging to the estate of the plaintiff's intestate.

In the case of *Central Lunatic Asylum vs. Flanagan*, 80 Va., 110, decided January 15, 1885, it was held: In action for damages, defendant's motion that plaintiff be required to file a bill of particulars is then denied, but at the next term it is allowed, and plaintiff files the bill, and trial proceeds without defendant asking for time to consider of his defence. He cannot raise the objection in the appellate court.

In the case of *Wright vs. Smith*, 81 Va., 777, decided April, 29, 1886, it was held: Account filed with declaration, under statute, is part of the declaration.

In the case of *Kenefeck vs. Caulfield*, 88 Va., 122, decided June 25, 1891. There was a declaration in assumpsit which stated the date of the account filed therewith, which was presented as a debt due at the institution of the suit, and verdict was rendered accordingly. Held: No error that the account was not dated.

SECTION 3251.

In the case of *Valley Mutual Life Association vs. Treewalt*, 79 Va., 421, decided October 2, 1884, it was held: Declaration drawn in substantial conformity with the statute is sufficient.

In the case of *Virginia Fire and Marine Insurance Company vs. Saunders*, 84 Va., 210, decided December 8, 1887, it was held: A declaration showing plaintiff's intention to proceed under the statute "to simplify declarations in actions against insurance companies," is a good statutory declaration; even though largely following the form of a declaration in debt.

In the case of *Tilley vs. Connecticut Fire Insurance Company*, 86 Va., 811, decided April 10, 1890, it was held: In action on policy it is sufficient that the declaration refer to policy and

allege in general terms the performance of all its conditions and the violation of none of its prohibitions, and it is not necessary that it allege that there had been an award, though policy provides that no suit be sustainable until after an award.

SECTION 3253.

In the case of *Holland et ux. vs. Trotter*, 22 Grat., 136, decided April 10, 1872, it was held: As a general rule the court will at any time before the hearing grant leave to amend where the bill is defective as to parties, or in the mistake or omission of any fact or circumstance connected with the substance of the bill, or not repugnant thereto. The amendment may be made by common order before answer or demurrer, and afterwards by leave of court.

In the case of *Buchanan vs. King's Heirs*, 22 Grat., 414, decided July 13, 1872, it was held: It is the duty of the clerk to dismiss a suit when the process is served, and the bill is not filed in the time prescribed by the statute; but if the bill is filed before an order of dismissal is entered, and the defendant answers without insisting upon the dismissal of the suit, and consents to a hearing of the cause, he thereby waives the objection.

SECTION 3254.

In the case of *McConico vs. Mosely*, 4 Call, 360, decided October, 1798, it was held: Whether the court of chancery should postpone the original cause until the cross suit is ready, that both may be heard together, is discretionary, and the discretion is to be exercised as circumstances may require for the attainment of justice.

Affected delay in preparing the cross suit for hearing would be just cause for proceeding to hear the original bill.

Suits between different parties claiming the same property will be heard together to avoid decrees that might clash with each other.

In the case of *Hudson et als. vs. Hudson's Executors*, 3 Rand., 117, decided December, 1824, it was held: The plaintiff in a cross bill cannot contradict the assertions in his answer in the original suit.

In the case of *Mettert's Administrator vs. Hagan*, 18 Grat., 231, decided January, 1868. M., in his lifetime, conveyed by deed to H. M.'s interest in the estate of J., deceased, upon the consideration, as expressed in the deed, of one thousand dollars. After the death of M., H. files his bill to recover the said interest; and M.'s administrator resists it, on the ground that M. was incapable from drink of making a contract, and that the deed was obtained by the fraud of H., and that H. gave no consideration for it. The evidence touching M.'s competency being

contradictory, and there being some proof that M. had confirmed the deed after its execution, held: Though, according to the strict rules of pleading, a bill or cross-bill should have been filed to set aside the deed, yet the answer of M.'s administrator may, for that purpose, be treated as a cross-bill, so as to enable the court to do ample justice in the cause.

In the case of *Moorman vs. Smoot and Wife et als.*, 28 Grat., 80, decided January, 1877. There were nine children tenants in common of slaves subject to the life estate of their mother. One of them, J., by his will gives to his brother K. certain lands, plantation utensils, and "all the interest I may have in an undivided dower estate." J.'s widow marries T., and T. buys the shares of six of the children, one of them K., and he buys of the husband of N., one of the children, her share, but her husband dies in the lifetime of N. and her mother. K. dies and gives his interest under the will of J. to Y. T. sells two of the slaves to M.; M. afterwards sells them and the increase of one of them for nine hundred and sixty dollars. T. and his wife have removed from the State. After the death of the life-tenant, S., who had not sold her interest in the slaves, files her bill against M., making N. and Y. defendants, setting out the facts, and claiming her interest in the slaves sold to M. Held: It was not necessary that N. and Y. should file a cross-bill in the cause in order to set up their claims against M.

In the case of *Cralle vs. Cralle*, 79 Va., 182, decided May 1, 1884. Where husband in 1874 obtained, upon order of publication against absent wife, a decree of divorce *a vinculo matrimonii* for wilful desertion for five years, and in 1876 wife asks for a rehearing and for alimony, and proves at rehearing, by plaintiff's admissions and otherwise, that the desertion was not wilful, in fact not hers, but his. Held: Equity, regarding substance rather than form, will treat her answer as a cross-bill, and give her what on the latter she would be entitled to.

In the case of *Wayland et ux. vs. Crank's Executor*, 79 Va., 602, decided December 4, 1884, it was held: Where answer contains charges, and makes demands against complainants, which by strict rules of pleading could only be set up by bill or cross-bill, a court of equity will consider and treat such answer as a cross-bill, so as to enable it to do complete justice in the case.

The case of *Adkins vs. Edwards* was reported in 83 Va., 316, but does not cover this section.

SECTION 3255.

In the case of *Fox et als. vs. Cosby et als.*, 2 Call, 1, decided October 12, 1799, it was held: It is error to take judgment against an infant defendant by default, who is not stated on the

record to have appeared by his guardian to defend the suit, or that the guardian appointed by the court ever acted, or had notice of such appointment.

In the case of *Roberts's Widow and Heirs vs. Stanton*, 2 Munf., 129, decided May 30, 1810, it was held: It is error to enter a decree against infant defendants without assigning them a guardian *ad litem*; and though the infancy did not appear in the original proceedings, yet, if it be alleged in a petition for a rehearing (the decree being interlocutory), a guardian *ad litem* ought to be appointed.

In the case of *Wells's Heirs vs. Winfree et als.*, 2 Munf., 342, decided October 8, 1811, it was held: A guardian *ad litem*, appointed to prosecute an appeal on an infant's behalf, is not obliged to accept the appointment. A reasonable time ought, therefore, to be given him to consider whether he will accept, and to prepare for trial.

In the case of *Brown vs. McRea's Executors*, 4 Munf., 439, decided October 13, 1815, it was held: An office judgment against an infant, who in the writ is named as defendant, "by J. K., his guardian," cannot be supported, but must be reversed *in toto*, if there be nothing in the record to show that J. K. was guardian by testament, or *ex provisione legis*, or guardian *ad litem* appointed by court.

In the case of *Beverly vs. Miller*, 6 Munf., 99, decided February 4, 1818, it was held: If a suit against an infant in the superior court of chancery be fully defended by his guardian appointed by the county court, whose answer is received in his behalf under the sanction and authority of the superior court, he must be equally bound by such defence as if such guardian had been, in form, appointed guardian *ad litem*; but if the suit abate as to such guardian by his death before the decree, a guardian *ad litem* ought to be appointed, notwithstanding all the testimony and accounts were taken before his death.

In the case of *Cole vs. Pennel*, 2 Rand., 174, decided December 18, 1823. Where an office judgment is obtained in an action on a promissory note against two defendants, one of whom is an infant at the time of confessing the judgment. Held: On a writ of error *coram vobis* being brought, the proceedings should be set aside as far as the declaration or other good pleading. So decided by two judges in a court consisting of three. The judgment in such case ought to be revoked as to both defendants, and not as to one only.

In the case of *Hite (Executor) vs. Hite's Legatees*, 2 Rand., 409, decided March, 1824, it was held: It is not competent to guardians of infant parties to waive any benefit to which the infants are entitled in a decree; and it is error to decree on such consent.

In the case of *Talley et als. vs. Starke's Administratrix et als.*, 6 Grat., 339, decided October, 1849, it was held: In a suit in equity by a guardian of infants for the sale of their real estate, a guardian *ad litem* for the infants may be appointed at rules.

The reference to 1 Rob., 449, is an error.

In the case of *Ewing's Administrators et als. vs. Ferguson's Administrator et als.*, 33 Grat., 548, decided September, 1880, it was held: The heirs of E., being infants, though their guardian was a party and answered, they were entitled to be defended by a guardian *ad litem*, and although one was appointed for them, and there was a paper purporting to be an answer found among the papers of the cause, yet, as it did not appear that it had been filed, it was error to decree the sale of the infants' land without an answer filed by guardian *ad litem*.

In the case of *Smith vs. Henkel et als.*, 81 Va., 524, decided March 11, 1886, it was held: When it appears of record that the infant defendants appeared and answered by their guardian *ad litem*, and that there was a general replication thereto, it will be presumed here that the answer was regularly filed, though the answer itself is not found among the papers in the record.

Where infants, apparently of full age, buy land, give their bonds, take a deed with vendor's lien retained, and fail to pay, and suit is brought to enforce the lien on the land, and the purchasers, then of age, set up the defence of infancy when their bonds were signed; the suit not being on their bonds, but to enforce the lien *in rem*, the infancy is immaterial.

In the case of *Hinton et als. vs. Bland's Administrator et als.*, 81 Va., 588, decided April 8, 1886, it was held: It is only where there is no committee, or where there is a conflict of interest between the committee and the lunatic, that it becomes necessary to appoint a guardian *ad litem* for the insane defendant.

In the case of *Daingerfield vs. Smith*, 83 Va., 81, decided March 31, 1887, it was held: Infant defendants are not competent to consent to decree of sale, and their guardian *ad litem* cannot consent for them.

This is the case cited from 11 Va. Law Journal, 588.

SECTION 3259.

In the case of *R. & D. R. R. Co. vs. Rudd*, 88 Va., 648, decided January 26, 1892. The original summons stated damages at fifteen thousand dollars; copy, at one thousand five hundred dollars. Held: The variance could be taken advantage of only by plea in abatement, and at last was waived by failure to object before verdict.

SECTION 3260.

In the case of *Hooe vs. Marquess*, 4 Call, 416, decided October, 1798: The questions, whether after answer without a plea

in abatement to the jurisdiction of the court, and whether the court of appeals has jurisdiction to reverse such cases, were debated, but no decision rendered.

In the case of *Pollard vs. Patterson's Administrators*, 3 H. & M., 67, decided October, 1808, it was held: The true construction of the act reducing into one the general acts of the high court of chancery, is, that if it appear from the face of the bill that the matter thereof is not proper for a court of equity, it should be dismissed, even "after answer filed, and no plea in abatement to the jurisdiction of the court."

In the case of *Bradley vs. Welsh*, 1 Munf., 284, decided April 18, 1810, it was held: A plea in abatement ought not to be received to set aside an office judgment, unless it be matter which arose *pais darrein continuance*.

In the case of *Payne & Fairfax vs. Grim*, 2 Munf., 297, decided May 15, 1811, it was held: After issue joined on a plea to the action, it is too late to move the court to dismiss the suit on the ground of a defect in the writ, or for leave to file a bill in abatement.

In the case of *Hickman vs. Stout*, 2 Leigh, 6, decided February, 1830, it was held: Where a bill in chancery states matter proper for relief in equity, and defendant, without pleading to jurisdiction in abatement, answers the bill, he is precluded from taking exception to jurisdiction afterwards by the statute. *Aliter*, if bill on its face show case not properly relievable in equity.

In the case of *Collins et als. vs. Jones*, 6 Leigh, 530, decided July, 1835. Bill for relief in equity against a judgment at law, on grounds which would have been a good defence at law, without showing any reason why the defence was not made at law; defendants object to the jurisdiction in their answers; the court directs an issue to try the facts on which the relief is asked, and a verdict is found for the plaintiff; and then the court decrees relief. Held: The case was not proper for relief in equity, and notwithstanding the verdict for the plaintiff on the issue, the bill should have been dismissed.

In the case of *Middleton vs. Pinnel*, 2 Grat., 202, decided July, 1845, it was held: A plea in abatement to the jurisdiction of the court, on the ground that the defendant did not reside in the county in which the suit was brought, nor did the cause of action arise there, must state where the defendant does reside, and where the cause of action did arise.

In the case of *Hudson vs. Kline*, 9 Grat., 379, decided September 3, 1852, it was held: If a bill does not state a proper case for relief in equity, the court will dismiss it at the hearing, though no objection has been taken to the jurisdiction by the defendant in his pleading.

In the case of *Beckley vs. Palmer et als.*, 11 Grat., 625, decided July, 1854, it was held, p. 631: A defendant in an execution files a bill to enjoin the execution, on the ground that a previous execution sued out on the same judgment had been levied by the sheriff on the property of another defendant in the execution sufficient to discharge it. In such case the bill must be filed in the county in which the judgment was recovered; and the circuit court of another county has no jurisdiction of the case. In such case it is not necessary that the objection to the jurisdiction should be made by demurrer or plea; but it must be taken at the hearing of the cause.

In the case of *Washington and New Orleans Telegraph Co. vs. Hobson & Son*, 15 Grat., 122, decided April, 1859, it was held: In an action against a telegraph company, the line of which extends through several States, though it appears that some of the defendants live out of the State, this is not cause for arresting the judgment against the company. If it is a good ground for objection to the jurisdiction of the State court, it must be taken by plea in abatement before the defendants plead in bar.

In the case of *Jones vs. Bradshaw*, 16 Grat., 355, decided February 18, 1863, it was held: The statute applies only where the objection to the jurisdiction of the court is for mere matter of abatement, as where the case is a proper one for a court of equity, but not for the particular court in which the suit is brought, or where the suit ought to be abated by reason of some circumstances attending the situation of the plaintiff or defendant or the like. Where a bill alleges proper matter for the jurisdiction of a court of equity (so that a demurrer will not lie), if it appears on the hearing that the allegations are false, and that such matter does not in fact exist, the result must be the same as if it had not been alleged; and the bill should be dismissed for want of jurisdiction.

The ground of equitable jurisdiction stated in the bill being the want of a discovery from the defendant, and it appearing from the evidence that as to some material facts alleged the plaintiff had full proof, and as to the others they were merely pretences, the bill will be dismissed at the hearing for want of jurisdiction.

In the case of *Green & Shuttle vs. Massie*, 21 Grat., 356, decided August, 1871, it was held: If at the hearing of a cause the case upon the pleadings and proofs is one of which a court of equity has no jurisdiction, the bill should be dismissed, though the defendant has made no objection to the jurisdiction either by demurrer, plea or answer, but has defended himself on the merits; and in such a case an appellate court will reverse a decree in favor of the plaintiff, and dismiss the bill,

though no objection to the jurisdiction was taken in the court below.

In the case of *Warren vs. Saunders*, 27 Grat., 259, decided March 9, 1876. W. sues S. in assumpsit in the county of J., and sends the process to the city of R. where S. resides, and it is served upon S. by the sheriff of R. S. files a plea in abatement stating these facts, but does not say where the cause of action arose. Held: The plea is sufficient in this case, though it does not give the plaintiff a better writ.

In the case of *Mosby and Wife vs. Withers's Executors et als.*, 80 Va., 82, decided January 15, 1885, it was held: Where in a suit in equity proof is presented of another suit in equity pending in same court between same parties, concerning same subject, it is not error to reject the plea, consolidate the causes, and proceed in them as in one cause.

In the case of *Salamone vs. Keiley et als.*, 80 Va., 86, decided January 15, 1885, it was held: Where a bill fails to state a case proper for relief in equity, the court will dismiss it at the hearing, though no objection has been made in the pleadings; but a defective bill may be aided by the answer and the evidence.

In the case of *Wells et als. vs. Hughes's Executor*, 89 Va., 543, decided January 12, 1893, it was held: Where a bill shows on its face matter proper for, and the parties are within, the jurisdiction of the court, exception for want of jurisdiction can only be taken by plea in abatement.

SECTION 3261.

In the case of *Prunty vs. Michell & Cobbs*, 76 Va., 169.

1. Non-Joinder.—Defendants.—If one of several joint contractors be omitted as defendant, advantage of the omission can be taken only by plea in abatement.

2. Idem.—Plaintiffs.—If omitted as plaintiff, and the omission appear on the pleadings, advantage thereof may be taken by demurrer, motion in arrest of judgment, or writ of error.

3. Idem.—Idem.—But if the omission be disclosed only by the evidence, the plaintiff will be non-suited.

SECTION 3262.

In the case of *Wamsley vs. Lindenberger & Co.*, 2 Rand., 478, decided May 17, 1824, it was held: A promissory note is executed by one of two partners, in the name of the firm, one of the partners was an infant at the time of the execution of the note. An action is brought against the adult partner only. The action is badly brought; the act of the infant being voidable only and not void.

In the case of *Strange vs. Floyd*, 9 Grat., 474, decided October 25, 1852, it was held: All the obligees in a joint bond must

join in an action thereon, or some sufficient excuse for not joining them must be stated in the declaration, or the objection is fatal on general demurrer. In an action on a bond to more than one obligee, non-payment of the debt to all of the obligees must be averred in substance in the declaration, or the objection will be fatal on general demurrer.

SECTION 3264.

In the case of *Stone vs. Patterson*, 6 Call, 71, decided April, 1806, it was held: The plaintiff may under the act of Assembly plead and demur to the whole declaration.

In the case of *Syme vs. Griffin*, 4 H. & M., 277, decided November, 1809, it was held: It is settled under our act of Assembly that a plea and demurrer at the same time to the whole declaration are admissible.

In the case of *Waller's Executor vs. Ellis et als.*, 2 Munf., 88, decided October, 1809, it was held: Under the act of 1792, the plaintiff in replevin, and the defendant in all other actions, may plead as many several matters, whether of law or fact, as he shall think necessary for his defence, notwithstanding such several matters be inconsistent with each other.

If a defendant plead and demur to the whole declaration, and the demurrer be overruled, judgment ought not to be entered without first trying the issues joined on the other pleas.

In the case of *Lang vs. Lewis's Administrator*, the same against the same, 1 Rand., 277, decided January, 1823, it was held: It is error for a plaintiff to reply and demur to the same plea.

In the case of *Reed vs. Hanna's Executor*, 3 Rand., 56, decided November, 1824, it was held: Where the objection to a second plea filed under the act of Assembly is that the matter of that plea is already put in issue, the party ought not to be put to the hazard of a demurrer in order to avail himself of that objection; the proper and safe practice being to try that question on a motion to reject the plea or strike it out, if it has been entered on record. So decided by two judges in a court consisting of three.

In the case of *Vaiden vs. Bell*, 3 Rand., 448, decided October, 1825, it was held: A special demurrer and plea are filed to the same declaration; afterwards the joinder in demurrer is withdrawn, and the declaration is amended in the point specified in the demurrer, and issues are joined on the same pleas. No further notice is taken of the demurrer, and a verdict is rendered on the issues.

The demurrer to the first declaration must be considered as abandoned, and the pleas to the first declaration as insisted on by the defendant as pleas to the second.

The reference to 4 Leigh, 402, is an error.

In the case of *Maggort vs. Hansbarger*, 8 Leigh, 532, decided July, 1837. A special plea is offered and the plaintiff objects to its being filed, but the ground of his objection does not appear. The record only shows that the special plea was filed a year after the general issue had been pleaded. An appellate court cannot say that the plea was improperly received. A defendant is not inhibited from pleading specially what he might give under the general issue, unless the matter pleaded amounts to the general issue, that is to say, denies the allegations which the defendant is bound to prove. Where the cause of action is avoided by matter *ex post facto*, such matter may always be specially pleaded, whether it could be given in evidence under the general issue or not.

Where a plea in bar is to the whole declaration, and upon a demurrer the court is of opinion that the plea is sufficient, unless the plaintiff move for leave to withdraw his demurrer and reply, the demurrer will be overruled, and final judgment entered for the defendant.

In the case of *James River & Kanawha Company*, 16 Grat., 434, decided January 26, 1864, it was held, pp. 439-'40: A plea in abatement is admissible in an action of ejectment. The act refers only to pleas in bar of the action. *Quere*: If a defendant may not plead in abatement and in bar at the same time, the pleas being filed at the proper time? A defendant may waive his plea in abatement and plead in bar to the action. A defendant in ejectment, admitting that he was mistaken as to the matter pleaded in abatement, and upon this admission submitting the issue to the plea to the court, at the same time asking leave to file the plea of "not guilty," this was in effect a waiver of the plea in abatement, and he should have been permitted to file the plea of "not guilty."

In the case of *Allen et als. vs. Hart*, 18 Grat., 722, decided April, 1868, it was held, p. 729: The defence of set-off is admissible in a motion upon a forthcoming bond taken on a warrant of distress.

In the case of *O'Bannon vs. Saunders*, 24 Grat., 138, decided November, 1873, it was held, p. 147: If defendant pleads several distinct matters of defence in one plea, the plaintiff may reply generally to it, the defendant being guilty of the first fault.

In the case of *Virginia Fire and Marine Insurance Company vs. Buck & Newson*, 88 Va., 517, decided December 14, 1891, it was held: Under the pleas of *non assumpsit* and *nil debet*, any matter of defence whatever is admitted which tends to deny defendant's liability to the plaintiff's demands, except the statute of limitations, bankruptcy, and tender, which do not contest the owing of the debt, but merely that an action can be maintained

for it; and notwithstanding this section allows defendant to plead as many matters of defence as he chooses, yet it does not give him the absolute right to his special pleas, setting up defences admissible under pleas already received; and the court may strike out such special pleas though already admitted and issue joined.

SECTION 3266.

In the case of *Phillips vs. The Commonwealth*, 19 Grat., 485, decided November 4, 1868, it was held, p. 510: Though the plea tendered by the prisoner was informal and properly rejected by the court, yet the objection to the jurisdiction, being a mere question of law, however made, whether by suggestion or motion *ore tenus*, should be considered and decided by the court.

SECTION 3267.

In the case of *Virginia Fire and Marine Insurance Company vs. Saunders*, 84 Va., 210, decided December 8, 1887, it was held: It is the well-established rule of pleading, that where new matter is introduced the pleading shall conclude with a verification. This rule applies as well to the plaintiff's replication as to any other pleading, and the first clause of this section, providing that special traverses, or traverses with an inducement of new matters, shall conclude to the country, does affect this rule.

SECTION 3268.

In the case of *Nadenbousch vs. McRea*, 1 Va. (Gilmer), 228, decided April 3, 1821, it was held: General replication to the plea of payment does not of itself constitute an issue. Appearance bail becoming special bail should be allowed to prove the similitur to a replication added by the clerk without his consent, and in such case the bail should be allowed to rejoin, demur, etc.

In the case of *Southside R. R. Co. vs. Daniel*, 20 Grat., 344, decided March, 1871, it was held: In an action on the case for damages to plaintiff's land there is the plea of not guilty, on which issue is joined, and there is a special plea, to which there is a special replication concluding to the country. To this there is no rejoinder, and the record does not say that issue was joined upon it; but the parties go to trial and the subjects of the special plea and replication are contested before the jury, which renders a verdict for the plaintiff. No objection having been taken to the want of joinder of issue in the court below, it seems that the objection cannot be taken in the appellate court.

In such a case, if the subject of the replication is such that the defendant cannot rejoin special matter without a departure from the defence set up in the plea, but must take issue upon the replication, the non-joinder of issue will be cured by the statute.

SECTION 3271.

In the case of *Jones's Executor vs. Clarke et als.*, 25 Grat., 642, decided January 7, 1875, it was held, p. 675: A demurrer to a bill in equity in the form given in the statute is sufficient.

In the case of *Dunn vs. Dunn*, 26 Grat., 291, 296, decided June 23, 1875. J. was a partner in a mercantile business with W. and A. That partnership was dissolved, and J. and A. formed a partnership to carry on the same business at the same place, and this partnership was dissolved; afterwards J. filed his bill against W. and A., charging that both partners are indebted to him, and asking for a settlement of their accounts. W. demurs and answers, the demurrer being contained in the answer and not stating the grounds of demurrer. Held: The bill is multifarious. The demurrer is sufficient in form.

In the case of *Matthews vs. Jenkins*, 80 Va., 463, decided April 16, 1885, it was held: It is settled in this State that a demurrer in the form prescribed by the statute, and assigning no grounds, inserted in the answer is sufficient; and when the court has adjudicated the principles of the cause in favor of the plaintiff the presumption is that it overruled the demurrer, though the record does not show what was done with it.

SECTION 3272.

In the case of *Mantz vs. Hundley*, 2 H. & M., 308, decided April 16, 1808, it was held: A general demurrer to a plea in abatement ought to be sustained though the plea be defective in form only.

In the case of *Miller vs. McLuer*, 1 Va. (Gilmer), 338, decided October 20, 1820, it was held: Assigning special pleas for a demurrer does not make a demurrer special which is in its nature general. Not adding the joinder in demurrer is not an available error in an appellate court, after argument and a decision on the demurrer in the court below.

In the case of *Roane's Administrators vs. Drummond's Administrators*, 6 Rand., 182, decided March, 1828, it was held: Where pleadings terminate in a demurrer on either side, any error in the previous pleadings on either side may be taken advantage of.

In an action of debt on a judgment for a certain sum to be discharged by the payment of a lesser, if the declaration demands a wrong sum, and no special demurrer is filed, the error is cured by the statute of *jeofails*, there being enough in the declaration to show the true amount of the judgment.

In the case of *Mowry vs. Miller*, 3 Leigh, 561, decided March, 1832, it was held: On general demurrer to a declaration the court looks always to the substantial meaning of its allegations to ascertain whether it states good cause of action.

In the case of *Carthrae vs. Clarke*, 5 Leigh, 268, decided April, 1834, it was held: Though there be no formal affirmative and negative in pleading, yet whenever a replication disaffirms the whole substance of the plea it may regularly conclude to the country.

If a replication which ought to conclude with a verification concludes to the country, and the replication be substantially a good answer to the plea, and there be a general demurrer to the replication, the irregularity of the conclusion is cured by the statute of *jeofails*.

In the case of *Horton & Hutton vs. W. and E. Towers*, 6 Leigh, 47, decided February, 1835, it was held: The utmost strictness is required in pleas and abatements, and a general demurrer to such plea has all the effect of a special one.

Plea in abatement to jurisdiction held naught: 1, Because pleaded by attorney, not in person; 2, Because concluded with a prayer *quod billa cassetur*, instead of *si curia cognoscere velit*; and 3, Because it did not give plaintiffs a better writ.

In the case of *Bennett's Executor vs. Giles (Governor)*, at the relation of Loyd, 6 Leigh, 316, decided April, 1835. In debt on sheriff's official bond in name of G., successor of T., governor of Virginia, to whom the bond was given, plea that G. was not, and that M. was, the successor of T., and demurrer to the plea. Held: Though the plea was obviously designed to entrap, the demurrer must be sustained.

Upon a demurrer taken by a plaintiff to a plea, the court goes back to the first fault, and if plaintiff's declaration is defective gives judgment for defendant on demurrer, nor is the defect cured by the defendant pleading over.

In the case of *Shelton's Executors vs. Welsh's Administrator*, 7 Leigh, 175, decided February, 1836. In a debt on a decree for money which does not give running interest thereon, the declaration demands the interest from the date of the decree, as part of the debt. Held: Declaration bad on general demurrer for demanding interest as part of the debt.

When a declaration is defective and the judgment upon it is therefore reversed, and yet the declaration shows a just demand if properly asserted, plaintiff shall not turn out of court, but the cause shall be remanded for further and correct proceedings.

In the case of *Baily et als. vs. Beckwith (Executor)*, 7 Leigh, 604, decided July, 1836, it was held: Upon an obligation to A. by the name of executor of B., the action should be brought by A. in his individual character, and he ought regularly to declare in the debit and detinet; but though the declaration be in the detinet only, it will not be held bad for this cause. The allegation of the debit is such mere matter of form that the omission will be disregarded even on special demurrer.

In the case of *Creel vs. Brown*, 1 Rob., 265 (2d edition, 281). Where one of the counts in a declaration is in case for a tort, and another in assumpsit, a general demurrer to the declaration for such misjoinder ought to be sustained. There being a demurrer to a declaration, and an issue in fact, a verdict is found for the plaintiff, and it does not appear that any judgment was given on the demurrer otherwise than by implication, from the fact that final judgment was given for the plaintiff after the verdict. The court of appeals is of opinion that the demurrer ought to have been sustained. Held: The judgment must be reversed, the verdict set aside, and the cause remanded to the circuit court, that it may proceed to judgment on the demurrer, unless the plaintiff shall, on leave obtained in that court, amend his declaration; and if the declaration be amended, for such further proceedings as may in that case be proper.

In the case of *Henderson vs. Stringer*, 6 Grat., 130, decided July, 1849. A demurrer to an entire declaration, whether general or special, raises the question whether there be, or be not, matter in the declaration sufficient to maintain the action. If there be several counts, and one good, that is sufficient to maintain the action, and the demurrer must be overruled. If there be a single count containing several breaches, any one of which is well assigned, that is sufficient to maintain the action. If there be a single count containing a demand of several matters which in their nature are divisible, any one of which is well claimed, that is sufficient. Whether the objection be that one of several counts or that one of several breaches, or that part of plaintiff's demand which is of distinct and divisible nature, is bad, the demurrer should be to that count or to that breach, or to that part of the demand, as the case may be, which is bad. A demurrer to a declaration with a statement, as special cause of demurrer, that one of the counts or breaches, or parts of the plaintiff's demand of a distinct or divisible nature, is bad, does not alter the character of the demurrer. And if there be matter enough in the declaration to maintain the action the demurrer must be overruled. Upon a demurrer to a declaration for a misjoinder of actions, the objection, if well founded, goes to the whole declaration.

A declaration in debt contains but one count, and claims the sum of five hundred and sixty-nine dollars, made up of the aggregate amount averred to be due by two single bills; by the first of which the defendant bound himself, as it is alleged, to pay the plaintiff one hundred dollars cash and eighty-five dollars in good cash notes; and by the second he bound himself to pay to the plaintiff three hundred and eighty-five dollars. The breach laid is that the defendant has not paid the several parcels of the said sum of five hundred and sixty-nine dollars, or

any or either of them or any part thereof, in money or good cash notes. The defendant demurred to the declaration, and stated four special grounds of demurrer. Held: The demurrer cannot be sustained.

The declaration counts on a bond by which defendant bound himself to pay. The bond offered in evidence is dated September 2, 1837, and says, "For value received 1st of March next, I bind my heirs, etc., to pay." Held: That from the face of the paper it is to be inferred the obligor intended to bind himself. There was, therefore, no variance in that respect. That it was sufficient to set out the bond according to its legal effect; and as this suit was against the obligor only, it was only necessary so to describe it as to show that he was bound. There was, therefore, no variance in this respect.

In the case of *Roach vs. Gardiner*, 9 Grat., 89, decided July 26, 1852, it was held: In an action at law the defendant demurs to the declaration and afterwards agrees to the facts, and that the court shall render a judgment upon the case agreed, which is done. He thereby waives his demurrer to the declaration.

In the case of *Cunningham vs. Smith et als.*, 10 Grat., 255, decided July, 1853, it was held: Duplicity in a plea can only be objected to by a special demurrer.

SECTION 3273.

In the case of *Sutton vs. Gatewood and Wife*, 6 Munf., 398, decided October 14, 1819, it was held: When a demurrer to a bill in chancery is overruled, a decree ought not to be pronounced against the defendant, but leave should be given him to file an answer.

A demurrer to a bill in chancery against a guardian for advances of money, etc., by the plaintiff for the use of the ward, ought not to be sustained on the ground that the ward ought to have been a party; but if, upon the answer of the guardian, it should appear proper, the court should then direct the ward to be made a party.

In the case of *Northwestern Bank vs. Nelson*, 1 Grat., 108, decided September 1844, it was held: Defendant's demurrer to a bill being overruled, he is at liberty to file any sufficient answer; and an answer to a bill of discovery is sufficient when it shows that defendant is protected from making the discovery sought for by the bill.

SECTION 3274.

In the case of *Pryor vs. Adams*, 1st Call, 382 (2d edition, 332), decided October 25, 1798, it was held: The court of chancery should judge on the proofs before it, and in a clear case decree thereon without directing an issue.

SECTION 3275.

In the case of *Bowles vs. Woodson*, 6 Grat., 78, decided April, 1849, it was held: A defendant, though in default for want of an answer, ought to be permitted to file any proper answer at any time before a final decree; but the trial of the cause is not to be subsequently delayed, unless for good cause shown.

In the case of *Reynolds vs. The Bank of Virginia et als.*, 6 Grat., 174, July, 1849, it was held: A defendant in equity who is in default files a demurrer to the bill, which is overruled. He is not entitled to two months in which to file an answer.

In the case of *Bean et als. vs. Simmons*, 9 Grat., 389, decided September 3, 1852, it was held: It is the right of a defendant in equity to file his answer at any time before a final decree is made in a cause where the court had received the case when submitted for decision, had examined the papers and settled the terms of a decree deciding the principles of the cause, though it was an interlocutory decree, and a decree had been prepared and considered by the court and directed to be entered in the order-book, but before it had been entered, and on the same day it was directed to be entered, a defendant tendered his answer. Held: The defendant was then entitled to file his answer.

In the case of *Brent vs. Washington's Administrator*, 18 Grat., 526, decided April, 1868, it was held: A defendant being in default for want of an answer, comes in and demurs to the bill, and upon the hearing upon the demurrer the court overrules it, and proceeds to decree upon the case. The only question in the cause being upon the construction of a will, and the defendant not having asked leave to file an answer, the appellate court will not for this cause reverse a decree which is correct upon the merits.

In the case of *Elder's Executors et als. vs. Harris et als.*, 76 Va., 187, 191-'92.

Fraudulent Deed.—Suit to Set Aside.—Case at Bar.

3. Bill filed by a creditor in 1874 to set aside, as fraudulent, deed made by J. before he became a bankrupt (if ever he was one), and W. was taken for confessed as to grantor, but answered by grantee, who denied the fraud, but made no reference to bankruptcy of J., or to his assignee. After long litigation the fraud has been established, and plaintiff's rights fixed by this court, and the land, one subject of controversy, sold, and sale confirmed, and the value of personalty (the other subject) has been ascertained by a commissioner, and the cause awaits the action of the court on exceptions to his report. Held: After this it is too late to allow the alienee to file a supplemental answer and set up a new defence, the effect of which, if valid and sustained, would be to turn plaintiffs out of court.

In the case of *Welsh vs. Sollenberger*, 85 Va., 441, decided

November 8, 1888, it was held: A decree annulling a conveyance for fraud, and directing commissioner to ascertain the location and value of the lands and the liens thereon, is not a final decree in the sense that an answer may not be filed thereafter.

SECTION 3276.

In the case of *Clarke vs. Tinsley's Administrator*, 4 Rand., 250, decided May, 1826, it was held: When exceptions are filed to an answer, they must be disposed of before any further proceedings can take place in the cause.

In the case of *Coleman vs. Lyne's Executor*, 4 Rand., 454, decided October, 1826, it was held: Where the answer of the defendant in chancery omits to notice some of the allegations of the bill, and replies to others, the allegations not noticed are not considered as admitted, but the plaintiff must except to the answer as insufficient.

An answer cannot be excepted to as insufficient after replication.

In the case of *Craig vs. Sebrell*, 9 Grat., 131, decided August 2, 1852, it was held: The mode in which an exception to an answer shall point out the omission excepted to is a matter of practice discretionary with the court, and not a subject of appeal.

But if otherwise, the exception being sustained and the defendant having filed another answer, then the subject of the exception properly ended.

SECTION 3277.

In the case of *Ogden et als. vs. Brown et als.*, 83 Va., 670, decided September, 1887, it was held: Where decree of sale to satisfy lien for purchase-money is entered as by confession, and on same day purchaser answers, setting up that in a suit in the same court a controversy is pending as to the ownership of said money, this is good cause to amend or suspend the decree until the question of ownership is settled.

SECTION 3278.

In the case of *Commonwealth vs. Sayers*, 8 Leigh, 722, decided by the General Court, June, 1837, it was held: Pleas in abatement offered in prosecutions for misdemeanor ought to be verified by oath or affirmation.

In the case of *Jackson vs. Webster*, 6 Munf., 462, decided January 15, 1820, it was held: A plea of *non est factum* ought in general to be received by the court, notwithstanding the defendant has previously pleaded payment, especially if it be offered under circumstances showing it is not intended for the purpose of delay.

The affidavit to the plea on *non est factum* is not rendered de-

fective by inserting the words "to the best of the defendant's knowledge and belief." No man can be required to swear positively (if at all) to legal references.

In the case of *Franklin vs. Cox*, 4 Rand., 448, decided August 1826, it was held: The plea of *non est factum* is a plea to the merits, and ought to be received after an issue made up on the plea of payment, upon the delay in filing it being sufficiently accounted for.

In the case of *Cleaton vs. Chambliss*, 6 Rand., 86, decided November, 1827, it was held: The plea of *non est factum*, whether general or special, must conclude to the country, and in such a case, the plaintiff cannot reply any new matter. He must either accept it by similitur or demur.

In the case of *Hicks et als. vs. Goode*, 12 Leigh, 479, decided January, 1842. In a debt on a bond defendant pleads that the bond was delivered as escrow, upon conditions which were not performed, *et sic non est factum*; the plea is not verified by affidavit of the party, according to statute, but plaintiff makes no objection for want of such affidavit, and the plea is received by the court; issue is joined upon it; trial; verdict and judgment for defendant. Held: The want of the affidavit to the plea is not a good objection to the judgment in an appellate court.

In the case of *Ward et als. v. Churn*, 18 Grat., 801, decided June, 1868. A bond is drawn, with the names of the principal and of four persons as sureties inserted therein. The principal and three of these sureties sign it. Two of these sureties sign and deliver it upon condition that a certain one of the other two named shall execute it; but he does not, and it is delivered to the obligee without his signature. Held: That whether the bond was delivered to a third person, not a party to the bond, or to the principal or any other co-obligor, the parties so delivering it on condition are not bound by the said bond; and it is not necessary, to give effect to said condition, that the same should have been known by the obligee when the bond was delivered to him. The bond, being void as to the two who delivered it on condition, is void as to the third surety, who executed it without any condition. If the bond was delivered to the obligee on the condition stated, and the condition was known to him, he is not entitled to recover on the bond. In an action on such a bond, in the absence of all evidence of a conditional delivery by the sureties who signed it, the presumption of the law is that they consented to the delivery of the bond without the signature of the other party whose name is on the bond.

In the case of *Preston vs. Hull*, 23 Grat., 600, decided June, 1873, it was held: A paper perfect as a bond, except that there is a blank for the name of the obligee, is signed by P. and M., and is put into the hands of M. for the purpose of borrowing

money upon it. It is expected that F. will lend the money, but that, if he does not, it may be gotten from some other person. M. obtains the money from H., and fills the blank in the paper with the name of H., and delivers it to him. This is done in the absence of P. and without his knowledge. It is not the bond of P.

The reference to 24 Grat., 202, is an error.

In the case of *Penn (Assignee) vs. Hamlett et als.*, 27 Grat., 337, decided March 30, 1876, it was held: A blank paper is signed and sealed by a principal and by three others who intend to be his sureties, and it is left with the principal to be filled up and signed by him. He does fill it up, and delivers it to the obligee named therein. It is not the bond of the three, and does not bind them. But, the principal having filled it up and delivered it when thus complete, it is his bond and it binds him.

In the case of *Miller vs. Fletcher et als.*, 27 Grat., 403, decided April 6, 1876, it was held: If a bond, perfect on its face, is delivered to the obligee as an escrow, to be valid upon another person's executing it, it is valid, though the condition is not complied with.

A deed perfect on its face cannot be delivered as an escrow to the grantee or obligee, upon a condition upon which it is to be a valid deed. In all such cases the condition is void, and the deed is at once operative. Parol evidence is inadmissible to prove that a deed perfect on its face was delivered to a grantee on a condition.

In the case of *Nash vs. Fugate et als.*, 32 Grat., 595, decided January, 1880. A bond is signed by the principal obligor and a number of sureties, and there are several scrolls below the names of the sureties who sign it. In other respects the bond is complete and perfect on its face; but the sureties sign it and deliver it to the principal obligor, on condition that he shall obtain additional sureties to execute it before he delivers it to the obligee, without obtaining additional securities. Held: The bond is binding on the sureties unless the obligee had notice of the condition on which they executed it, and the fact that there were other scrolls to the instrument, to which no name was signed, was not sufficient to put the obligee upon inquiry as to the authority of the obligor to deliver the bond to him. A bond signed by a principal obligor and sureties, apparently perfect and complete, may be avoided by parol proof that the obligee, at the time he received it from the principal obligor, had notice that other persons were to sign it. In such a case the evidence ought to be very clear and satisfactory.

In the case of *Wendlinger vs. Smith et als.*, 75 Va., 309, it was held: G., executor of V., makes a contract with W. to sell to W. a lot of ground. The contract is perfect on its face and

absolute; but at the foot of it there is a paper referring to it, and indicating that the devisees of V. expressed their approval of the sale. The paper has to it nine seals, only four of which have names attached to them. The writing is presumably a part of the instrument, and indicates that all the devisees of V. were to approve it. Whether their approval was to be a condition upon which the contract was to take effect is uncertain upon the face of the papers, and therefore parol evidence to prove the condition is competent.

The rule of law that a deed cannot be delivered to a party to whom it is made as an escrow, to be the deed of the obligor only on condition, and that in such case the delivery is absolute and the condition nugatory, is applicable only to the case of deeds which are upon their face complete contracts, requiring nothing but delivery to make them perfect according to the intentions of the parties; not to deeds which upon their face import that something more is to be done besides delivery to make them competent and perfect contracts according to the intention of the parties.

In the case of *Keene's Executor vs. Monroe and Wife*, 75 Va., 424, decided April 14, 1881, it was held: Upon a plea of *non est factum* the evidence showed that a scroll was made in juxtaposition to the name of the obligor. Whether this was done with his consent was a question of fact for the jury; but whether it was a material alteration is a question of law for the court. And in the absence of fraud such an alteration is not material, and did not change the legal effect of the instrument.

The reference to 76 Va., 537, is an error.

In the case of *Priest vs. Whiteacre (Sheriff)*, 78 Va., 151, decided December 13, 1883, it was held: It is incumbent on party offering instrument as evidence to explain any appearance of alteration on its face. But where witness mentions a written contract, and opposite party demands its production, it is not incumbent on the other party, who does not offer or claim under it, to explain any appearance of alteration on its face.

In the case of *Batchelder et als. vs. White*, 80 Va., 103, decided January 15, 1885, it was held: A material alteration of a bond or note, after its execution, when intentionally made by one having an interest in it, and without the consent of the party bound by it, invalidates the instrument as to such party.

Q. borrowed of W. one thousand dollars upon his note endorsed by S. Afterwards, without the consent or knowledge of S., but with the knowledge and consent of W., the note was altered by Q. and raised to one thousand five hundred dollars as security for an additional five hundred dollars which thereupon W. lent Q. Held: The alteration invalidated the note entirely as to S.

SECTION 3279.

In the case of *Kelly vs. Paul*, 3 Grat., 191, decided July, 1846, it was held: The statute only applies where the declaration alleges that the defendant, or the person stated to have made the writing, subscribed his name thereto.

In the case of *Shepherd, Hunter & Co. vs. Frys*, 3 Grat., 442, decided January, 1847, it was held: It was not the purpose of the act to narrow the defence under the general issue; but, in regard to a particular matter, to require notice of the defence, and some security against its being vexatious or frivolous. The act applies to instruments signed with the name of the partnership. But the question is still open whether the persons sought to be charged are members of the partnership.

In the case of *Phaup vs. Stratton*, 9 Grat., 615, decided February 14, 1853. In debt on a note signed with a partnership name, the declaration charges that the defendants by their partnership name subscribed the note, and there was no affidavit by the defendants or any of them putting the execution of the note in issue. Held: That they were precluded from showing that the partnership had been dissolved before the note was made, and that the person making it had no authority to execute it for the other partners.

In the case of *James River & Kanawha Company vs. Littlejohn*, 18 Grat., 53, decided October, 1867, it was held, p. 76: The bill having alleged that the order was drawn by one of the defendants, the act applies, and no proof of the signature is necessary.

In the case of *Simmons vs. Simmons's Administrator*, 33 Grat., 451 and 458, decided July, 1880. With the answer of a defendant a bond of the plaintiff's decedent is filed. The plaintiff filed no replication, but pleaded *non est factum* to the bond filed with the answer. On the evidence being heard, the court below decided that the bond was not the deed of the plaintiff. Held: While it was irregular and improper to have allowed a plea to have been filed to an answer, and the proper course was for the plaintiff to have filed a general replication to the answer, accompanied by an affidavit, putting in issue the execution of the bond, which would have been sufficient to require the defendant to prove such execution, yet, as the plea which was sworn to can be now treated as an affidavit, as the parties took issue on it, and testimony, and the appellant has not been prejudiced by the irregular proceedings and trial on said plea as such, the decree will not now be reversed for such irregularities, substantial justice having been done between the parties.

In the case of *Harnsberger vs. Cochran*, 82 Va., 727, decided January 13, 1887, it was held: Where bill or other pleading sets up a writing and alleges that it was made and signed by

defendant's intestate in his lifetime, and defendant by his answer under oath denies the allegation and demands proof, such answer is a substantial compliance with the statute, and puts the genuineness of the writing in issue with the burden of proof on the allegor.

SECTION 3280.

For the reference to 3 Grat., 442, see *supra*, Section 3279.

In the case of *Gillett vs. The American Stove and Hollowware Company*, 29 Grat., 565, decided November, 1877, it was held: In an action of *assumpsit*, the writ and declaration is in the name of a plaintiff, which indicates that said plaintiff is a corporation, but it is not stated to be a corporation. The defendant pleads *non assumpsit* but does not file an affidavit that the plaintiff is not a corporation. Under the statute it is not necessary that the plaintiff should prove it is a corporation.

In the case of *Baltimore & Ohio Railroad Company vs. Sherman's Administratrix*, 30 Grat., 602, decided September 12, 1878, it was held: In an action against a railroad company it is not necessary to aver in the declaration that it is a corporation, nor is it necessary to prove on the trial that the defendant is a corporation, unless with the plea there is filed an affidavit denying that it is. The court will *ex officio* take notice of the fact.

In the case of *Stewart & Pulmer vs. Thornton et als.*, 75 Va., 215, decided January 20, 1881, it was held: The county school-boards are by act of Assembly constituted a corporation, and a suit to recover a fund belonging to the corporation must be brought in its corporate name. A suit by persons styling themselves the directors of the county school-board of their county cannot be maintained.

SECTION 3281.

In the case of *Thornton vs. Gordon*, 2 Rob., 719, decided March, 1844, it was held: It is a rule in equity that the answer of a defendant denying the allegations of the bill must be taken as true unless disproved by two witnesses, or by one witness and circumstances in his support; it is not in the power of a plaintiff to make his case an exception to this rule by stating in his bill that he expects to prove its allegations, and disclaiming a discovery from the defendant.

A bill is filed to enjoin the sale of property conveyed to secure a debt alleged to be usurious, and the plaintiff avers that he expects to make full proof of his allegations, and disclaims all benefit of any discovery from the defendant. The injunction is awarded, but afterwards the defendant files an answer denying the allegations of the bill, and the plaintiff relies on the testimony of a single witness unsustained by any corroborating circumstances. Held: The injunction must be dissolved and the bill dismissed.

In the case of *Jones et als. vs. Abraham et als.*, 75 Va., 466,

decided April 21, 1881, it was held, p. 469-'70: Though a plaintiff in his bill may disclaim the benefit of a discovery, he cannot thereby deprive the defendant of the right to answer on oath, and have the advantage of such answer as evidence in his favor so far as it is responsive to the bill. The case provided for by the statute is exceptional.

The answer of a defendant which does not profess to be on his own knowledge can only be treated as a plea of denial, and not as evidence in his behalf. Although an answer responsive to the bill must be taken as true unless disproved by more than the testimony of one witness, this may be done not only by the testimony of two witnesses, but by one with corroborating circumstances, or by documentary evidence alone.

In the case of *Moore vs. Ullman et als.*, 80 Va., 307, decided March 19, 1885, it was held, p. 310-'11: The testimony of one witness with corroborative circumstances, or circumstances alone, or documentary evidence alone, may overcome an answer that is responsive to the averments of the bill.

SECTION 3283.

In the case of *Mills vs. The Central Savings Bank*, 16 Grat., 94, decided September 3, 1860, it was held, p. 96: In an action of debt against makers and prior endorsers of a negotiable note, they plead jointly *nil debet* and usury. Before the trial the maker confesses a judgment, and there is final judgment against him, and the two prior endorsers release him from all liability to them. As the maker is liable to the two last endorsers under the act for five per cent. damages for any amount of the debt they may have to pay, he is not a competent witness for the defendants to prove usury.

In the case of *Insurance Company of the Valley of Virginia vs. Barley's Executors*, 16 Grat., 363, decided February 18, 1863, it was held: A power of attorney to confess a judgment may be executed before the action is brought.

A judgment may be confessed either in court or in the clerk's office by an attorney in fact, though the attorney is not a lawyer.

As actions at law in the county court are cognizable only at the quarterly terms, so motions to set aside any of the proceedings in the office in such actions are cognizable only at a quarterly term, and therefore the preceding vacation referred to in the statute means, in its application to such cases, the interval between the quarterly terms of the court.

In the case of *Brown vs. Hume*, 16 Grat., 456, decided February 23, 1864, it was held: A judgment confessed in the clerk's office on the morning of the first day of the term of the court, before the hour for the opening of the court, is a judgment confessed in vacation, and valid.

In the case of *Brockenborough's Executors et als. vs. Brockenborough's Administrator et als.*, 31 Grat., 580 and 599, decided March, 1879. L. brings an action on a bond against B. which is on the office-judgment of the court at its March term, which commences on the third of the month, and the office-judgment is confirmed on the fifth, which is the last day of the term of the court. On the first day of the same term of the court B. goes into court and confesses a judgment in favor of S., no suit having been instituted against B. Held: The judgment in favor of S. is valid, though no suit had been instituted by him against B. That the judgment of L. relates back to the first day of the term, and, the law not recording a fraction of a day, both judgments stand as of the same date.

In the case of *Shadrack's Administrator vs. Woolfolk et als.*, 32 Grat., 707, decided January, 1880, it was held: Judgment confessed in the clerk's office, though no process appears to have been issued or served, and though the clerk has failed to enter it upon the order or minute book, or any other book in the office, and the only evidence of it is unsigned memorandum endorsed on a declaration which seems to have been filed and the bond enclosed in the declaration, is a valid judgment, and entitled to rank as such against other creditors of the debtor.

If the entry of a judgment confessed in the office upon the order or minute book has not been made at the time of confession, the clerk may make the entry at any time, and if he fails to do it, the court may at any time direct him to make an entry.

In the case of *Smith et als. vs. Mayo (Trustee)*, 83 Va., 910, decided November, 1887, it was held: In entering a confession of judgment the clerk acts privately as a ministerial officer, and he may enter his own confession of judgment in favor of his creditors, and it will be valid.

SECTION 3284.

In the case of *Blane vs. Sansum*, 2 Call, 495 (2d edition, 415), decided October 18, 1800, it was held: If a declaration be blank as to the sums, the date of the obligation, the assignment thereof to the plaintiff, and as to the damages, an office-judgment rendered thereon is erroneous.

In the case of *Waugh vs. Carter*, 2 Munf., 333, decided March, 1811, it was held: It is error sufficient to reverse an office-judgment that the common order was entered before the plaintiff filed his declaration.

In the case of *Winchester et als. vs. The President and Directors of the Bank of Alexandria*, 2 Munf., 339, decided June 26, 1811, it was held: A judgment by default cannot be entered when the writ has not been returned.

In the case of *Crews and Higginbotham vs. Garland*, 2 Munf.,

491, decided November 19, 1811, it was held: A writ cannot be legally executed after the term to which it was returnable.

A judgment entered in the clerk's office before the execution and return of the writ is erroneous, and cannot be supported by the writ's being returned executed to the term when judgment is made final.

In the case of *The James River & Kanawha Company vs. Lee*, 16 Grat., 424, decided November 23, 1863, it was held: An office-judgment in an action of ejectment does not become final without the intervention of the court or a jury; but there ought, in every such case, to be an order for an inquiry of damages. •

In the case of *Johnson vs. Fry*, 88 Va., 695, decided January 28, 1892, it was held: Where the declaration does not plainly describe the items and the account therewith filed, but merely mentions the sums paid, without giving any information about them, the account is insufficient.

SECTION 3285.

In the case of *Ruffin vs. Call*, 2 Washington, 233 (2d edition, page 181), decided at April term, 1796. Justice Roane, in delivering the opinion of the court, stated, *obiter dictum*: That in case of an action on a bond with a collateral condition an inquiry of damages is necessary.

In the case of *Hunt et als. vs. McRea*, 6 Munf., 454, decided December 16, 1819, it was held: A judgment at rules in a clerk's office cannot lawfully be made final on a declaration in debt for money lent, and not alleged to be founded on any specialty bill or note in writing, until a writ of inquiry has been awarded and executed.

In the case of *Metcalfe vs. Battaile*, 1 Va. (Gilmer), 191, decided March 12, 1821, it was held: A negotiable note is not, as to the endorser, a note for the payment of money within the meaning of the act of 1804. Judgment cannot, consequently, be rendered in such case without the intervention of a jury. On reversing such judgment, when there has not been a jury, the defendant will be allowed to object on the merits in the court below.

In the case of *Hatcher vs. Lewis*, 4 Rand, 152, decided March, 1826, it was held: Where a joint action is brought against drawer and endorsers of a negotiable note an office-judgment cannot be confirmed against all or either of the defendants without a writ of inquiry.

In the case of *Reese vs. Conococheague Bank*, 5 Rand., 326, decided June, 1827, it was held: A judgment by default, for want of appearance, founded on an instrument of writing for the payment of money, on which an endorsement of a credit is made by the plaintiff himself, ought to be entered subject to

such credit, or if the plaintiff refuses to take the judgment in that way a writ of inquiry should be awarded.

In the case of *Shelton's Executors vs. Welch's Administrators*, 7 Leigh, 175, decided February, 1836. In a debt on a decree for money a conditional judgment is entered in the office, without awarding a writ of inquiry of damages, and the judgment not being set aside becomes final at the next term, and execution is sued out on the judgment, but at the ensuing term the court set aside the judgment as irregularly entered, and gave defendants leave to plead to the action. Held: It was error to enter judgment in the office without awarding an inquiry of damages, and this was a clerical error, which the court properly corrected at a subsequent terms.

In the case of *McMillion vs. Dobbins*, 9 Leigh, 422, decided July, 1838, it was held: In an action on the case, if there be an office-judgment against the defendant with a writ of inquiry, and afterwards without any plea in the cause the jury be sworn as if there was an issue, and a verdict be found for the defendant, the verdict will be set aside and a new trial directed.

For the reference to 16 Grat., 424, see case of *James River & Kanawha Company vs. Lee*, *supra*, Section 3284.

The reference to 32 Grat., 472, is an error.

In the case of *Smithson vs. Briggs et ux.*, 33 Grat., 180, decided April 15, 1880, it was held: An office-judgment in an action of ejection does not become final without the intervention of a court or jury.

SECTION 3286.

In the case of *Grigg vs. Dalsheimer*, 88 Va., 508, decided December 10, 1891, it was held: When under said section plaintiff in assumpsit filed with his declaration an affidavit to the justness of his account and the time from which it bears interest, and defendant filed plea of *non assumpsit* without affidavit, and his plea is stricken out and his subsequent plea with affidavit is rejected and final judgment given for plaintiff, such judgment is not void, as the court had jurisdiction of both subject-matter and parties, and a writ of prohibition will not lie to restrain its enforcement.

SECTION 3287.

In the case of *Digges's Executor vs. Dunn's Executor*, 1 Munf., 56, decided March 13, 1810, it was held: A judgment at rules in the clerk's office of a county court ought to be entered as of the last day of the succeeding quarterly term, but if it be entered as at rules only, it is merely a clerical misprision and therefore amendable.

In such case, if the judgment be declared upon as of a quarterly term, and the transcript produced be of a judgment at

rules (which ought to have been entered as of such quarterly term), the variance as immaterial.

In the case of *Wallace et als. vs. Baker*, 2 Munf., 334, decided June 22, 1811, it was held: When the appearance bail, having been admitted to defend the suit, afterwards waives his plea, judgment is to be entered against the principal as well as against the bail.

In the case of *Evans vs. Freeland*, 3 Munf., 119, decided January 11, 1812, it was held: A *scire facias* purporting to be founded upon a judgment entered at rules in the clerk's office of a county court, but not mentioning that the judgment was confirmed, by not being set aside at the ensuing quarterly term, nor even that such quarterly term accrued prior to the suing out of the said *scire facias*, ought to be quashed as not setting forth any legal cause of action.

In the case of *Baird vs. Peter*, 4 Munf., 76, decided May 15, 1813, it was held: Under the act judgment may be entered, as well as execution issued for interest, though not mentioned in the writing, and not demanded by the declaration.

In the case of *Green vs. Shipwith*, 1 Rand., 460, decided May, 1823, it was held: It is an error in a court of law to enter a judgment against a defendant on the day after a conditional judgment has been confirmed at the rules. The defendant has until the next term after the conditional is confirmed in the office to set it aside, under this act of Assembly.

In the case of *White vs. Archer*, 2 Va. Cases, 201, decided by the General Court, June, 1820, it was held: A *capias ad respondendum* was issued returnable to the rules on the first Monday in April, and on that day common order was entered; the first Monday in May was the next rule-day, on which day the common order was confirmed in the office. On the same day the court sat. It was not regular to place that case on the office-judgment docket of that term, because the statute directs that the docket shall be made out before every term.

Anonymous.—4 H. & M., 476, decided by the Superior Court of Chancery for Richmond, September, 1809, it was held: On a bill taken as confessed the plaintiff cannot obtain a final decree without filing his documents and proving his case.

In the case of *Ender's Executors vs. Burch*, 15 Grat., 64, decided January, 1859, it was held: If the term of a circuit court lasts more than fifteen days, all office-judgments in which no writ of inquiry is ordered become final judgments on the fifteenth day, and cannot afterwards be set aside by the court. Where a court authorizes executions to issue upon judgments recovered during the term, the judgments become final from the time when executions may issue, and cannot afterwards be set aside by the court.

A court having set aside an office-judgment, and the execution

which had issued upon it after the fifteenth day of the term, and permitted the defendant to plead, the plaintiff may have a *supersedeas* from this order, and though that part of the order setting aside the judgment is interlocutory, the appellate court will reverse the whole order.

See the case of the *James River & Kanawha Company vs. Lee*, 16 Grat., 424, *ante*, Section 3284.

In the case of *Wall vs. Atwell*, 21 Grat., 401, decided August, 1871, it was held: In debt on bond, if the common order and the common order confirmed have been regularly entered at rules, the cause is properly on the office-judgment docket at the next term of the court, though no endorsement of the proceedings may have been made upon the papers in the cause. If the proceedings in the office has been so irregular that the cause is not properly on the office-judgment docket, the court should remand it to the rules for proper proceedings.

An office-judgment cannot be set aside when it stands as an office-judgment on the docket of the court by a plea in abatement.

In the case of *Turnbull vs. Thompson*, 27 Grat., 306, decided March 16, 1876, it was held: A summons in debt is served on a defendant on the 3d of February, and the judgment by default becomes final on the 3d of March. Under the statute the day of the service of the process may be counted, and therefore thirty days had elapsed between the service of process and the judgment, and it is a valid judgment.

In the case of *Dillard vs. Thornton*, 29 Grat., 392, decided November, 1877. On September 30, 1867, a summons in debt on a single bill was sued out, returnable to the succeeding October rules, to which rules it was returned executed on the 3d of October, and the plaintiff filed his declaration, and, the defendant not appearing, a conditional judgment was entered against him, which was confirmed at the succeeding rules, held October 28, 1867; and final judgment was entered against the defendant on the last day of the succeeding term of the circuit court, which was October 31, 1867, which was less than one month after the service of process on the defendant. Held: The entry of final judgment against the defendant within one month after he was served with process was erroneous.

According to the true construction of our statutes, where less than one month has elapsed between the service of process and the end of the succeeding term, the conditional judgment will become final at the term next succeeding the expiration of one month after the service of the process. The aforesaid judgment of October 31, 1867, having been set aside in the court below on the motion of the defendant, the court should have reinstated the cause upon the docket, with liberty to the defendant to plead, and to set aside the office-judgment upon the

usual terms, the said judgment to become final in case of his failure to set it aside. Where under such a judgment a *fi. fa.* is issued, and there is a proceeding by suggestion against persons indebted to the defendant, such defendant may, upon proper notice, appear in such proceeding and have the judgment vacated and all proceedings thereunder quashed. A notice to reverse or correct a judgment by default, or to quash an execution, need not be in writing. All that is requisite is that there should be reasonable notice.

In the case of *Terry (Assignee) vs. Dickinson et als.*, 75 Va., 475, decided April 21, 1881, it was held: Where process in an action of debt was served upon a defendant whilst he was in the military service of the Confederate States, and there is an office-judgment confirmed whilst he is in the service, the judgment is a valid judgment, and cannot be questioned in another suit. The judgment is not void though no declaration was filed in the cause, and can only be avoided by the proper proceedings taken in due season in the court which rendered the judgment. If, upon proceedings in the county court which rendered the judgment to set it aside, that court sustains the motion, and upon writ of error to the circuit court the judgment of the county court is reversed and the motion dismissed, and there is no appeal, the judgment of the circuit court is conclusive in favor of the original judgment upon all other courts.

In the case of *Neal et als. vs. Utz et als.*, 75 Va., 480, decided April 21, 1881, it was held: Where process was served upon a defendant in an action of debt on the day on which he was convicted of a felony, but before the conviction had taken place, and in that action a judgment by default was obtained against the defendant while he was confined in the penitentiary, the court having fairly acquired jurisdiction in the cause, the doctrine of relation does not apply so as to override and avoid the process.

Whether a judgment be the act of the court, or be entered up by the clerk under the statute, the effect is the same; in either case it is the act of the law, and until reversed by the court which rendered it, or by a superior tribunal, it imports absolute verity, and is as effectual and binding as if pronounced upon a trial on its merits.

In the case of *Mc Veigh vs. Bank of Old Dominion*, 76 Va., 267.

Scire Facias.—Neither declaration nor rule is necessary upon a *scire facias* to revive a judgment. If *scire facias* is returnable to rules, and defendant makes default, there should then be an award of execution which, if not set aside at the next term, becomes a final judgment as of the last day of the term. No order of the court is necessary in such case, but could prejudice no one.

In the case of *Robertson vs. Mays*, 76 Va., 708. This section applies to "judgments by default," and perhaps to "decrees on bills taken for confessed," and not where the defendants appear and answer; and the thirty days necessary to elapse in order to ripen a cause for hearing on its merits are thirty days from the service, not the return of the process.

SECTION 3288.

In the case of *Hunt vs. Wilkinson*, 2 Call, 50 (2d edition, 41, and quoted in the Code, 65), decided November 9, 1799, it was held: Plea *pais darrien continuance* may be pleaded after office-judgment and before the end of the next quarterly term.

In the case of *Mandeville vs. Mandeville*, 3 Call, 225 (2d edition, 194), decided May 7, 1802, it was held: The defendant may be ruled to trial in the county court at the first term after the office-judgment.

In the case of *Bradley vs. Welsh*, 1 Munf., 284, decided April 18, 1810, it was held: A plea in abatement ought not to be received to set aside an office-judgment, unless it be of matter which arose *pais darrien continuance*.

In the case of *Gray & Scott vs. Campbell*, 3 Munf., 251, decided April 2, 1812, it was held: It is no plea to an action upon an injunction bond "that the injunction was not dissolved unconditionally, but upon terms that the plaintiff at law should execute a bond for securing the title to a tract of land," without averring in the plea that such bond had not been given. Such defective plea ought not to be received by the court to set aside an office-judgment. Where an injunction is dissolved upon a condition, and that condition has been complied with by the defendants in equity, the surety in an injunction bond is not exonerated.

In the case of *Wychie vs. Macklin*, 2 Rand., 426, decided May 7, 1824, it was held: Where pleas are offered on setting aside an office-judgment, the court may exercise a sound discretion about receiving them, and should receive none (if objected to) that do not go to the merits of the action.

In the case of *Franklin vs. Cox*, 4 Rand., 448, decided August, 1826, it was held: The plea of *non est factum* is a plea to the merits, and ought to be received after an issue made up on the plea of payment, upon the delay in filing it being sufficiently accounted for.

In the case of *Syme vs. Griffin*, 4 H. & M., 277, decided November, 1809, it was held: A general demurrer is an issuable plea, which ought to be received for the purpose of setting aside an office-judgment.

In the case of *Backhouse vs. Jones's Administrators*, 1 Va. (Gilmer), 3, decided 1805, it was held: The plea of the statute

of limitations ought not to be allowed at any term subsequent to that at which the office-judgment ought to have been set aside, unless some sufficient cause appeared to excuse the neglect of pleading it in due time.

The reference to 16 Grat., 424, is to the case of *James River & Kanawha Company vs. Lee*, quoted *supra*, Section 3287.

The reference to 21 Grat., 401, is to the case of *Wall vs. Atwell*, cited *supra*, Section 3287.

In the case of *Smithson vs. Briggs et ux.*, 33 Grat., 180, decided April 15, 1880, it was held: The defendant in the ejectment may, upon notice to the plaintiff, appear at the next term of the court, and move the court to set aside the judgment and to allow him to plead therein.

SECTION 3290.

In the case of *Hook vs. Ross*, 1 H. & M., 310, decided June 10, 1807, it was held: In case of a bill in equity for specific performance of an agreement, if the defendant be guilty of contumacy, and the court, for want of evidence which he is bound to disclose, be not able to direct the specific performance, a sum of money may in like manner be decreed for the purpose of compelling the production of such evidence.

A writ of sequestration cannot regularly be issued on a sheriff's return of *non est inventus* upon an attachment for contempt.

In the case of *Postal Telegraph Cable Company vs. N. & W. R. R. Co.*, 88 Va., 929, decided March 24, 1892, it was held: Where defendant's employees, without orders, drove across complainant's railroad after award of injunction to restrain trespass on its roadway, and defendant disclaimed all evil intent, it was error to impose a fine for contempt.

SECTION 3291.

The case of *Kennedy vs. Baylor*, 1 Wash., 162, decided at the spring term, 1793, and quoted in the Code, is merely a case in which the practice was in accordance with this section; the decision is entirely on the merits of the case.

In the case of *Dalby vs. Price*, 2 Wash., 246 (1st edition, 191), decided at April term, 1796, it was held: In all cases where a general commission issues for taking depositions, upon an answer and replication in any suit in the high court of chancery, the cause must remain at rules six months from the time of filing the replication before it is set down for hearing; unless this be dispensed with by consent of parties, entered on the record.

In the case of *Picket et ux., et als. vs. Chilton*, 5 Munf., 467, decided March 11, 1817, it was held: It is not sufficient ground

for reversing an interlocutory decree, that no day was given an infant defendant to show cause against it, after he should come of age, because such omission may be corrected in the final decree.

In the case of *Jones vs. Mason (Executor of Jones)*, 5 Rand., 577, decided August, 1827, it was held: When a cause is set down for hearing by consent, upon bill and answer, the answer is to be taken as true.

In the case of *Poling vs. Johnson*, 2 Rob., 255, decided August, 1843, it was held: In a suit in chancery, where an answer is filed at rules in due time, four months from the time of the replication to the answer are allowed the parties for taking their depositions, and until the expiration of the said four months neither party has the right (without the consent of the other) to set the cause for hearing.

In the case of *Dabney vs. Preston's Administrators*, 25 Grat., 838, decided February 18, 1875, it was held: The decree in the court below was made when there was no replication to the answer of D., and after an appeal from the decree by D. was perfected, the court, on the motion of the plaintiffs, made an order permitting the plaintiffs to file the replication *nunc pro tunc*. If it was a proper case for such an order, the court should have allowed D. time to take testimony to meet the new phase of the case presented by the issue thus taken on his answer.

SECTION 3292.

In the case of *Key vs. Hord et als.*, 4 Munf., 485, decided October 27, 1815, it was held: On the hearing of a suit in chancery, if it be discovered that the cause is not matured for hearing as to some of the defendants, against whom the plaintiff appears to have a claim in equity, the bill ought not to be dismissed upon the merits, but only as to those defendants against whom there is no equity; as to the other defendants, it should be sent back to the rules for further proceedings, notwithstanding the plaintiff may have been negligent, and the cause was prematurely set for hearing on his motion.

In the case of *Cartigne vs. Raymond et als.*, 4 Leigh, 579, decided November, 1833. Upon a bill in chancery by a distributee against an administrator and his surety, alleging that the administrator has not duly accounted, and praying an account, the bill is taken *pro confesso* as to the administrator, but the surety answers and proves that the plaintiff, on a full and final settlement, has released the administrator, and so is not entitled to an account; upon which the chancellor dismisses the bill with costs as to both defendants. Held: The bill was properly dismissed as to both defendants.

SECTION 3293.

In the case of *Eubank et als. vs. Rall's Executor; Same vs. Sandige (Assignee), etc.*, 4 Leigh, 308 and 317, decided February, 1833. Judgment upon *nil dicit* in county court, entered on the minute book "for specialty and costs," and then entered at large by the clerk in the order-book for debt, with interest from March 1, 1817, the date of the specialty, though the day of payment appointed in the condition was March 1, 1818, the clerk, in his entry in the order-book, following not the condition of the bond, but a memorandum thereon endorsed, that the debt, if not punctually paid, should bear interest from the date of bond. Held:

1. It was error to give interest from the date of bond, instead of from the day of payment; and

2. This error was a clerical mistake, amendable by the court at a subsequent term.

In the case of *Southall's Administrators vs. The Exchange Bank of Virginia*, 12 Grat., 312, decided April, 1855, it was held: In an action of debt the common order is confirmed at rules irregularly, the defendant having pleaded to a part of plaintiff's demand. This irregularity cannot afterwards be corrected at rules.

An irregularity committed at rules may be corrected at the next term of the court, and the plaintiff may be allowed to withdraw a defective replication and reply, and if the plea filed at rules does not go to the plaintiff's whole demand, he may sign judgment for so much as is not covered by the plea.

In such case the defendant is entitled to a continuance of the cause, as of right if he demands it.

In the case of *Insurance Company of the Valley of Virginia vs. Barley's Administrators*, 16 Grat., 363, decided February 18, 1863, it was held: As actions at law in the county court are cognizable only at the quarterly terms, so motions to set aside any of the proceedings in the office in such actions are cognizable only at a quarterly term. And therefore the "proceeding vacation" means in its application to such cases the interval between the quarterly terms of the court.

In the case of *Wall vs. Atwell*, 21 Grat., 401, decided August, 1871, it was held: If the proceedings in the office had been so irregular that the cause is not properly on the office-judgment docket, the court should remand it to the rules for proper proceedings.

SECTION 3294.

The reference to 7 Leigh, 720, is an error.

In the case of *Early et ux. vs. Friend et als.*, 16 Grat., 21, decided August 28, 1860, it was held: One tenant in common may maintain a suit in equity against his co-tenant, who has occu-

pied the whole of the common property, for an account of rents and profits.

The case of *Graham vs. Pierce*, 19 Grat., 28, decided January 29, 1869, supports the case of *Early vs. Friend*, 16 Grat., 21, cited *supra*.

In the case of *Newman vs. Newman*, 27 Grat., 714, decided September, 1876, it was held: B. and C. are joint tenants of a furnace, a forge, and a large quantity of land, derived from their father; and B., who had conducted the business for some years in the lifetime of his father, continues to carry it on, with the assent of his sister, without any contract with C. He must account to C. for her share of the benefits. Though there were efforts between B. and C. to agree upon a rent which should be paid by B. to C. for her half of the property, and B. seems to have thought that his proposition was acquiesced in, and did not keep such accounts as he should have kept, so as to enable him to render the account of profits to her, yet C. is entitled to have the account taken, and to have her share of the profits. B., having been allowed all his expenses in carrying on the business, including \$1,500 a year for his services and interest on his capital employed in it until it became self-sustaining, and then being allowed by the decree three-fifths of the net profits, he, at least, cannot complain of the decree.

In the case of *Huff vs. Thrash*, 75 Va., 546, decided July 26, 1881, it was held: Where there are two administrators their relations *inter se* are fiduciary, and they may be held to account, each by the other, in a court of equity, touching transactions between themselves connected with the administration of the trust. This equitable jurisdiction extends to cases of account between tenants in common, joint tenants, partners, and, by analogy, between executors and administrators who have a joint and entire interest in the effects of the testator or intestate. In all cases in which an action of account would be the proper remedy at law, and in all cases where the trustee is a party, the jurisdiction of a court of equity is undoubted.

In the case of *Fry et als. vs. Payne*, 82 Va., 759, decided January 27, 1887, it was held: One parcener receiving more of the rents and profits than his share is liable to his co-parceners in an action of account.

CHAPTER CLX.

In the case of *Hill vs. Southerland's Executor*, Wythe's Chancery Reports, 73, decided October, 1790, it was held: If a debtor who owes money on several accounts does not, at the time of making payments, or before, direct in which of those accounts they shall be credited, the creditor may enter the credit in either account he pleases.

In the case of *Lightfoot vs. Price*, 4 H. & M., 431, decided in the Superior Court of Chancery for the city of Richmond, 1810, it was held that payments were to be applied first to the payment of accrued interest, and, if the payment exceeds the interest, the remainder to be applied to the reduction of the principal. Should the payment, however, fail to extinguish the accrued interest, then the principal may not be increased, as that would give interest upon interest.

In the case of *Donally vs. Wilson*, 5 Leigh, 329, decided April, 1834, it was held: If A. owes a debt to B., payable on demand, for which C. is A.'s surety, and A. assigns debts of others to B. in part payment, and after such assignment, but before the assigned debts are collected, A. contracts another debt to B., for which there is no security; in such case B. cannot, after the collection of the assigned debts, apply the same to the payment of A.'s last debt contracted after the assignment was made, and recover the whole amount of the first debt from C., the surety for it.

There can be no election as to the application of payments where there is but one debt due at the time of the payment made.

In the case of *Smith vs. Loyd*, 11 Leigh, 512, decided January, 1841, it was held: Where one is indebted to another for several debts, and the debtor makes payments without directing to which of the debts they shall be applied, and the creditor makes no particular application of the payments when received, there is no settled rule that the payments shall be applied either according to the presumed intention of the debtor or that the payments shall be applied in the manner most beneficial to the one or the other, but it devolves upon the court to apply the payments according to the justice of the particular case, with a view of all its circumstances. In general, where several debts are due, and payments are made without specific application by either debtor or creditor at the time, the payments ought to be applied to extinguish the debts according to priority of time.

In the case of *Miller vs. Trevillian*, 2 Rob., 1, decided April, 1843, it was held: A debtor owing a debt consisting of principal and interest, and making a partial payment, has a right to direct its application to so much of the principal, to the exclusion of the interest, and the creditor, if he receives it, is bound to apply it accordingly.

In the case of *Vance vs. Monroe*, 4 Grat., 52, 1847. M. sells S. a tract of land, for the purchase-money of which he takes three bonds, payable in one, two and three years, and he takes a deed of trust on the land to secure the same. When the first bond becomes due he sues thereon and obtains a judgment on

which execution is issued and levied on the property of S., who obtains an injunction thereto, which is afterwards dissolved. M. then brings an action on the injunction bond against S. and his surety, V.; and pending the suit the land is sold under the deeds of trust, and purchased at a price not quite sufficient to discharge the two last bonds for the purchase-money, which were then due. After the sale the defendants to the suit on the injunction bond insist that the proceeds of the sale of the land should be first applied to satisfy the judgment obtained on the first bond. Held: The proceeds of the sale are to be applied to the discharge of the two last bonds, leaving the judgment on the first bond in full force.

In the case of *Ross (Executor) vs. McLauchlan's Administrator*, 7 Grat., 86, decided May 14, 1850, it was held: A debtor, by four bonds payable at successive periods, makes payments to his creditors, which, upon a settlement after the death of the debtor, are ascertained to amount to more than a sufficiency to discharge the first bond. The creditor will not be permitted to apply the amount remaining after discharging the first bond as a credit upon the fourth, but the court will apply it to the second bond in relief of a party bound as surety for the amount of the second bond.

A creditor by two judgments and a bond files a bill against the executor of his debtor, and obtains a personal decree against the executor for the whole amount. Upon an execution which issued upon this decree, a part of the money is made. The judgments being debts of highest dignity, the money so made is to be applied as a credit upon them in relief of a party who is bound as a surety for the judgments.

In the case of *Schofield vs. Cox et als.*, 8 Grat., 533, decided January, 1852. A. owns a tract of land on which there is a deed of trust to secure a large debt. A. sells two-thirds of the land to B. and for the purchase-money takes from B. eleven bonds payable at successive periods, and a deed of trust upon the property sold to secure them. A. assigns to C. the fifth, sixth, and seventh bonds due, and B. pays to A. either before the assignment or afterwards, without notice of it, rather more than to discharge the first four bonds, and then A. and B. become insolvent. Held: That C. as assignee of A. is entitled as between him and A. to the benefit of the deed of trust given by B. to secure the payment of his bonds.

That C. is entitled to have one-third of the land not embraced in his security applied in the first place to satisfy the first encumbrance, to the relief of the two-thirds of the land conveyed by B. to secure his bonds.

That the payments beyond the amount of the first four bonds, made by B. to A., without notice of the assignment, having been

made on account, are not so treated as applicable to the first bond assigned to C., but to the bonds held by A.

In the case of *Howard et als. vs. McCall* (*Administrator for, etc.*), 21 Grat., 205, decided June, 1871, it was held: The debtor not having directed the application of the payment, it was the right of the creditor to apply it to the first bond; and if neither had applied it, the law would apply it to the first bond due, and it is to be presumed that it was so applied.

In the case of *McClintic vs. Wise's Administrators et als.*, 25 Grat., 448, decided September, 1874. W. sold land to M., retaining the title, for four thousand one hundred dollars; cash one thousand dollars, and three bonds payable January 1, 1858, 1859, and 1860. The first was paid to W. He transferred the bond due January 1, 1860, to S. in May, 1859, who assigned it to H. W. died in possession of the bond due January, 1879. His administrators sued M. in equity to subject the land to pay the bond held by W. at his death without making S. or H. a party, and the land was sold by a commissioner to J. for two thousand dollars, and the sale was confirmed, and the commissioner was directed to collect the money and pay the plaintiffs. H. upon his petition is made a defendant in the suit, and files his answer, claiming that his bond is still unpaid, and that he is entitled to priority of payment out of the land. The administrators file an answer, insisting that H. had lost his right to subject the land by his laches in not suing M., who had in the meantime become insolvent. The decree gives priority to the plaintiffs over H., and he appeals. Held: The bond held by H. having been transferred by W. in his lifetime, though due after the bond retained by him, is to be first paid out of the proceeds of the sale of the land.

In the case of *Chapman vs. Commonwealth*, 25 Grat., 721, decided January 21, 1875, it was held: The debtor may direct the application at or before the time of making such payment, and such direction may be given directly or expressly, or by implication.

If the debtor gives no such direction, according to his pleasure, he may make it either at the time of the payment or afterwards, before the commencement of any controversy on the subject, but after he has once made the application he cannot change it to another without the consent of all the parties concerned.

Such application by a creditor may also be made either expressly or by implication. If he enters the debits and credits in a general account as they occur, this will be considered, in the absence of evidence to the contrary, as a general application of the credits to the debts in the order of time in which the debts occur, thus paying the debt first due.

If neither the debtor nor the creditor make the application, then the law will make it according to the circumstances of each case, and if there be no other controlling circumstance the application will be made according to the order of time, paying first the oldest debt. But if the debts be due by a collector or other receiver of public money, under bonds with different sets of sureties, then the law will so apply the payments, if possible, as that the money collected under one bond shall be applied to the relief of the sureties in that bond; and the creditor in such case, if he be informed as to the source from which the money with which a payment may have been made was derived, cannot apply it otherwise, even with the consent or by direction of the principal debtor.

In the case of *Fultz vs. Davis*, 26 Grat., 903, decided December 2, 1875, it was held: Where payments are made from time to time on a debt bearing interest, the interest is to be computed on the debt up to the time of payment, and the payment is to be deducted from the amount, principal and interest. It is error to compute interest on payments to a future day when the debt is paid or settlement made, and then credit the payment and interest upon the debt, principal and interest.

In the case of *Gordon vs. Fitzhugh et als.*, 27 Grat., 835, decided November, 1876. K. made a deed to F. conveying a tract of land in trust to secure the purchase-money of the land, evidenced by five bonds, payable at different periods to R., the vendor. R. first assigned the bond payable second in date to M., next he assigned the bond first payable to McG., and afterwards he assigned the last three to G. The land when sold did not produce sufficient to pay all the bonds. Held: The bond assigned to McG., the first assignee, is to be first paid; then the bond assigned to M., the second assignee, and the balance if any, is to be paid to G., the last assignee.

See the case of *Grubbs vs. Wysors*, 32 Grat., 127, cited *ante*, Section 2860.

In the case of *Lingle et als. vs. Cook's Administrator*, 32 Grat., 262, decided September, 1879, it was held: Where a debtor owes various debts to the same creditor, and makes a payment, the application of the payment may be made by himself at the time he makes it, and if he fail then to make it, the application may be made by the creditor, and if he fails to make it, the court before which the transaction comes may direct it to be made according as may, in the judgment of the court, appear to be equitable and just under all the circumstances of the case.

In the case of *Coles vs. Withers et als.*, 33 Grat., 186, decided April, 1880. In 1852 C. sold to M. a tract of land for \$3,564, for which she took his bond, and reserved a lien on the face of

the deed given M., which was duly recorded. Between the sale in 1852, and December, 1855, there were other transactions between C. and M., by which the latter became indebted to the former (inclusive of the purchase-money for the land) \$10,630.50, and for which he executed his bond, with two personal sureties, and the bond for \$3,564 was surrendered. M. died in 1856, leaving his whole property to his wife L., who was a sister of C. L., the widow, soon married W., and in 1863 W. and wife conveyed the land purchased of C. with other lands to H., made him a deed and put him in possession. On October 19, 1866, the balance due on the \$10,630.50 bond was \$4,123, for which W., who was the representative and had married the widow of M., gave his bond, got possession of the \$10,630.50 bond, and confessed a judgment for the \$4,123 in favor of C., which he, W., alleges was in lieu of the bond which he got possession of. W. soon went into bankruptcy and paid but a small portion of the judgment. C. denies the statement of W. about his possession of the bond, and there is nothing in the record to certainly show, or to show that she ever intended to release the lien reserved in the deed to M. H. denies all knowledge of the reserved lien at the time of the purchase and until a long time thereafter. There was nothing done by C. to induce H. to believe that she had waived her lien, or to influence his conduct in any way. On a bill filed by C. against H., and W. and wife in 1871, to enforce the lien for the purchase-money then due on the land sold by C. to M., and afterwards by W. and wife to H., held: As to the payments made on the bond for \$10,630.50, H. insisted that they should be first applied to extinguish the purchase-money bond of \$3,564, and that was therefore extinguished. Held: H., being not one of the original parties to the bond, has no right to insist how payments shall be appropriated, that being a right existing only between those parties, and whilst, as a rule, where there are two debts, one secured and the other not, the courts will apply the payments to the unsecured debts, yet, as no general rule applicable to every case can be adopted without the greatest hardship, if neither party has made the application, according to what it deems right and proper in each case, and in this case the payments should be applied *pro rata* to all of the debts due to C.

In the case of *Magarity vs. Shipman*, 11 Va. Law Journal, 214, decided January 20, 1887, it was held: When no application of a payment by a debtor has been made by either party, the creditor cannot complain of the action of the court in applying them to a secured debt which is undisputed and is prior to and bears a higher rate of interest than another and an unsecured debt.

SECTION 3295.

In the case of *Faulkner's Administrator vs. Brockenbrough*, 4 Rand., 245, decided May, 1826, it was held: Where it is stipulated in a mortgage that money shall be paid on or before a certain day, and it is paid after that day, the mortgagee is not deprived of his right of action at law on the mortgage. The acceptance of the money by the mortgagee after the day appointed for payment does not change the rights of the party at law.

SECTION 3298.

In the case of *Scott vs. Alexander & Peterfield Trent*, 1 Wash., 77, decided at the spring term, 1792, it was held: A debt due from an individual partner cannot be set off against a partnership debt.

In the case of *White, Whipple & Co. vs. Bannister's Executors*, 1 Wash., 166, decided at the spring term, 1793, it was held: A set-off is improper as against rent due testator's estate, though a bill in chancery to restrain the execution of a judgment for the rent may be treated as an original bill of discovery of assets; and after such discovery, if the estate be solvent, then the set-off will be proper.

In the case of *Brown's Administratrix vs. Garland et als.*, 1 Wash., 221, decided at the fall term, 1794. The administratrix had advertised a discount of five per cent. to all creditors of the decedent who should purchase any of the property of decedent, and the defendant offered this as evidence of the solvency of the estate, to support a plea of set-off against a bond given by said defendant to the plaintiff as administratrix; and the defendant thereunder offered two bonds given by the decedent. Held: The defendant, not being a purchasing creditor, cannot claim under this offer, and without this there is no doubt of the admission of the set-off being improper.

In the case of *Rose vs. Murchie*, 2 Call, 409 (2d edition, 344), decided October 25, 1800. A., being indebted to D., F. & Co. by bond, died; and at the sale of his estate by his executors, F., the acting partner of D., F. & Co., bought a slave, which he carried to his own plantation, and there kept him. The amount of the purchase for the slave was held a good discount against the bond. (In this case the rule that a private debt of a partner cannot be set off against a debt due the company does not apply.)

In the case of *Dangerfield vs. Baylor's Administrator*, 1 Munf., 529, decided November 27, 1810, it was held: A debtor ought not to be allowed a set-off (even in equity) for unliquidated and disputed claims against his creditor purchased by him after suit brought by the creditor against him.

In the case of *Ritchie & Wales vs. Moore*, 5 Munf., 388, decided February 4, 1817, it was held: In an action against a commercial company, a set-off of a debt due to an individual partner cannot be allowed.

In the case of *Porter vs. Nekervis*, 4 Rand, 359, decided June, 1826, it was held: Joint and separate demands cannot be set off against each other; nor can partnership and separate demands be set off against each other.

In the case of *Webster vs. Couch*, 6 Rand, 519, decided October, 1828, it was held: Unliquidated damages for a substantive injury cannot be set off either at law or in equity against a legal demand.

In the case of *Cabell's Executor vs. Roberts's Administrator*, 6 Rand., 580, decided November, 1828, it was held: Court of equity will not interfere with judgment at common law where matters of set-off could have been introduced by common law methods.

In the case of *Gilliat vs. Lynch*, 2 Leigh, 493, decided February, 1831, it was held: Against a debt due by A. and B. jointly to C., a due debt by C. to B. alone cannot be set off in equity any more than at law.

In the case of *Feazle vs. Dillard*, 5 Leigh, 30, decided January, 1834. Feazle is indebted to Dillard by bond payable January, 1820, which, after it is due, is assigned by Dillard to Campbell; but before notice of assignment, Feazle becomes surety for Dillard in a bond to Burd, payable February 22, 1822. Dillard becomes insolvent. Held: Feazle is entitled in equity to set off the amount of the bond in which he is Dillard's surety to Burd, though not yet due (unless he is indemnified against his suretyship) against his own bond to Dillard in the hands of Campbell, the assignee. But he may waive this equity as against the assignee by his own conduct.

In the case of *Pulliam vs. Winston*, 5 Leigh, 324, decided April, 1834, it was held: An obligor in a bond given to one as administrator of an estate cannot offset debts due him from the administrator individually against the demand on the bond, either at law or in equity; nor can he set off debts due him from the intestate, nor his claim as one of the distributees of the intestate's estate, since, to allow such set-offs, would involve the necessity of taking an account of the assets in every case in which the administrator asserts a demand on behalf of the estate, and might subject the administrator to a *devastavit* if a mistake should be made.

In the case of *Clopton (Administrator) vs. Morris et al.*, 6 Leigh, 278, decided April, 1835. N., holding bonds of C. for \$40,000, payable at a future day, assigns them to B. and M., and then becomes insolvent; S. holds a bond of N. to him for \$2,247 on

demand; after N.'s assignment of C.'s bonds to M. and B., but before C. has notice of such assignment, an agreement is made between C. and S. whereby S. assigns N.'s bond held by him to C., and C. gives his note to S. to pay him the amount thereof six months after the date when C.'s bonds to N., assigned to M. and B., were to fall due; at the time of this agreement between C. and S. they were both apprised of N.'s insolvency, and their purpose was to save to S. the debt which N. owed him, if by this means it could be saved; and it was understood between them that, if S.'s assignment of N.'s bond to C. should turn out not to be a legal one, or if, by reason of any law unknown to either party, C. should be unable to set off N.'s bond assigned to him by S. against his own bonds to N. assigned to M. and B., then neither C. should have recourse against S. on his contract of assignment, nor S. have recourse against C. on his note for the contents of N.'s bond assigned by S. to him. In an action by M. and B. against C. on his bonds assigned by N. to them, it was held: C. is entitled to set off N.'s bond to S. assigned by S. to C.

In the case of *Craigien's Executrix vs. Lobb*, 12 Leigh, 627, decided August, 1841, it was held: Though no action lies for clerk's fees till they shall be put into an officer's hands for collection, and he has returned that they cannot be levied by distress, yet the clerk may set them off against an action on his bond to the party from whom they are due.

In the case of *Taylor's Administrator vs. Spindle*, 2 Grat., 44, decided April, 1845. A vendee of land being entitled to an abatement from the amount of the purchase-money for the failure of the vendor to put him in possession of part of the land at the time specified in the contract, and the vendee afterwards becoming insolvent, and the land being sold, and the vendor having assigned the bonds for the purchase-money and removed from the State, the assignee of one of the bonds, having obtained a judgment against the vendee before the conveyance by him of the land, comes into equity to enforce satisfaction of his judgment out of the lands in the hands of the purchasers. Held: The purchasers are entitled to set off the amount to which the vendee is so entitled against the purchase-money yet due. If the vendee paid a part of the purchase-money to the vendor, or to a subsequent assignee, with notice of a prior assignment of one of the bonds, the purchaser can only set off against such prior assignee the balance due to the vendee, the amount so paid by him. If two or more of the bonds for the purchase-money are unpaid, the claim of the vendee should be first applied to the discharge of those last assigned, and only the balance remaining after their discharge is a good set-off against the first assignee. If the bonds were still in the hands of the vendor, or

if the assignment thereof was a cotemporaneous act, and a judgment binding the lands of the debtor has been obtained on one of the bonds, and no such judgment has been obtained on the others, the claim of the vendee shall not be set off against the judgment binding the land, except for the balance of said claim, after discharging the other bonds.

In the case of *Wayland vs. Tucker et als.*, 4 Grat., 267, decided January, 1848. The principal and two sureties in a bond became insolvent, and the other surety paid the debt. Previous to this payment the solvent surety had executed his bond for less than half the amount of the first-named bond to one of his co-sureties, who had conveyed it in trust for his creditors. After the payment of the first-mentioned debt by the solvent surety, judgment was recovered against him on his own bond, and he then enjoined the judgment, claiming to offset it by his co-surety's portion of the debt that he had paid. Held: He is entitled in preference to the assignee of his bond. He is entitled to relief in equity, notwithstanding the judgment at law.

In the case of *Trimyer vs. Pollard*, 5 Grat., 460, decided January, 1849, it was held: Where a defendant does not file a plea of set-off, but files his account and gives notice of set-off, the plaintiff cannot reply the statute of limitations, and he is therefore at liberty to rely upon it in evidence.

In the case of *Hupp vs. Hupp*, 6 Grat., 310, decided July, 1849. H. & N. are merchants and partners. H. sells out to M., and the new firm undertakes to pay the debts of the first. H. becomes indebted to the new firm, for which he executes his bond with two sureties, and this bond is assigned for value to A. The new firm afterwards fails, and the partners are insolvent, leaving debts of the old firm unpaid to a larger amount than the bond of H., and H. pays them. Held: H. is entitled to equity to set-off against his bond in the hands of the assignee the debts of the old concern of H. & N., which M. & N. were bound to pay, and which H. had paid.

In the case of *McClellan vs. Kinnaird*, 6 Grat., 352, decided October, 1849, it was held: Judgment on a forthcoming bond enjoined at the suit of the surety, on the ground that he had an action pending against the plaintiff in the judgment for a larger amount, and that the plaintiff was insolvent.

In the case of *Minor vs. Minor's Administrator*, 8 Grat., 1, decided July, 1851, it was held: The count in an action of assumpsit by an administrator is for money had and received, and the bill of particulars merely states an account in which the defendant is debtor to the administrator for money received, stating a sum certain. The count and the bill of particulars are not sufficient to admit proof of an admission by the

defendant that he had received from a third person a sum certain belonging to the estate of the plaintiff's intestate.

In the case of *Bell vs. Crawford*, 8 Grat., 110, decided July, 1851, it was held: In assumpsit defendant pleads non-assumpsit, and with it files affidavit of set-off and the set-off, which is a note. Though there is no plea of set-off or bill of particulars, the evidence in relation to the set-off is properly admitted.

In the case of *Glazebrook's Administrator vs. Ragland's Administrator*, 8 Grat., 332, decided October, 1851. A deed of trust by husband in favor of himself and wife was not duly recorded, but the land was sold by the trustee under a decree of the court in a friendly suit by the *cestui que trust* against the trustee, and conveyed to the purchaser by deed duly recorded. Years afterwards, but before all the purchase-money was paid, the purchaser became the surety of the husband in a forthcoming bond, and was compelled to pay the money. In an action on the bond for the purchase-money by the trustee against the administratrix of the purchaser, she pleaded as a set-off the debt paid by the purchaser as surety of the husband. Held: That though the deed of trust was not duly recorded, yet under the circumstances it was valid, and neither the purchase-money nor the land was liable for the husband's debts. The deed of trust being valid, the interest of the husband in the trust-subject is a joint interest, and therefore cannot be set off by a debt due from himself.

In the case of *Rice's Executor vs. Annatt's Administrator*, 8 Grat., 557, decided April, 1852, it was held: Where the defendant relies upon a specific payment or set-off by way of discount against a debt, an account stating distinctly the nature of such payment or set-off, and the several items thereof, must be filed with the plea, though the defendant may rely upon the parol admissions of the plaintiff to prove such payment. But this is not necessary where no specific payment is relied on; but the defendant offers proof of the admissions of the plaintiff that but a portion of the debt is due.

In the case of *Hudson vs. Kline*, 9 Grat., 379, decided September 3, 1852, it was held: If the claims which he holds against the plaintiffs at law are only recoverable in equity, still he is not entitled to enjoin the judgment, and to have them set off against it.

In the case of *Ragsdale vs. Hagy et als.*, 9 Grat., 409, decided September 6, 1852, it was held: A vendee of land being entitled to come into equity to enjoin a judgment recovered by an assignee on a bond given for the purchase-money, on the ground of difficulties in the title, and it being doubtful whether he can get a title, though the title is decreed to him in his suit, he is entitled to set up in equity offsets he held against his vendor

prior to the assignment; and he is not bound to plead them at law; and this especially as one of the offsets arose out of the contract of sale, and another was only an equitable offset at the time of the assignment.

In the case of *Perkins (Administrator) vs. Hawkins (Administrator)*, 9 Grat., 649, decided February 24, 1853, it was held: Defendant may have leave to file an additional account of set-offs when it will not produce delay to the plaintiffs and it is necessary to attain the justice of the case. And if the plaintiff obtains leave to amend his declaration, as defendant is entitled to a continuance, there can be no objection to filing the account on the ground of delay.

In the case of *George vs. Strange's Executor*, 10 Grat., 499, decided October, 1853, it was held: An injunction to a judgment at law to set up payments or offsets which he might have pleaded at law, and if a discovery was necessary to enable him to prove them, he should have filed his bill of discovery in aid of his defence at law, or he should have filed interrogatories to the plaintiff under the statute.

In the case of *Davis vs. Miller*, 14 Grat., 1, decided April 11, 1857, it was held: A set-off as between the maker and payee, acquired after the transfer of an overdue note, though acquired without notice of the transfer of the note, cannot be set off against the holder.

By the endorsement of negotiable notes, though after-due, the legal title passes without notice to the maker. But in the case of transfers of choses in action not negotiable, only the equitable title passes, and the maker may make payments to the payee or obligee until he has notice of the transfer.

In the case of *Allen et als. vs. Hart*, 18 Grat., 722, decided April, 1868, it was held: The defence of set-off is admissible in a motion upon a forthcoming bond taken on a warrant of distress.

In the case of *Exchange Bank of Virginia vs. Knox*, 19 Grat., 739, decided May 25, 1870. Under the act requiring the banks of the Commonwealth to go into liquidation, the banks being insolvent execute deeds conveying all their property, including debts due to them, to trustees for the payment of their debts. Held: Though the charter of the banks requires them to take their notes in payment of debts due to them, this does not authorize debtors of the banks to pay their debts with the notes of the banks bought up after the execution and recording of the deeds.

In the case of *Saunders, etc., vs. White et als.*, 20 Grat., 327, decided January, 1871, it was held: The principles decided in the cases of *Exchange Bank of Virginia for Camp (Trustee), etc., vs. Knox, etc.*, and *Farmers' Bank of Virginia for Goddin, etc., vs. Anderson & Co.*, 19 Grat., 739, reaffirmed.

In the case of *James et als. vs. Johnson*, 22 Grat., 461, decided July 18, 1872, it was held: In a suit upon a bond given by M. and others to the person who was administrator of the estate of their intestate for the amount due him upon a settlement, they cannot set off moneys subsequently received by him as administrator, the claims not being in the same character.

Though the administrator has made a statement of assets received and payments made by him since the bond was given, and, finding a balance of the estate in his hands, endorses it as a credit upon the bond, yet as the obligors do not acquiesce in that statement, they are not to be allowed the credit endorsed, but the balance due by the administrator must be ascertained by a correct settlement of his administration account.

The bond bears date on the 14th of May, 1863, and is payable on demand, and the balance found due to the administrator at that date is almost wholly made up of his commissions on receipts and disbursements prior to the 15th day of November, 1862. The bond having been given with reference to the Confederate States treasury notes as a standard of value, is to be scaled as of its date.

In the case of *Whartman et als. vs. Yost*, 22 Grat., 595, decided September 11, 1872. Y. brings an action of debt upon a bond against W. and two others, W. being the principal in the bond. The defendants seek to set off a judgment recovered by P. against Y., which has been assigned to W. Held: Under the statute the judgment is a good set-off to the bond, though the debt sued for is against W. and two others, and the judgment is assigned to W., and though the plaintiff's claim is legal and the claim of W. is equitable.

See the case of *Chapman et als. vs. The Commonwealth*, 25 Grat., 721, cited *ante*, Chapter 160.

In the case of *Huffmans vs. Walker*, 26 Grat., 314, decided June 30, 1875. W. brings debt on a bond against H., and H. pleads payment and set-off, on which there is a re-issue. H. files with his plea a statement of the payment which was the amount of a bond of W. and J. to S., and that W. agreed with H. if H. would pay the bond due to S., H. should have credit for the amount as a payment on the bond sued on. Held: H. is a competent witness to prove what passed between himself and J. in relation to the arrangement between him and J. for the procurement, and D., that F. would take in payment of his debt any debt on W. which K. would take in payment of S.'s debt to W. D. obtained this judgment from H., and assigned it to K., who credited the amount on S.'s debt to W. There was a verdict for the defendant, and on motion for a new trial, held: The evidence should have been excluded from the jury, the defendant's plea not describing the payment so as to give plaintiff notice of its nature, as required by the statute.

In the case of *Peery vs. Peery*, 26 Grat., 320, decided June 30, 1875. H. recovers a judgment against W. and P.; afterwards W. and H. die, and K. qualifies as the executor of W. and the administrator of H.; as administrator of H., K. sues out a *scire facias* to revive the judgment against P., the surviving obligor, and he appears and files a general plea of payment, without stating the nature of the payment. He proves that H. in his lifetime assigned the judgment to D., who was a debtor of S., who was a debtor of W., and that under an agreement between S. and by H. of the bond of S., though J. is dead.

If the plea is sustained by the evidence, the payment of the bond of S. by H. is a good payment *pro tanto* upon his bond to W.

Payment of a debt is not necessarily a payment of money, but that is payment which the parties contract shall be accepted as payment.

In the case of *Finney et als. vs. Bennett*, 27 Grat., 365, decided March, 1876, it was held: The bank of P. was ruined by the late war, and no officers of the bank have been elected, nor has there been a meeting of the board since April, 1865, and it has done no business since, and in fact it had been abandoned and ceased to exist. In April, 1866, H. and M., suing as well for themselves as for all the other stockholders, creditors, and depositors, etc., filed their bill against the bank and the president for a settlement of its affairs and a distribution of its assets. The court appointed a receiver in the case, and in June, 1866, there was a decree for an account.

A debtor of the bank purchasing debts due from the bank after the decree for an account is only entitled to stand in the shoes of his assignor, and receive his proportion of the assets realized.

In the case of *Armentrout's Executors et als. vs. Gibbons et als.*, 30 Grat., 632, decided September, 1878. In 1856 M. sold and conveyed her share of that tract of land to her brothers, J. and H., reserving a vendor's lien in the deed for \$1,204.93. In 1860 J. and H. sold and conveyed with general warranty the whole tract to A. for \$23,500, of which one-third was paid in cash, and bonds of \$2,000 given to H. for the balance, payable in each year, from 1861 to 1867, and \$1,666.66 in 1868, reserving in the deed a vendor's lien as security. In 1860 H. assigned the four bonds falling due in 1865, 1866, 1867, and 1868 to K., and K. assigned to G. in April, 1861. K. assigned to S. the bond due in 1865. A. died in 1867, having paid off the first four bonds and made payments to G. on the sixth, and after his death A.'s executors paid to K. the last bond. The deed from M. to J. and H. was recorded, but was destroyed by the Federal forces in 1864. After the war C., as assignee of M., filed a bill

to enforce the vendor's lien in the deed from M. for the \$1,204.93 and obtained a decree. Pending C.'s suit G. filed his bill to enforce the vendor's lien in the deed to A. for a balance due on the two bonds assigned to him. A.'s executors and devisees insisted that they should have credit on the bonds assigned to G. and S. for the amount of C.'s decree, they insisting that the purchase-money paid by A. in his lifetime, and by the executors since, was paid without any knowledge of C.'s lien on the land; that, deed having been destroyed, J. and H. were insolvent. Held: A. was entitled to a credit on account of the purchase-money due by him as a vendee of said land for the said sum of \$1,204.93, with interest, and he was so entitled as against the assignee of said bonds, at least of the assignments made without his consent.

That the liability of such assigned bonds to such right of set-off is not in the order in which said bonds are payable, but in the inverse order of their assignment, and if some of said bonds were assigned and some were not, the unassigned bonds were liable to said right of set-off bonds before the assigned bonds, even though the unassigned bonds were payable before the assigned bonds.

That the said land remained liable in the hands of A., the vendee, to the said vendor's lien for the said sum of \$1,204.93 and interest, notwithstanding the destruction of the record of the deed, and that the said A. and his executors may have paid the full amount of the purchase-money and interest, without actual knowledge of the existence of such lien at the time of such payment, the due recordation of the said deed in which said lien was reserved being constructive notice to him and them of the existence of such lien, and as effectual for this purpose as actual notice of its existence, or as if the deed had not been destroyed.

A. receiving notice of the assignment of the said bond to K., before his payment of the bonds of 1861, 1862, 1863, and 1864, then such payment, to the extent of the said sum of \$1,204.93, with interest, was a payment in his own wrong; but if he made such payment without such notice, then he or his intestate is entitled to a credit for the sum of \$1,204.93 on the said assigned bonds.

The bond for \$1,666.66 paid by the executors of A. to K. was subject to the said set-off in preference to, and in exoneration of, the bonds assigned by K. to G. and S., and this though the executors paid it without knowledge of the said C.'s lien. Both A. and his executors were chargeable with constructive notice of said set-off, by reason of the recordation of the deed aforesaid, and the liability of said estate resulted from such notice.

The bill having been filed to enforce the vendor's lien upon

the land, it was not necessary that the plaintiff should have a settlement of an account of the personal estate of A., for the purpose of exhausting the same in the payment of his debts, before he could enforce the charge reserved on the land for the payment of the purchase-money. This charge is as effectual as would have been a deed of trust on the land to secure the purchase-money, which certainly might have been enforced by a sale either before or after A.'s death, without a necessity of first exhausting the personal estate.

In the case of *Edmunds (Assignee) vs. Harper*, 31 Grat., 637, decided March 20, 1879, it was held: S. as principal and H. as his surety executed their bond to E. E. owes S. and N., partners, an account, and N. assigns it to S. E. becomes bankrupt, and S. proves the account before the register in bankruptcy, and he afterwards becomes bankrupt. The assignee in bankruptcy of E. sues H. on the bond, and H. pleads the account as set-off. Held: Under the Virginia statute the account is a valid set-off for H. in the action against him on the bond.

In the case of *Liberty Savings Bank vs. Campbell et als.*, 75 Va., 534, decided August 11, 1881. J. and C. were partners and the owners of two bonds executed to them on a sale of land. The bonds were in the custody of J., who, to raise money for his private purposes, pledged them by an attempted assignment, along with other securities, to the Liberty Savings Bank, where he procured certain notes to be discounted, and used the proceeds, sometimes for his own benefit and sometimes for the benefit of the firm. The bank afterwards made collections on the bonds, and ultimately became the owner of them by purchase at public auction, where they had been sold as forfeited collateral. In a controversy between C. (representing the firm) and the bank (representing the bonds and their proceeds) it was held: That the bank is equitably entitled to set-off against C.'s claim the amount of money which the bank paid out on J.'s checks, and which actually went to the discharge of the partnership debts; and it makes no difference that the money so checked upon by J. was the proceeds of notes discounted by the bank for his private accommodation.

In the case of *Dobyns & Davis vs. Rawley*, 76 Va., 537.

Joint Purchasers.—Sureties.—Substitution.—Innocent Purchaser.—Set-offs.—Alteration of Bond. F. conveys land to joint purchasers, R. and J., but retains a lien for unpaid price. They divide it, valuing R.'s part at two thousand six hundred dollars, J.'s at two thousand four hundred dollars, and R. conveys to J. his part, retaining no lien. R. (J. uniting) conveys his part to F. D., retaining lien for unpaid price. R. and J. pay F. equally, except on note of one thousand five hundred dollars for last instalment, whereof R. owed eight hundred and

fifty dollars and J. six hundred and fifty dollars; but R. paid four hundred and fifty dollars on it, when F. D. took it up from F. By recorded title bond, J. sold his part to B., who owed balance of one thousand three hundred and fifty dollars on the price. In 1879 R. sued F. D. to enforce his lien for the unpaid price, making only F. D. defendant; but all concerned were ultimately made parties by amended bills that were demurred to as too multifarious. B. claimed that he was purchaser for value without notice; but the conveyance from F. to R. and J., retaining lien, was recorded before B. bought. J. relied on a six hundred dollar note of R. to J. as guardian, and on a one thousand dollar bond of P. and R. to J., partly in his own right and partly as guardian, as set-offs against any sum demanded of him by R. on note given by R. and J. to F., and held by F. D. The six hundred dollar note was included in a judgment confessed by J. to his wards, but which, though possibly secured, was not paid. The one thousand dollar bond had been changed in a material point by J. without R.'s consent. Held:

1. F. D. is entitled to set off the note of R. and J., which he took up from F., against the balance that he owes on the land conveyed to him by R. and J.

2. R. hath a lien on the land conveyed by him to J., in the hands of B., who is not a purchaser for value without notice, not having paid all the purchase-money, and being affected with notice of the lien on the whole land conveyed by F. to R. and J., which is retained on the face of the recorded deed; and to satisfy that lien, so much as is necessary for the purpose must be sold.

3. The amended bills are not too multifarious, the new parties and matters being necessary.

4. The six hundred dollar note is not a proper set-off against R.'s claim, as J. holds it only as a guardian, no title in his own right having been vested by mere confession of judgment to his wards.

5. Had the wards' money been, by agreement actually executed, applied by the guardian to pay his own debt to R., such application would not be allowed to stand as against the wards. And even as between R. and the guardian, such an agreement would not be carried out by this court.

6. The one thousand dollar bond, having been materially changed by J. after its delivery, is null, and, of course, cannot be used as a set-off against R.'s claim on J.

In the case of *Smith vs. Bradford*, 76 Va., 758.

3. *Idem.*—*Idem.*—Equitable Set-offs.—Competency of Witnesses.—Case at Bar. B. and wife sell and convey her maiden land. Purchase bonds secured by trust deed thereon. At same time B. conveys his encumbered land to trustee for Mrs. B.'s

separate use, and in trust deed it is stipulated that trustee shall collect the bonds and discharge the liens. B. collected and misapplied the money. Later, when insolvent, B. assigned to the trustee two other bonds and his interest *jure mariti* in the personal estate of his wife's father, P., deceased, in lieu of the trust funds so misapplied. W., a brother of Mrs. B., was indebted to P.'s estate. B. was indebted to W. Mrs. B. died, leaving children. In suit to settle the administration of P.'s estate, W. filed petition alleging that B. owed him, and praying that what he owed B. on account of his distributive share in P.'s estate might be set off by B.'s indebtedness to him. Held:

1. The bonds given for the maiden land of Mrs B., and by the trust deed securing their payment, settled to her separate use, and directed to be applied to discharge the liens on the land conveyed to her for her separate use, so far as needed for the purpose, are to that extent to be considered as her separate real estate, at her death descendible to her children as her heir at law.

2. The assignment by B. dated December 1, 1869, in trust for Mrs. B., is valid, and the assigned property, so far as is needed to discharge said liens, is to be considered as her separate real estate. But the surplus, if any, is to be considered as her separate personal estate, and such personal estate having, upon her death, vested in B. as her distributee, can be properly set off by W. to the extent of B.'s indebtedness to him against his debt to P.'s estate.

In the case of *Botetourt County vs. Burger*, 86 Va., 530, decided November 21, 1889, it was held: In an action on a bond with collateral conditions, where the only plea is "conditions performed," the defendant is not entitled to prove a set-off.

SECTION 3299.

In the case of *Chew (Executor of Wormeley) vs. Carter's Administratrix*, 6 Munf., 120, decided February 18, 1818, it was held: In debt on a bond, if defendant plead that the same was obtained by false suggestions and misrepresentations by the plaintiff, as per preamble in the said bond, and the plaintiff join issue as to the fact, which issue is found against him by a jury, whatever estoppel (if any) might have been to such plea is thereby waived, and judgment ought to be for the defendant.

Issue being joined on a plea that a bond was obtained by fraud, a verdict "for the defendant, because the jury believe the bond was obtained by fraudulent means," is sufficiently positive and certain.

In the case of *Taylor vs. King*, 6 Munf., 358, decided April 7, 1819, it was held: In a court of common law, fraud may be given in evidence to vacate a deed on the plea of *non est factum*,

if such fraud relate to the execution of the instrument, as if it be misread to the party, or his signature be obtained to an instrument which he did not intend to sign; but fraud committed in a settlement of accounts which preceded, or in a statement of facts which induced, its execution cannot be pleaded or given in evidence, the only remedy in such cases being in equity.

In the case of *Wyche vs. Maclin*, 2 Rand., 426, decided May 7, 1824, it was held: In an action at law on a specialty it is not competent for the defendant to avoid it by pleading that it was obtained by fraudulent misrepresentations made by the plaintiff.

In the case of *Tomlinson's Administrator vs. Mason*, 6 Rand., 169, decided March, 1828, it was held: In debt on a bond a plea that the bond was obtained by fraud, covin, etc., without saying whether the fraud was in the consideration of the bond, or in its execution, is immaterial.

Where property is sold, a bond taken, suit brought, and the defendant pleads that the property was of less value than it was represented to be, such defence sounding in damages is bad, and the proper remedy would be an action of deceit.

In the case of *Christian and Wife et als. vs. Miller (Assignee)*, 3 Leigh, 78, decided October, 1831, it was held: A. and B. execute a joint bond to C., part of the consideration of which is the price of a parcel of corn sold by C. to A., deliverable at a day subsequent to the date of the bond; the corn is not delivered according to the contract. In debt on the bond by C. against A. and B. the defendants cannot set off the value or the price of the corn.

In the case of *Murray, Caldwell & Co. vs. Pennington*, 3 Grat., 91, decided April, 1846, it was held: A lessor covenants to put certain repairs on the demised premises, which he fails to do. In an action of replevin upon a distress for the rent the tenant may set off the damages accrued by the failure of the lessor to make the repairs.

In a suit between third persons and a lessor, to which the lessee is not a party, a decree is made directing the sheriff to rent out the demised premises. The premises are rented out and the lessee yields possession of the premises. Held: That as the decree did not direct the sheriff to evict the lessee, and there was no paramount title under which the lessee might have been evicted, his surrender of the premises was not an eviction so as to release him from the payment of rent.

In the case of *Isbell's Administrator vs. Norvell's Executor*, 4 Grat., 176, decided October, 1847, it was held: Upon an action on a bond given for the hire of two slaves, one of whom was never delivered to the hirer, the obligor is entitled under a special plea to a credit to the amount of the hire of the slave not delivered.

Hirer of a slave pays physician for attending on the slave whilst he is hired. He is entitled to have the amount repaid him by the owner of the slave.

In the case of *Pence (for, etc.) vs. Huston's Executors*, 6 Grat., 304, decided July, 1849. In debt upon a bond the defendant files a special plea under the act of April 16, 1831, in which he alleges that the bond was executed for part of the purchase-money of a tract of land which the obligee in the bond had conveyed to the defendant, with a covenant to warrant the title thereof free of the claims of all persons whatever; that a valid claim had been set up to the land by a purchaser from the defendant's vendor, and the defendant had been compelled to give up the land, and had purchased it again from said claimant at an advanced price. The plaintiff took issue on the plea, and there was a verdict for the defendant. Held: That if the plea does not set up a defence which is authorized by the statute, yet it asserts a substantial claim against the plaintiff; and after verdict it is cured by the statute of *jeofails*.

In the case of *Shiflett vs. The Orange Humane Society*, 7 Grat., 297, decided March 5, 1851, it was held: In an action for a bond given for the purchase-money of land, the act of 1831 does not authorize a plea of failure of consideration upon equitable grounds, which would require a rescission of the contract out of which the bond originated, and a reinvestment of the obligee with the interest of the land alleged to have been sold to the obligor.

In the case of *Cunningham vs. Smith et als.*, 10 Grat., 255, decided July, 1853, it was held: But in such case the plea avers that the representations were untrue, and that the plaintiff at the time of making them knew them to be untrue, and knowingly made them with the intent to defraud the defendant; and proceeds to set out the unsoundness of numerous articles purchased, and to detail particulars in which the representations had turned out to be untrue. This is a good plea.

In the case of *Watkins vs. Hopkins (Executor)*, 13 Grat., 743, decided March 11, 1857, it was held: A plea of equitable offset under the statute must show that the offset is such as may be set up under the statute, and must be verified by affidavit.

In an action on a bond for five hundred dollars, given for the last payment of the purchase-money of land, a plea that the plaintiff was to make the defendant a good title to the land upon the payment of the bond, and that the defendant had offered to pay it upon the making of the title, and that the plaintiff had failed and refused to make the title, by reason whereof the consideration had failed to the extent of two hundred and fifty dollars, is not a good plea in substance. In such an action a plea that the plaintiff had failed to give the de-

defendant possession of two acres of the land for two months after the time at which by the contract he was to deliver possession, or that he had not delivered the tenement in the plight and condition in which it was at the time of the sale, and in which by the contract he was to deliver it, but delivered it in a damaged condition from injuries done or permitted in the meantime to the tenement and freehold, is a good plea, setting up a partial failure of the consideration.

The reference to 21 Grat., 678, is an error.

In the case of *Burtners vs. Keran*, 24 Grat., 42, decided November, 1873, it was held: Where a deed is procured by a fraudulent misrepresentation the defence can only be made at law in the mode provided by the statute, and the defendant should file a plea averring the fraud or special circumstances which entitle him to relief in equity. And the facts should be set forth with sufficient precision and certainty to apprise the plaintiff of the character of the defence intended to be made, and to enable the court to decide whether the matter relied on constitutes a valid claim to equitable relief.

In the case of *Huff vs. Broyles*, 26 Grat., 283, decided June 16, 1875, it was held: A party who in an action of debt against him files a plea under the statute of the breach of the warranty in the sale of an animal, and claims to be relieved to the extent of the price paid for the animal, in which he succeeds, cannot maintain another action for other damages and expenses he has incurred on account of the breach of said warranty.

A party filing a plea under said statute may claim and recover all the damages he has sustained by the breach of the warranty which he could recover in an action for a breach of warranty. If a party filing such a plea only claims and recovers a part of the damages he has sustained, and then brings an action to recover for other damages, a plea of the former judgment is a good plea in bar to the action.

In such action defendant pleads *non assumpsit*, and a special plea of the former judgment, vouching the record, to which special plea plaintiff demurs. The court sustains the demurrer, and the plaintiff not replying further to the special plea the court may render judgment for the defendant without trying the issue upon the plea of *non assumpsit*.

In the case of *Keckley vs. Union Bank of Winchester*, 79 Va., 458, decided October 2, 1884, it was held: Where plea avers that defendant had been induced by plaintiff to make a note, for which the note in suit is a renewal, and which was given for another's debt, by representing to defendant that that debt was amply secured by trust deed on real estate, whilst the plea on its face shows that the note was renewed several times after the defendant knew that the trust deed would not satisfy the debt

and that defendant had changed the debt by dropping the original debtor, and giving the note in suit, such facts constitute no defence to the note in suit.

In the case of *Grayson vs. Buchanan*, 88 Va., 251, decided July 9, 1891. A contract for the sale of land, containing, according to representations, one hundred and forty acres and one-half of a certain spring, but which afterwards proved to contain only one hundred and twenty-six acres and not the spring, was held liable to abatement in price. Though written contract fails to mention spring, and a bill in equity is brought to reform contract, alleging mistake on one side accompanied by misrepresentations on the other, parol evidence is admissible to show that the true contract and relief will be granted; and so likewise, where the defence is made in action at law for the price by special plea in the nature of set-off under this section, such plea is allowable in such case.

Where a plea in the nature of set-off filed in such case sufficiently conforms to the statute, but was not sworn to, such defect is not one for which judgment will be reversed, inasmuch as, upon survey of entire record, the judgment appears to be substantially right.

SECTION 3303.

The case of *Jones (Executor) vs. Jones*, 1 Munf., 150, is an error.

See the case of *Trimyer vs. Pollard*, 5 Grat., 460, cited *ante*, Section 3298.

In the case of *Botetourt County vs. Burger*, 86 Va., 530, decided November 21, 1889, it was held: In an action on a bond with collateral conditions, where the only plea is "conditions performed," the defendant is not entitled to prove a set-off.

CHAPTER CLXI.

SECTION 3306.

In the case of *Bullit's Executor vs. Winston*, 1 Munf., 269, decided March 22, 1810, it was held: An appeal from, or *supersedeas* to, an order quashing an execution against two defendants need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only.

In the case of *Hairston vs. Woods*, 9 Leigh, 308, decided March, 1838, it was held: Where there are two plaintiffs in a *supersedeas*, if one of them die, the cause will abate as to him, and proceed in the name of the surviving plaintiff.

In the case of *Rose's Administrator vs. Burgess*, 10 Leigh, 186 (2d edition, 193), decided April, 1839. Pending an action of detinue at the suit of four plaintiffs, one of them dies, and a

scire facias is awarded to revive the action in the name of his executor. Held: The *scire facias* was improvidently awarded.

In the case of *Cunningham (Executor), etc., vs. Smithson*, 12 Leigh, 33, decided March, 1841, it was held: Decree against surviving partners and executor of deceased partner of mercantile house, from which defendant appeals, and pending appeal, one of the surviving partners dies; the death is not suggested, and the court proceeds to hear cause, reverses the decree, and dismisses plaintiff's bill as to the surviving partners; proof is afterward offered of the death of one of them before the hearing, and appellee moves to set aside decree of reversal for that cause; motion overruled because there was still a surviving partner before the court, who represented the whole interest, and because appellee cannot complain of a decree in favor of the deceased party.

In the case of *Townes vs. Birchett*, 12 Leigh, 173, decided April, 1841, it was held: Bill in equity against two persons who have been auctioneers and partners; one dies pending the suit, it is not necessary to revive the suit against the representative of the decedent; the plaintiff may proceed against the survivor alone.

See the case of *Richardson's Executor vs. Jones*, 12 Grat., 53, cited *ante*, Section 2855.

SECTION 3307.

In the case of *Norris vs. Tomlin & Gray*, 2 Munf., 336, decided June 24, 1811, it was held: Process of revivor is not necessary in the court of appeals, if the appellee died between verdict and judgment.

In the case of *Reid's Administrator vs. Striders's Administrators*, 7 Grat., 76, decided May 14, 1850, it was held: Where a party to a cause pending in the supreme court of appeals dies pending the appeal, it is not necessary to revive the cause in the name of the representative, but the case may be revived when it goes back to the court below.

SECTION 3308.

In the case of *Keel & Roberts vs. Herbert's Executors*, 1 Wash., 138, decided at the fall term, 1792. A *supersedeas* was awarded against Herbert, who afterwards, and before the service of the writ, died. This court, on motion, awarded a new *supersedeas* against the executors, which was executed, but afterwards quashed it, and awarded a *scire facias* to hear errors against the executors, being of the opinion that the second *supersedeas* could not be considered as a continuing process, but a new one, and therefore that the executor could not sue upon the bond first given for prosecuting the *supersedeas*.

In the case of *Daniel vs. Robinson's Executors*, 1 Wash., 154,

decided at the spring term of 1793. The appellee being dead, counsel for the defence moved to enter appearance for the executors without waiting for a *scire facias*, which is only necessary to force an appearance. The court granted the motion and tried the cause at the instance of the counsel for the appellee, although it was objected by Mercer, J., that a trial at this time would be a surprise upon the appellant, who might consider the appeal as abated until regularly revived; but it was said by the court that the appellant ought to follow the cause.

In the case of *Boswell & Johnson vs. Jones*, 1 Wash., 322, decided at the fall term, 1794. An action of trespass was brought by Jones against the appellants in the district court; they pleaded jointly not guilty. A verdict was rendered against Johnson for £15, and the defendant, Boswell, was found not guilty. Upon the motion of Johnson alone a new trial was awarded, and a verdict was afterwards found for £60 against both defendants. A motion in arrest of judgment being made by Boswell, and overruled, both defendants applied for and obtained a *supersedeas* to the judgment of the court rendered upon the last verdict.

The plaintiffs in error being both dead, it was submitted to the court whether a new *supersedeas* or writ of error should be awarded, or whether a *scire facias* to revive the former ought to issue, and in the latter case whether it should be revived in the names of the executors of both plaintiffs, or of the survivor only. Held: A *scire facias* should issue in the names of the executors of both the plaintiffs.

In the case of *Tomkies vs. Walker*, 6 Call, 44, decided April, 1806, it was held: If in ejectment judgment be given for the defendant, and the plaintiff appeals, pending which the appellee dies, the appellant cannot sue out a *scire facias* against his heirs. He must bring a new suit.

In the case of *Keys's Executor vs. Harmer's Representatives*, 1 H. & M., 330, decided June 16, 1807, it was held: A suit in chancery for a conveyance of land, in case the defendant dies before a final decree, ought to be revived against his heirs and devisees, and all other persons holding, claiming, or in any manner interested in the land in question.

In the case of *Gibbs vs. Perkinson*, 2 H. & M., 211, decided March 29, 1808. An appeal having abated at one term by the death of the appellant, at the next term a *scire facias* was awarded on the motion of his administrator, who had qualified since the abatement, for the appellee to show cause why the appeal should not be revived.

In the case of *Buster vs. Wallace*, 3 H. & M., 217, decided November 16, 1808, it was held: An appeal having abated at the

March term by the death of the appellant, a *scire facias* to revive it may be awarded at the ensuing October term.

In the case of *Scott vs. Adams*, 3 H. & M., 501, decided April 29, 1809, it was held: Where the appellee dies, the court will not take up the appeal in the name of the executors without giving the appellant notice of a *scire facias*, especially where a great length of time has elapsed since the appeal.

In the case of *Carter vs. Carr*, 1 Va. (Gilmer), 145, decided December 8, 1820, it was held: The death of one of the demandants in a writ of right before trial abates the whole writ.

In the case of *Drago vs. Stead et als.*, 2 Rand., 454, decided May 28, 1824, it was held: The death of one of the demandants in a writ of right before trial and judgment abates the whole writ, and it is of no importance whether the deceased demandant left a child or not.

In the case of *Harris vs. Crenshaw*, 3 Rand., 14, decided November, 1825, it was held: In a case of trespass *quære clausum fregit*, if the defendant dies before verdict, the writ will abate, but if after verdict and judgment, the plaintiff has a right to a *sci. fa.* against the personal representative of the defendant, though not against his heir or devisee, and the personal representative has a right to reverse the judgment on appeal if he can.

In the case of *Commonwealth vs. Haines*, 2 Va. Cases, 134, decided by the General Court at the June term, 1818, it was held: On a joint recognizance by three persons, default being made, a *sci. fa.* was awarded, which abated by return as to one, by death as to the second, and the third pleaded to issue, after which he died. A *scire facias* to revive was proper against the personal representative of the third cognizor, though not against his heirs. But original process of *sci. fa.* will lie against the heirs of the said cognizor and against the heirs and personal representatives of the second deceased cognizor.

In the case of *Lovell vs. Arnold*, 2 Leigh, 16, decided February, 1830. Writ of right abates at the death of the tenant in 1812, and the abatement is entered of record; *sci. fa.* sued out by demandant in 1820 to revive the suit against heirs of tenant. Held: The abatement was absolute, and suit could not be revived under provision of statute of 1819, that provision being prospective.

For the references to 3 Leigh, 42 and 344, see Chapter 138.

See the case of *Clopton's Administrator vs. Clarke's Executor*, 7 Leigh, 325, cited *ante*, Section 2920.

The reference to 7 Leigh, 720, is an error.

In the case of *Davis et als. vs. Teays*, 3 Grat., 283, decided at the July term, 1846. A writ of right is brought against a *feme* life tenant, who dies, and the demandants revive the action

against her heirs at law. They claim and hold the land in controversy, not as her heirs at law, but as devisees under the will of her father. Held: The demandants may revive against the heirs of the first tenant, and they may defend the action by showing title in themselves, however revived.

In the case of *Chapman vs. Dunlap*, 4 Grat., 86, decided July, 1847, it was held: The defendant in a proceeding of unlawful detainer dies pending an appeal by the plaintiff below. The cause cannot be revived.

In the case of *Richardson's Administrator vs. Prince George Co. Justices*, 11 Grat., 190, decided April, 1854. A judgment is recovered in the name of B. H. and three others, justices of Prince George county, for the benefit of the marshal of the Superior Court of Chancery of the Williamsburg district. The defendant being dead, a *scire facias* issued to revive the judgment, which, after setting out the plaintiffs, and the recovery of the judgment for the benefit of the marshal, adds, "which marshal was W." Held: This is not a variance.

In this case, the marshal being dead, the *scire facias* recites that it was awarded at the instance of M., his administrator. Though it might have been more regular for the *scire facias* to recite that it was awarded at the instance and on the behalf of the plaintiffs on the record, yet, as it would have been good if the averment at whose instance it had issued had been wholly omitted, the recital was mere surplusage, and does not vitiate the *scire facias*.

Neither the *scire facias* nor any part of the record showing what was the character of the obligation or other liability upon which the original judgment was rendered, and the demandant's plea not averring that it was such a statutory bond as required that there should be a relator in any action brought upon it, and that the relator should be a party, having the legal right to sue, it must be regarded as a common law bond or liability, subject to be sued on in the names of the payees without a relator, or for the benefit of the holder, or any party entitled to the benefit of it; and whether W. was marshal or M. was the administrator, is a question in which defendant has no interest, and it cannot be raised by him by plea in bar to the plaintiff's claim.

The *scire facias* stated that the judgment had been suspended by injunction. This was an unnecessary allegation, and may be treated as surplusage, and a plea that the judgment had not been suspended by injunction offered no bar to the *scire facias*.

The *scire facias* further stated that the injunction had not been dissolved. A plea that the injunction had not been dissolved is bad, and an issue made upon it is immaterial. Therefore, though the court admits improper evidence upon it, offered by the plaintiff, it is not cause for reversing the judgment.

The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either the plaintiff or defendant, and the injunction operates upon the judgment of the *scire facias* to restrain and prohibit the issue of execution thereon.

In the case of *Wilson et ux. vs. Smith*, 22 Grat., 493, decided August 28, 1872, it was held: In a suit by W. against S. for partition of land, before any decree in the cause W. dies, leaving a widow and infant child. The suit may be revived in their name, and neither a bill nor a *scire facias* is necessary, but it may be revived upon their motion without notice.

The order of revival suggests the death of W., and that the suit be revived and proceeded in in the name of "J. and S., administrators with the will annexed, ——— Wilson, infant son and sole heir, and ——— Wilson, widow and devisee of said John W. Wilson, deceased." Though the administrators with the will annexed were not necessary, yet it does not harm, and though the Christian names of the infant child and the widow are omitted, they are sufficiently described to identify them.

It would have been out of place to have revived the suit in the name of a next friend of the infant, and an order authorizing some person to prosecute the suit for the infant might have been made in a subsequent order as in the order reviving the suit.

In the case of *McVeigh vs. Bank of Old Dominion*, 76 Va., 267.

Scire facias.—Neither declaration nor rule is necessary upon a *scire facias* to revive a judgment. If *scire facias* is returnable to rules, and defendant makes default, there should then be an award of execution, which, if not set aside at the next term, becomes a final judgment as of the last day of the term. No order of the court is necessary in such case, but could prejudice no one.

SECTION 3309.

In the case of *Stearns (Executor) vs. Richmond Paper Manufacturing Company*, 86 Va., 1034, decided September 17, 1890, it was held: Where a case is revived at rules under this section, its revival constitutes no ground for a continuance.

CHAPTER CLXII.

SECTION 3316.

In the case of *Boswell vs. Flockheart*, 8 Leigh, 364, decided May, 1837, it was held: An application by a defendant for a change of venue, on the ground of general prejudices existing against him in the town where the cause is to be tried, should be supported by the affidavits of the disinterested individuals.

In the case of *McAlexander vs. Hairston's Executor*, 10 Leigh, 486 (2d edition, 507), decided July, 1839. An action of slander is commenced on the 21st of July in a circuit court; but the judge of that court being related to one of the parties, an order is entered on the 27th of September, by consent of the parties, sending the case to the county court. On the 20th of November a motion is made to the county court for a continuance, on the ground that the defendant had been confined to his bed by sickness for some time previous, and was still so confined, so that he could not attend to the case in person and prepare himself for trial; and it is admitted by the plaintiff's counsel that such had been, and still is, the situation of the defendant. But a trial being nevertheless urged, the court is divided on the motion for a continuance, and the same being overruled, a verdict and judgment are rendered against the defendant. Held: The county court erred in so ruling the defendant to trial at the term next after the cause had been transferred to that court, and at which it was docketed in that court for the first time.

In the case of *Spengler vs. Davy*, 15 Grat., 381, decided July, 1859, it was held: A cause which had been pending in a county court for more than a year is called for trial, and a motion by the defendant for a continuance is overruled, and he then moves the court to remove the case to the circuit court. This motion is properly overruled.

In the case of *Hoghead vs. Baylor*, 16 Grat., 99, decided September 3, 1860, it was held: The fact that counsel believed that a case had been removed from the county to the circuit court, and was therefore taken by surprise, and had not prepared himself by examining the papers and the law of the case, the original counsel being present and prepared, is not cause for a continuance. After cause is called for trial in the county court, and continuance refused, a party is not entitled to have it removed to the circuit court, though it has been pending more than twelve months.

In the case of *Muller, etc., vs. Bailey*, 21 Grat., 521, decided November 17, 1871, it was held: A circuit court may make an order to remove a cause to another court whilst the cause is at rules.

In the case of *Town of Danville vs. Blackwell (Judge)*, 80 Va., 38, decided January 8, 1885. Act directing that, on motion, on twenty days' notice by any party any suit or proceeding pending in a corporation court shall be removed, as of right, to the circuit court of said corporation, is not unconstitutional. In such a case there was effectual trial. At next term defendant, after notice under said act, moved for the removal of the case to the circuit court, and the corporation court denied the motion. Held: Right of removal was not waived.

Mandamus is the remedy for refusal to remove.

SECTION 3317.

In the case of *Boswell vs. Flockheart*, 8 Leigh, 364, decided May, 1837, it was held: When a judge of a circuit court is so situated as to render it improper, in his judgment, for him to preside at the trial of a cause, the statute makes it lawful for him to remove the cause to another circuit. In such case, however, the propriety of removing or refusing to remove depends upon the self-consciousness of the judge, and an appellate court cannot revise his decision.

CHAPTER CLXIII.

SECTION 3320.

The reference to 1 H. & M., 10, is an error.

In the case of *White's Executors vs. Johnson et als.*, 2 Munf., 285, decided May 11, 1811, it was held: A commissioner's report, if erroneous upon its face, may be objected to at the hearing of the cause, though no exception be previously filed; and, also, in the appellate court, though no exception appear to have been taken in the court below; but without such exception it cannot be impeached on grounds, and in relation to subjects, which may be affected by extraneous testimony. Whether interest ought to be charged in an administration account is a question the decision of which may depend upon extraneous testimony. A failure to set forth in a commissioner's report that notice was given to the parties is not an error sufficient to reverse a decree, if no exception to the report appear in the record.

In the case of *Winston vs. Johnson's Executors*, 2 Munf., 305, decided June 5, 1811, it was held: Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report too soon, are not sufficient reasons for a bill of review, such objections not having been taken (as they ought to have been) before the rendition of the decree. New matter is no ground for a bill of review, unless it was discovered since the decree was pronounced.

In the case of *McCandlish (Administrator) vs. Edloe et als.*, 3 Grat., 330, decided October, 1846, it was held: When a commissioner, to whom accounts have been referred by an interlocutory decree for settlement, gives notice to the parties, by publication in a newspaper, of the time and place of his acting upon the subject, an exception by a party for want of personal notice, when that was practicable, ought not to be entertained, unless he shows, by his own affidavit or otherwise, that he had no such information of the contemplated proceedings of the commissioner as would have enabled him to attend. In taking an account the commissioner may take the depositions of wit-

nesses to enable him to act upon the subject, under his general notice, and a special notice is not necessary.

When an interlocutory decree merely confirms generally a report containing alternate and conflicting statements, it must be understood that the court has reserved to itself the power of selecting, by its future decree, between such statements, and of decreeing accordingly.

A claim of a creditor not reported on by the commissioner may be directed to be considered as a claim stated in the report, and it will be open to all just exceptions.

When the real estate of a testator is necessary for the payment of his debts, it is not improper to direct an account of the rents and profits from his death, for the purpose of ascertaining what rents and profits had accrued from that period, and by whom they had been received, in order to enable the court to decide by its future decree what persons, if any, were accountable therefor.

In the case of *Miller vs. Holcombe's Executor*, 9 Grat., 665, decided February 24, 1853. A commissioner's report made in a cause had been returned for more than six years, and the cause was then taken up and heard, the argument concluded, and the opinion of the court pronounced; and then the party against whom the opinion was expressed excepted to the report for want of notice. Held: That the exception should be disregarded.

In the case of *Hill et als. vs. Bowyer et als.*, 18 Grat., 364, decided April, 1868, it was held: In the absence of any objection in the court below, an appellate court would presume that notices to take the depositions were duly given, the contrary not appearing; and an objection to depositions on this ground, where the decree was by default, would not be available. The statute does not limit the class of cases in which the court may direct that notice may be given by publication, and it is no valid objection by a party upon whom process in the suit has been served that he did not see or hear of the notice, by publication, of the taking of an account by a commissioner, under the order of the court.

A defendant upon whom process has been served, who wholly neglects his defence, or contents himself with merely writing to a lawyer who practices in the court to defend him, without giving him any information concerning his defence, or inquiring whether he is attending to the case, is not entitled to relief against a decree by default, on the ground of surprise, however grossly unjust the decree may be.

In the case of *Coffman vs. Sangton et als.*, 21 Grat., 263, decided August, 1871, it was held: Courts of equity have jurisdiction in matters of account involving the transactions and

dealings of trustees and agents, whenever it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain, simple, and free from difficulty.

Though the notice of taking depositions and taking the account by the commissioner is not filed, yet, as the record says the deposition was taken pursuant to notice, and it appears that the defendants claimed commissions before the commissioner, it will be presumed in the appellate court, in the absence of proof to the contrary, that notice was given.

The report of a commissioner having been completed on the 10th of April, 1869, and the decree made on the 22d of October following, in the absence of anything showing the contrary it will be presumed by the appellate court that the report and account were returned and acted on according to the requirements of the statute.

In the case of *Dillard vs. Krise*, 86 Va., 410, decided December 5, 1889, it was held: When notice of taking an account is ordered to be given by publication in a newspaper, there must be at least twenty-eight days between the first insertion and the day of taking the account.

In the case of *Walker's Executors vs. Walke*, 2 Wash., 195 (2d edition, 251), decided at April term, 1796, it was held: Payments by a former to a subsequent guardian in depreciated money should be accounted for at their nominal amount, and are not subject to the scale of depreciation.

For 2 Munf., 285, see *supra*, this section.

In the case of *Garrett (Executor of Allen) vs. Carr and Wife et als.*, 3 Leigh, 407 and 413, decided February, 1832. Executor's accounts are audited before commissioners of the county court, the legatees being present at such settlement thereof; these accounts are returned to the court proved and recorded. Held: The presence of the legatees at the settlement is no objection to a bill in chancery to surcharge and falsify the accounts so settled.

In the case of *Cookus et als. vs. Peyton's Executors et als.*, 1 Grat., 431, it was held, p. 452: An error appearing on the face of a report will be corrected, though no exception has been taken to it in the court below.

In the case of *Will's Administrator vs. Dunn's Administrator*; *Mason's Executor vs. Dunn's Administrator*, 5 Grat., 384, decided January, 1849, it was held, pp. 411-'12: A commissioner's report, purporting to be made in obedience to an order of the court having made the report the basis of its decree, and there not appearing to have been any question of the commissioner's authority in the court below, the appellate court must

presume that it was made by proper authority, though no order of account is in the record.

In the case of *French vs. Townes*, 10 Grat., 514, decided October, 1853, it was held, p. 526: In the absence of any proof to the contrary, it was proper for the commissioner, in stating the amount of the different debts secured by the deed, to take the amount stated in the deed.

In the case of *Sir Jonathan Beckwith vs. Beckwith Butler et als.*, 1 Wash., 224, decided at the fall term, 1793, it was held: The answer of a defendant in chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiff's demand. In such a case he is as much bound to establish it by indifferent testimony as the plaintiff is to sustain his bill.

In the case of *Jones (Executor) vs. Watson*, 3 Call, 253 (2d edition, 222), decided October 14, 1802, it was held: After two references before commissioners appointed by the county court to settle an administration account, and one reference to the commissioner of the high court of chancery, no exception for the want of credits will be allowed here which was not made at one of the examinations.

In the case of *Perkins vs. Powers (Executor)*, 2 H. & M., 420-'22, decided May 5, 1808, it was held: The court of appeals will not enter into an investigation of an account taken by direction of a court of chancery when either no exception to the commissioner's report was taken in the court below, or not taken in such form as to enable this court to decide on the principle of law or equity on which the item excepted to was admitted or rejected.

For 2 Munf., 285, see *supra*, this section.

In the case of *Simmons vs. Simmons's Administrator*, 33 Grat., 451, decided July, 1880, it was held, pp. 456-'57: The answer of a defendant in which no reference is made to a commissioner's report will not be regarded as an exception to said report, and where there are no errors on the face of the report, and no exceptions taken thereto in the court below, they cannot be taken for the first time in the appellate court.

In the case of *Kraker vs. Shields*, 20 Grat., 377, decided March, 1871. In November, 1862, S. sells to K. a house and lot in Richmond for \$14,500, of which \$4,500 is paid in cash, and notes with interest for the balance are given, payable in one, two, three, and four years, with a deed of trust to secure them. The cash payment and first and second notes are paid in Confederate money; the third is paid four months before it fell due by a compromise, S. taking for it \$2,000 in United States currency. Bill to enjoin the sale of the house and lot for the payment of the fourth note alleges that it was given with

reference to Confederate currency as the standard value, and prays that S. may be required to receive payment according to the value of that money at the time of the contract. S. denies this was the contract, and says he was to be paid in the currency of the time the note fell due, and asks the court to adjudicate the question. Held: The court may refer the case to a commissioner to inquire whether a contract was made with reference to Confederate money as the standard of value, or whether the notes were to be paid in the currency of the time they fell due.

It is not a case in which the court should have directed an issue, and this especially as there was no conflict of testimony when the case was referred to a commissioner.

The interest being included in the note, if there is a decree for the payment of the note it is proper to decree interest on the whole amount.

The court being of the opinion that the note should be paid in the currency of the time the note fell due, may decree in favor of S. against K. for the amount. It was irregular after decreeing in favor of S. to dismiss the bill, and the appellate court will correct the decree in this respect, and affirm it with costs.

The decree should reserve liberty to S. to apply to the court by motion or petition in the cause for a sale of the house and lot under the trust, if the personal decree against K. failed to produce the money. This, too, the appellate court will correct, and affirm the decree.

In the case of *Bowers's Administrators vs. Bowers*, 29 Grat., 697, decided January 17, 1878, it was held, p. 700: An attorney employed in a cause is not a competent commissioner to take an account ordered in the cause.

In the case of *Stuart, Palmer & Co. vs. Hendricks et als.*, 80 Va., 601, decided June 25, 1885, it was held: The principle is well established that when a question of fact is referred to a commissioner, depending upon the testimony of witnesses conflicting in their statements and differing in their recollection, the court must of necessity adopt his report, unless in a case of palpable error or mistake.

In the case of *Magarity vs. Shipman*, 82 Va., 784, decided January 20, 1887, it was held: When question of fact is referred to commissioner, depending upon the conflicting statements of witnesses, the court must adopt his report, unless there be palpable error and mistake. This is the case cited from 11 Va. Law Journal, 214.

In the case of *Stimpson vs. Bishop*, 82 Va., 190, decided July 1, 1886, it was held: Where report based on account of long standing and great confusion is confirmed by the court below

it will not be disturbed here unless error is palpable. This is the case cited from 10 Va. Law Journal, 543.

SECTION 3322.

In the case of *Cogbill vs. Boyd*, 79 Va., 1, decided January 24, 1884, it was held: It is a well-established practice for the court to instruct the master as to the principle upon which accounts should be restated.

SECTION 3325.

In the case of *Armstrong's Administrator vs. Pitts*, 13 Grat., 235, decided March 8, 1856, it was held: A cause is heard upon a report of a commissioner, which had not been returned for the legal period; the decree being merely interlocutory, the error should have been corrected by application to the court below; and it is not ground for an appeal, unless, upon application, the court below refuses to correct it.

In the case of *Strange's Administrator vs. Strange et als.*, 76 Va., 240 and 242, decided March 19, 1882, it was held: Where cause was heard prematurely on a commissioner's report in the court below, but no exceptions appear in the record, exception cannot be taken in appellate court, unless for errors appearing on face of record, and the hearing will be treated as having been by consent.

CHAPTER CLXIV.

SECTION 3328.

In the case of *Legrand vs. Hampden-Sidney College*, 5 Munf., 324, decided January 21, 1817, it was held: Though private acts of the assembly may be given in evidence without being specially pleaded, they are not to be taken notice of judicially by the court, as public acts are, but must be exhibited as documents, if not admitted by consent of parties.

SECTION 3330.

In the case of *Taylor's Administrator vs. The Bank of Alexandria*, 5 Leigh, 471, decided November, 1834, it was held, p. 476: The printed copies of the acts of Congress, distributed to the executives of the several States to be distributed among the people, are proper evidence of the statutes therein contained, without other authentication.

A statute is alleged in pleading to have been passed by Congress, to-wit, in 1811, but the statute given in evidence bears date in 1810; as the date is pleaded under a *videlicet*, no error.

In the case of *Dickinson vs. Hoome's Administrator et als.*, 8 Grat., 353, decided January, 1852. The court, on page 409, held: A foreign law, whether written or unwritten, may be

proved by a person who is learned in that law, without laying any foundation for the introduction of secondary testimony.

In the case of *Warner vs. Commonwealth*, 2 Va. Cases, 95, decided by the General Court, November, 1817, it was held: A transcript of a statute of another State, authenticated by the certificate of the Secretary of the Commonwealth, under his hand and seal, accompanied by a declaration of the governor, under the great seal of the Commonwealth, that he is the secretary, and that full faith and credit ought to be given to his official acts accordingly, is proper evidence to be submitted to the jury that such copy of the act is the law of said State.

In the case of *Hunter vs. Fulcher*, 5 Rand., 126, decided March, 1827, it was held: A law of another State is sufficiently authenticated under the act of Congress, if it has the seal of the State affixed thereto; and the particular officer entitled to affix the seal depends upon the regulations of the several States, respectively.

Where a party in a suit in Virginia relies on the law of another State to support his claim, he may produce an authenticated copy of the section only on which he relies, without a copy of the whole law.

SECTION 3334.

In the case of *Burk's Executor vs. Tregg's Executor*, 2 Wash., 276 and 281 (1st edition, p. 215), decided at the October term, 1796, it was held: Upon a plea of *nul tiel* record, if the record be of the same court a copy of it ought not to be given in evidence, but the original ought to be produced for inspection.

In the case of *Hord vs. Dishman*, 5 Call, 279, decided November, 1804, it was held: If the defendant is taken sick on his way to the trial of the cause, and is thereby prevented from making an affidavit that the original deeds are lost, and for want of such affidavit the court refuses to receive copies of the deeds in evidence, the court of chancery may relieve against the verdict and judgment obtained by the plaintiff.

In the case of *Anderson vs. Dudley*, 5 Call, 529, decided October, 1805, it was held: If a trial upon the issue of *nul tiel* record be in the same court where the judgment was rendered, it is error to inspect a transcript only, instead of the original record.

In the case of *Rowletts vs. Daniel*, 4 Munf., 473, decided October 19, 1815, it was held: A legally certified copy of an ancient deed, recorded on the grantor's acknowledgment, and accompanied with possession of the land by the grantee, ought to be received as evidence, without any proof that the original is lost or destroyed.

In the case of *Baker vs. Preston et als.*, 1 Va. (Gilmer), 235, decided June 20, 1821, it was held: The copy of a deed acknow-

ledged by the grantor before justices, by them certified to the clerk for record, and by him certified to be a true copy, is admissible as primary evidence, equivalent to the original.

The books kept by the treasurer are conclusive evidence of the balance actually in the treasury at any given time, both against the treasurer and his sureties, without being pleaded as an estoppel so as to charge them with balances carried forward from year to year as if those balances were actually on hand.

In the case of *Ben et als. vs. Peete*, 2 Rand., 539, decided June, 1824, it was held: The copy of a deed may be read in evidence, upon the oath of a party that he had searched the records in the clerk's office, and all other places where he supposed that the original deed might probably be found, and had not been able to find the original.

A certified copy of a deed recorded upon acknowledgment of the grantor, not required by law to be recorded, is evidence against the grantor and all claiming under him subsequent to acknowledgment. But it is not evidence against any person deriving title from the grantor before the acknowledgment.

In the case of *Gibson vs. The Commonwealth*, 2 Va. Cases, 111, decided by the General Court, November, 1817, it was held: A copy of a judgment of the General Court (upon an adjourned question), attested by the clerk, his attestation being proved, is sufficient evidence before the circuit court to prove what it purports to be.

In the case of *White vs. Clay's Executors*, 7 Leigh, 68, decided January, 1836, it was held: On the trial of an action of debt on an injunction bond, extracts from the record of the injunction cause, of the decrees in the cause, are competent and sufficient evidence without producing the whole record.

In the case of *Pollard's Heirs vs. Lively*, 4 Grat., 73, decided July, 1847, it was held: A deed acknowledged or proved before a hustings or a county court, which conveys land in another county, and thereupon ordered to be certified to the court of the county in which the land lies, was, upon this certificate, recorded in the General Court, when deeds were authorized to be recorded in that court. A copy of the deed, certified from the clerk's office of the General Court, is competent evidence in place of the original.

Copies of surveys of waste and unappropriated lands, and of patents from the register's office, are competent evidence in place of the originals.

Upon the question of the identity of the patentee with the ancestor of the demandants in a writ of right, the survey on which the patent issued, and the assignment thereon, and the surveys and patents of lands in the neighborhood of the land in controversy, may be competent evidence for the tenant to

disprove the identity of the patentee and the ancestor of the demandants.

In the case of *Usher's Heirs vs. Pride*, 15 Grat., 190, decided July, 1858, it was held: A certificate, purporting to be made by the auditor of the State, of land forfeited for the non-payment of taxes, being in the usual form in which he certifies papers from his office, is evidence of the execution of such certificate, and of the official character of the paper, and also of the facts therein contained. Though such certificate was made in 1844, yet, it having been offered in evidence in 1856, it is a *prima facie* evidence by the act, though said act was passed after the certificate was made.

In the case of *Ballard vs. Thomas & Ammon*, 19 Grat., 14, decided November 14, 1868, it was held: The original order-book of a county court is competent evidence wherever a certified copy would be evidence. The original order-book may be proved to be such by a deputy clerk, or any other person who can identify it.

In the case of *Effinger vs. Hall*, 81 Va., 94, decided November 19, 1885, it was held: Original will and will-book were destroyed, and a copy, previously made from said will-book and exhibited in a suit, having been withdrawn by leave and recorded, a copy from the copy thus recorded must be taken, *prima facie*, as a true copy of the will.

SECTION 3336.

In the case of *Corbett vs. Nutt (Trustee)*, 18 Grat., 624, decided April, 1868, it was held: Plaintiff in unlawful detainer proves he deposited the original will of his testatrix with the clerk of the Circuit Court of Richmond in 1864. He also proves that the witness had inquired for said paper of the said clerk at his office in the city of Richmond, in whose custody the said original paper had been left; that said clerk, at his request, made search for said paper, and reported it had been lost out of his possession and destroyed at the time of the fire in April, 1865. In the absence of all suspicion of fair dealing, this testimony is sufficient to let in a copy of the will, of the accuracy of which copy there is no question. Upon proof that the will had been regularly admitted to probate in the Circuit Court of Richmond, such proof of the loss and destruction of the record will authorize the admission of an official copy of the record, certified by the clerk; and this official copy having been admitted to probate in the Orphans' Court of the District of Columbia, an official copy from that office is admissible.

SECTION 3339.

In the case of *Talliferro vs. Pryor*, 12 Grat., 277, decided April 18, 1855, it was held: The clerk's office of a county court,

with all the records therein, having been consumed by fire, a paper purporting to be an official copy of a will of record in that office, and to be certified by a former clerk of the court, is admitted to record under the statute. The act of the clerk admitting the paper to record is conclusive upon the question of whether the paper is what it purports to be; and evidence to prove that the copy was not certified by the clerk whose name is affixed to the certificate, but by another person who was not authorized to make the certificate, is inadmissible in a collateral action.

See the case of *Effinger vs. Hall*, 81 Va., 94, cited *ante*, Section 3334.

SECTION 3340.

In the case of *Smith vs. Carter*, 3 Rand., 167, decided February, 1825, it was held: Where a will has been regularly proved in a court of probate, and afterwards destroyed by the enemy, with the book in which it was recorded, its contents may be proved by parol evidence. The remedy here pointed out is only cumulative, and does not deprive a party of his remedy at common law.

SECTION 3342.

In the case of *Buford vs. Buford*, 4 Munf., 241, decided January 6, 1814, it was held: A record legally authenticated of the proceedings of a court of competent authority in any other State of the United States is conclusive evidence in the courts of this State to show that a judgment was rendered, and that the party was compellable to pay the amount recovered against him; but it may be opposed by proof of fraud or collusion, or of subsequent payments or discounts.

The only competent evidence that an award, made *pendente lite*, was afterwards set aside on exception taken, is a transcript of the record thereof duly authenticated.

In the case of *Petermans vs. Laws*, 6 Leigh, 523, decided July, 1835, it was held: Office copies of deeds registered in another State are not admissible as evidence in this State, unless duly authenticated according to the laws of the United States.

The statute of Virginia concerning the authentication of foreign deeds applies to the original deeds, not copies.

An office copy of a deed registered in North Carolina is not admissible as primary evidence in this State, unless there be some statute of North Carolina making it so.

In the case of *Gornto vs. Bonney*, 7 Leigh, 234, decided February, 1836. A copy of a will and of the probate thereof in a court of North Carolina is offered in evidence; it is authenticated by a certificate of the clerk of the court under his seal of

office, and by a certificate of the presiding justice of the court that the clerk's certificate (not his attestation) is in due form. Held: The authentication is proper according to the act of Congress of May 26, 1790, and that act, not the act of March 27, 1804, is applicable to the case; and therefore the copy is proper evidence in our courts.

SECTION 3344.

In the case of *Kidd's Administrator vs. Alexander's Administrator*, 1 Rand., 456, decided May, 1823, it was held: The certificate of a notary public that a release was acknowledged by a party to be his act and deed ought not to be received in evidence, but the deposition of the notary public, or some equivalent testimony, ought to be produced to the court.

See the case of *Petermans vs. Laws*, 6 Leigh, 523, cited *ante*, Section 3342.

SECTION 3346.

In the case of *Johnston and Wife vs. Slater et als.*, 11 Grat., 321, decided July, 1854, it was held: A husband is not a competent subscribing witness to a deed executed during the marriage, by which real estate is conveyed to the wife, either for the purpose of proving due execution of the deed when called in question, or for the purpose of having it admitted to record.

A deed admitted to record upon proof by the subscribing witnesses, one of whom was the husband of the grantee, is null and void as to creditors, not having been duly recorded.

In the case of *William and Mary College vs. Powell et als.*, 12 Grat., 372, decided April, 1855, it was held, p. 382: A post-nuptial settlement is made by a husband upon his wife, the wife afterwards dies, and then a bill is filed by a creditor of the husband against her children to set aside the deed as fraudulent as to the creditor. The husband is not a competent witness to prove the consideration upon which the settlement was made.

In the case of *Murphy's Administrator et als. vs. Carter et als.*, 23 Grat., 477, decided June, 1873, it was held, p. 487: A husband whose wife is entitled to a distributive share of a deceased legatee of the testator is not a competent witness to prove that certain debts paid by the administrator were paid out of the proceeds of the land, so as to increase the amount for which the sureties are liable.

The administrator whose wife is one of said distributees is not equally interested on both sides so as to render him a competent witness for this purpose.

In the case of *Warwick vs. Warwick et als.*, 31 Grat., 70 and 77, decided November, 1878. D. and J. in 1858 sold and con-

veyed to W. a tract of land for \$42,500, payable in fifteen years with interest payable annually, and on the same day W. conveyed the land and another tract called R. in trust to secure the payment of the debt, and it was provided in the deed that when \$15,000 of the principal of the debt was paid the lien on R. should cease and be released. In 1862 W. having ascertained that J., the holder of this bond, would receive Confederate money in payment of his debt, sold land he held as trustee of his wife and children, and paid J. \$21,000. One payment of \$2,900 was made by W. on the 2d of May, 1863, on the principal of the debt out of the trust fund of his wife and children. Between the recording of the deed of trust and said payment by W. four judgments had been recovered against W. Held: W. is not a competent witness to prove his payments of the debt made out of the trust fund of his wife and children, and this though the objection to his competency was not made until four questions had been put to him on his examination in chief.

In the case of *Frank & Adler vs. Lilienfeld et als.*, 33 Grat., 377, decided July, 1880, it was held: Where the object of a bill is merely to subject the separate estate of a wife, and her husband is made a formal party only, she is a competent witness in the case, and the plaintiffs are also. And an answer filed by the husband, although responsive to the bill, cannot be used as evidence for the wife and against the plaintiffs, whilst that filed by her can be so used, so far as its statements are responsive and based on facts within her own knowledge.

In the case of *Fink Brother & Co. vs. Denny et als.*, 75 Va., 663, decided September, 1881, it was held, p. 669: Every post-nuptial settlement, when the settler is indebted, is, as against his creditors, fraudulent and void; and every settlement will be taken to be voluntary unless those claiming under it can show that it was made for valuable consideration. In such a case, when a deed charges that a bill was voluntary and fraudulent, the answer of husband and wife denying the fraud and setting up the defence of valuable consideration is not evidence for the respondents, but the defence must be established by proof.

In the case of *Hayes and Wife vs. Mutual Protection Association*, 76 Va., 225.

1. Husband and Wife.—By common law they cannot testify for or against each other, but each may testify in his or her own behalf.

2. Idem.—Married Women's Act.—Under this act all property acquired before or after marriage by *feme* is for her separate use. Suit to recover it is for her sole benefit, though she is required to join her husband in it; he has no interest in it, and she, *not he*, is bound for the costs. She is a competent witness in the suit.

In the case of *Smith vs. Bradford*, 76 Va., 758.

3. Notwithstanding the death of his wife, B. would be incompetent to testify for or against the settlement on his wife.

The reference to 76 Va., 769, is an error.

In the case of *Burton vs. Mill et als.*, 78 Va., 468, decided March 13, 1884, it was held: When husband and wife are both parties, and interested in the results of a suit, neither is a competent witness.

In the case of *Farley et al. vs. Tillar*, 81 Va., 275, decided January 7, 1886, it was held: Under act approved April 4, 1877, a married woman may sue and be sued on her contracts, as to her separate property, and as sole trader, just as if she was a *feme sole*; but her husband must be joined with her in the suit. In such suit she is a competent witness for herself, but he is not for her.

In the case of *Perry and Wife vs. Ruby et als.*, 81 Va., 317, decided January 7, 1886, it was held: Where husband and wife are both parties, and interested in the result of suit, neither is a competent witness.

In the case of *Marks et als. vs. Spencer*, 81 Va., 751, decided April 22, 1886, it was held: Though wife be dead, husband is not competent to prove what was the consideration of a post-nuptial settlement on her.

In the case of *N. & W. R. R. Co. vs. Prindle et ux.*, 82 Va., 122, decided June 24, 1886, it was held: By common law (unaltered by this section), husband and wife cannot testify for or against each other. By statute, each may testify in his or her own behalf. Under the separate property acts all property acquired by the *feme covert* during the coverture in any of the modes specified in the act, is her separate estate. She may sue or be sued as if she were a *feme sole* as to her separate property, or as a sole trader, but her husband must be joined with her.

In such suit she is a competent witness for herself, yet he is not for her. But damages for injuries to wife's person are not within that act, and are not her separate property; he has an interest in them, and in suits to recover such damages she is not competent to testify.

In the case of *Lindsay vs. McCormick et als.*, 82 Va., 479, decided October 8, 1886, it was held: One who is trustee for his wife is not a competent witness to prove his payments of the price of property purchased by him as such trustee out of the trust fund, and he being incompetent, so likewise is the commissioner to whom the alleged payments were made.

In the case of *Nicholas vs. Austin*, 82 Va., 817, decided January 27, 1887, it was held: In suit by wife for her separate

estate, husband joined for conformity, and not bound for costs, wife is competent to testify in her own behalf, but he is not for her.

This is the case cited from 11 Va. Law Journal, 170.

In the case of *Booth vs. McFilton*, 82 Va., 827, decided January 27, 1887, it was held: Officer before whom grantor acknowledged deed is not agent of the grantee, nor party to transaction, so as, the grantee being dead, to allow grantor to testify.

This is the case cited from 11 Va. Law Journal.

In the case of *Norfolk & Western Railroad Company vs. Read*, 87 Va., 185, decided December 4, 1890, it was held: Pending suit by man and wife against common carrier for injury to her goods while in course of transportation, the plaintiffs for value without recourse, by deed, assigned the right of action to her father, for whose benefit and at whose costs the suit continued to be prosecuted. Held: The assignor was a competent witness at the trial in behalf of the assignee.

In the case of *Ratcliff vs. Vandykes*, 89 Va., 307, decided September 15, 1892, it was held: The wife has no separate interest in the result of the suit, though made a party; her husband is a competent witness in his own behalf.

In the case of *Bowman et als. vs. Reinhart et als.*, 89 Va., 435, decided December 1, 1892, it was held: Where husband and wife are both parties to a suit in which the latter's interests are involved, he is not a competent witness for or against her.

In the case of *Field vs. Brown*, 24 Grat., 74, decided November, 1873, it was held: The plaintiff in a cause is not a competent witness under the statute to prove the acts and declarations of a deceased person under whom the defendants claim.

But when the question is whether the acts of such deceased person in building a dam across a stream injured the land of the plaintiff, the plaintiff is competent to prove the condition of his land, the character of the stream doing the injury, the effect of the dam on the stream and on the adjacent lands of the plaintiff, and other independent facts as to which his testimony, if untrue, could be rebutted by others as readily as by the deceased.

The plaintiff's deposition having been taken and the defendants having cross-examined him, they cannot have the questions and answers on cross-examination struck out, though they may refer to the acts and declarations of a deceased person under whom the defendants claim.

In an action by F. against B. for injury to his land by B.'s continuing a dam across a stream which had been erected by a previous owner, the defence of B. is that of adversary possession by him and those under whom he claims for more than

twenty years. To rebut the presumption arising from the possession, F. may prove what passed between his agent and M., a former occupant of the premises of B., showing that the agent of B. denied the right of M. to raise the dam, and that M. asked it as a privilege for a short time.

In the case of *Stratham vs. Ferguson's Administrators et als.*, 25 Grat., 28, decided April 8, 1874, it was held: In a controversy between an unmarried woman on the one part, and husbands and wives on the other, in relation to a transaction between them, in which all are interested, as the husbands and wives are incompetent from their relation with each other to testify in their own behalf in the case, the unmarried woman is not a competent witness in her own behalf.

In the case of *Martz (Executor) vs. Martz's Heirs*, 25 Grat., 361, decided October 2, 1874, it was held: A will is not a contract, and an executor or legatee is not a party to it in the sense of the statute.

One party to a suit is incompetent as a witness on account of the disqualification of the other party, only in a case when he was a party to the transaction which is the subject of the suit or proceeding, and the other party is dead, insane, or incompetent from some legal cause.

Where the objection is to the competency of the witness, and the objection is sustained, it is not necessary to state in the exception what the party offering him expects to prove by him.

In the case of *Huffmans vs. Walker*, 26 Grat., 314, decided June 30, 1875, W. brings debt on a bond against H., and H. pleads payment and set-off, on which there is issue. H. files with his plea a statement of the payment, which was the amount of a bond of W. and J. to L., and that W. agreed with H., if H. would pay the bond due to L., H. would have credit for the amount as a payment on the bond sued on. Held: H. is a competent witness to prove what passed between himself and J. in relation to the arrangement between him and J. for the procurement by H. of the bond of L., though J. is dead.

In the case of *Brown's Administrator, etc., vs. Dickinson*, 27 Grat., 690, decided June, 1876, it was held: Three bonds are executed to A. and G., and are left in the possession of G. A. sold the lands to E., but they being in the possession of G. were not delivered to E. G. sold and delivered the bonds to D. In a suit by E. against D. to recover the bonds, the deposition of A. was taken to prove that G. owed him, and had agreed that he should have the bonds; but at the time of taking the deposition of A. G. was dead. A. is liable to E. on his sale of the bonds to E., if he does not recover them; and as G. is dead, A. is not a competent witness, either at common law or under the statute, to prove that G. had agreed with him that

the bonds should belong to A., though A. is not a party in the suit.

In the case of *Mason et als. vs. Wood*, 27 Grat., 783, decided September 28, 1876. M. and four others execute a bond to W. for the price of a jack, and W. warrants him sound and a good foal-getter. F., one of the obligees, died, and in a suit on the bond by W. against the survivors they set up a breach of the warranty as their defence. On the trial W. introduces witnesses to prove what two of the defendants said to the witnesses, long subsequent to the purchase, to disprove by implication the breach of warranty; and then the defendant offers these two to testify as to what those conversations were. Held: F. being dead, W., the plaintiff, could not under the statute testify in the cause, and therefore the two defendants are incompetent to testify, though in relation to a matter which occurred after the death of F.

In the case of *Hord's Administrator vs. Colbert et als.*, 28 Grat., 49 and 56, decided January, 1877. H. recovers a judgment against M. and dies. Subsequently M. conveys land, etc., to C. to secure two bonds held by W., and this deed is recorded. The administrator of H. files a bill against C. and W., in which he charges that C. and W. had notice of the judgment of H. when the deed was executed, and that the debts secured by the deed are not *bona fide*. C. and W. answer, denying the notice and asserting the debts are *bona fide*. C. and W. are examined as witnesses in their own behalf, and C. is cross-examined on all the issues by the plaintiff, with a knowledge at the time of the objection to his competency; and after the testimony of T. is ended, plaintiff excepts to the competency of each of them, on the ground that H. was dead. Held: The plaintiff having cross-examined C. on all the issues in the cause, that was a waiver of the objection to his competency, and it cannot afterwards be made.

In the case of *Grigsby et als. vs. Simpson's Assignee, etc.*, 28 Grat., 348, decided April 5, 1877, it was held: In an action on a bond by the assignee of a deceased obligee, the obligors are incompetent witnesses to testify in their own behalf under the statute.

In the case of *Borst vs. Nalle et als.*, 28 Grat., 423, decided April 19, 1877, it was held, p. 433-'4: Grantor being dead, the grantee is not a competent witness in his own behalf as to the sale and conveyance of property.

In the case of *Neilson et als. vs. Bowman et als.*, 29 Grat., 732, decided February 7, 1878, it was held, p. 750: Where a party to a cause is examined in his own behalf, and cross-examined at length by the other party without objection to his competency, the objection cannot be made in the appellate court.

In the case of *Grandstaff et als. vs. Ridgely, Hampton & Co.*, 30 Grat., 1, decided January 31, 1878, it was held: In an action by R., the execution creditor of K. and B. against the sheriff and his surviving sureties, for a failure to pay over money collected on the execution, the plaintiff offered B. as a witness, stating that he, R., expected among other things to prove by this witness payment of money to said sheriff or his deputy on the execution of R. against K. and B. Held: B. was not so directly interested in the result of the suit, or in the verdict and judgment to be rendered, as to render him incompetent to testify in the cause.

In the case of *Burkholder et als. vs. Ludlam et als.*, 30 Grat., 255, decided March, 1878, it was held: Where a party to a suit is examined as a witness, and testifies about transactions to which the other party is dead, if he does not testify in his own favor, or in favor of any other party having an interest adverse to the party who is dead, or those claiming under him, but against his own interest and against the interest of those having an interest adverse to the dead party, he is not incompetent.

In the case of *Morris's Executor vs. Grubb*, 30 Grat., 286, decided March, 1878. In an action of debt by W. for the use of G. against the executor of M. upon two bonds purporting to be executed by M. and R., the administrator pleads *non est factum* and payment. The only proof of the execution of the bonds by M. is proof of an acknowledgment by M. to an agent of G. made after assignment to G., and the proofs as to payments are of payments made by R. to G. in the lifetime of M. Held: G. is not a competent witness under the statute to testify in his own behalf.

In the case of *Parents's Administrators vs. Spitlers's Administrators*, 30 Grat., 819, decided October 3, 1878, it was held: P. and C., commissioners, sell land to B., who executes his bonds for the deferred payments, with G. and P. as his sureties. B. sells the land to K. P. being dead, G., P., and K. are incompetent witnesses to prove the payment of the bonds by B. to P.

In the case of *Reynolds's Executor vs. Callaway's Executor*, 31 Grat., 436, decided January, 1879. R.'s executor brought an action of debt upon a bond against the executor of C. C. was one of four obligors on the bond, all of whom were dead but T., and T. was discharged bankrupt. The only issue in the case was on the plea of payment. Held: That T. having been released from the payment by his discharge in bankruptcy was a competent witness at common law for the defendant to prove payment of the debt.

In the case of *Carter vs. Hale et als.*, 32 Grat., 115, decided

July, 1879. In an action of debt by C. against H. and I., the surviving obligors in the bond sued on, the defendants plead set-off, and file a list of bonds delivered by H. to C., which the plea states C. received and undertook to collect and apply to the payment of the bond, and that C. had collected the debts. Held: That H. was not a competent witness at the time of the trial in April, 1876, to prove what passed between himself and C. in relation to said set-offs; and the law is the same in an action on the same bond against the administrator of the deceased obligor.

In the case of *Ellis vs. Harris's Executor*, 32 Grat., 684, decided February 5, 1880, it was held, p. 691: H., who built the dam, being dead, the plaintiff, E., is not a competent witness to prove anything occurring in the lifetime of H.

The executor of H., though a part owner of the land on which the mill was built, is a competent witness in the case.

In the case of *Terry vs. Ragsdale*, 33 Grat., 342, decided July, 1880, it was held, p. 349: In an action against a surviving partner upon a transaction in which the deceased partner was the acting party, the plaintiff introduces the defendant as a witness. The defendant so introduced becomes a competent witness in the cause, but this does not render the plaintiff a competent witness.

In the case of *Simmons vs. Simmons's Administrator*, 33 Grat., 451, decided July, 1880, it was held, p. 461: A witness who was not a party to the contract or transaction which is the subject of investigation is not disqualified on account of interest only, although one of the original parties to the contract or transaction be dead, insane, or incompetent to testify by reason of infamy or any other legal cause; and for that reason the other party is rendered incompetent to testify.

Objection to the competency of a witness cannot be taken for the first time in the appellate court.

In the case of *Knick et als. vs. Knick*, 75 Va., 12, decided November 18, 1880, it was held: A party in interest and on the record is not incompetent to testify in relation to a contract to which he is not a party, though one of the parties to the contract is dead, and the other party to the contract is incompetent to testify.

In the case of *Hughes et als. vs. Harvey et als.*, 75 Va., 200, decided January 20, 1881. W. was the agent of the widow and the heirs in making out the agreement; he was the commissioner to sell the dower-land, and the decree directed him to pay the proceeds to M. upon her giving bond to refund the money at her death; and he was the surety of M. as guardian of her daughter. J. was the counsel employed in both cases, and was the commissioner to sell the land, which M. and the

heirs proposed to buy, and he reported the sale to M. and her payment of the purchase-money, and there was a decree directing him to convey the land to M. without any reference to the agreement; but J. died without conveying the land, and the agreement was lost. Held: It was competent to prove the agreement, and that the purchase and payment were made in pursuance of it; and T. was a competent witness to prove it.

The reference to 75 Va., 207, is an error.

In the case of *Kelly vs. The Board of Public Works*, 75 Va., 263, decided February 10, 1881, it was held: K. was a competent witness to prove his arrangement with the board, although two of its then members are dead. In a suit against the corporation, the plaintiff cannot be disqualified as a witness by the exceptions made in the statute.

In the case of *Tate vs. Tate's Executor*, 75 Va. 522, decided August 4, 1881, it was held, pp. 529-'30: When all the parties to a controversy save one are dead, the surviving party is incompetent to testify in his own behalf as against the deceased parties, and objection may be entered by the personal representative of the deceased party whose estate would in anywise become liable for any portion of the claim of the surviving party.

In the case of *Keran vs. Trice's Executor et als.*, 75 Va., 690 and 693, decided September, 1881. The deposition of T. in a suit of K. vs. T. was taken and closed December 13, 1876, K. being present in person and by counsel, and cross-examining the witness. Afterwards T. died, and K. gave his deposition, K. and T. being the original parties to the transaction which was the subject of investigation in the cause. Held: K.'s deposition could not be read, his disqualification being clearly fixed by the very letter of the statute; but the deposition of T. was admissible, because he was competent to testify in his own behalf when he deposed.

In the case of *Carter et als. vs. Edmonds*, 80 Va., 58, decided January 15, 1885, it was held: The committee of a lunatic is competent to testify as to a contract made by him with a former committee of the same lunatic concerning the latter's affairs.

In the case of *Dugger's Children vs. Dugger et als.*, 84 Va., 130, decided December 1, 1887. In suit by children claiming as heirs of mother equitable title to property to annul trust deed and sale made thereof since mother's decease. Held: That the father is a competent witness to prove that the grantees and purchasers had actual notice of the plaintiff's claims.

In the case of *Well's Administrator vs. Ayers et als.*, 84 Va., 341, decided January 19, 1888, it was held: Books containing entries in defendant's handwriting, of payments by him in her

lifetime on note in action, is not admissible as evidence in defendant's favor.

Payee being dead, maker is not competent to testify in his own favor in action on the note, no person having an interest adverse to makers having previously testified to some fact occurring before payee's death.

In the case of *Wager vs. Barbour*, 84 Va., 419, decided January 26, 1888, it was held: One not a party to a bond, but who has agreed with the obligor to pay it, and has received from him the money for that purpose, is a competent witness to prove payment, though the obligee is dead.

In the case of *Hall vs. Rixey*, 84 Va., 790, decided April 26, 1888, it was held: One who is not a party to the contract or transaction which is the subject of investigation, is competent to testify, though one of the original parties to such contract or transaction is dead, or for other causes incompetent, and for that reason the other party is incompetent to testify.

In a suit by assignee against his assignor, on recourse, the subject of investigation is the assignment whereon the claim is based, and not the communications between the deceased assignor and the assignee's attorney, wherein the former directed the latter not to sue on the assigned claims, said attorney is competent to testify to said communications.

Communications by assignor to attorney of assignee are not privileged where attorney was acting for his client.

SECTION 3347.

In the case of *Saunders et ux. vs. Greever (Administrator)*, 85 Va., 252, decided August 16, 1888, it was held: When one distributee claims as his own personalty in possession of ancestor at his death under parol purchase by distributee from ancestor, said distributee is not, in a suit with his co-distributees, competent to testify to said purchase, unless his case comes within some one of the provisions contained in this section.

SECTION 3349.

See the case of *Keran vs. Trice's Executors et als.*, 75 Va., 690, cited *ante*, Section 3346.

SECTION 3358.

In the case of *Moore vs. Gilliam*, 5 Munf., 346, decided January 31, 1817, it was held: It seems that the testimony of an editor of a newspaper that he inserted therein the requisite number of times an advertisement, the purport of which he states on oath, is sufficient proof of such publication, on a trial in ejectment, without producing the advertisement itself.

In the case of *Cunningham's Executor vs. Smithson*, 12 Leigh, 32, decided March, 1841, it was held: In a chancery suit against

absent defendants the only proof of publication of an order was a certificate of the printer, not verified by oath; no exception was taken in court below, and court declaring that plaintiff had proceeded regularly against the absent defendants gave him a decree. Upon appeal neither party can object to the want of proof of publication, and especially the plaintiff, to whose fault the irregularity was imputable, cannot ask the reversal of his own decree on that ground.

SECTION 3359.

In the case of *Baxter vs. Moore*, 5 Leigh, 219, decided April, 1834, it was held: Depositions of witnesses read at the hearing of a suit in equity, without objection, cannot be objected to on the ground of incompetency of the witnesses, in the court of appeals, on the hearing of an appeal from the decree.

In the case of *Pollard's Heirs vs. Lively*, 2 Grat., 216, decided July, 1845. A person taking a deposition under a regular commission and notice certifies that the deposition was taken before him, and signs his name to the certificate, with the addition of the letters J. P. Held: It sufficiently appears that he is a justice of the peace.

A witness giving his deposition *de bene esse* states in it that he is unable, from his age and infirm health, to attend the court. This is sufficient to authorize his deposition to be read upon the trial of the cause in which it is taken.

Though in the case of *Simmons vs. Simmons's Administrators*, 33 Grat., 451, 460-'61, there were depositions taken, there is nothing affecting this section, the objections being to the competency of the witnesses, not to the authority to take the depositions.

SECTION 3362.

In the case of *Collins vs. Lowry & Co.*, 2 Washington, 97 (1st edition, page 75), decided at October term, 1795, it was held: When a deposition is read at common law, whether it was taken *de bene esse* or in chief, it should appear in the record on appeal that notice of the time and place of taking it had been given to the adverse party.

In the case of *Stubbs vs. Burwell*, 2 H. & M., 536, decided May 18, 1808, it was held: A deposition cannot be read to affect the interests of any party to whom no notice of the time and place of taking it had been given.

In the case of *Rowlett (Executor) vs. Moody*, 4 H. & M., 1, decided May 3, 1809. The "reasonable notice" which the law requires upon taking depositions must depend upon circumstantial evidence; therefore, when a notice was left with the wife of a party at his dwelling-house, when it was known

by the adverse party that he was absent on a journey to another State, and where it appeared, also, that the notice might previously have been given to the party himself, and that the taking of the depositions might have been postponed, as it respected the trial of the cause, till his return, it was held: That the notice was insufficient; and the deposition taken under it was suppressed.

In the case of *Chapman vs. Chapman*, 4 H. & M., 426, decided by the General Court of Chancery for Richmond, spring vacation, 1809, it was held: A notice to take a deposition, given to the overseer of the party, who resided for a part of his time in the State and for a part of the time out of it, is not sufficient.

In the case of *Butts vs. Blunt et als.*, 1 Rand., 255, decided December, 1822, it was held: Depositions ought not to be admitted in a suit at law, unless it appears by the record in what suit and by what authority they were taken, and that the witnesses could not attend at the trial.

In the case of *Hunter vs. Fulcher*, 5 Rand., 126, decided March, 1827, it was held: A notice to take depositions is insufficient if it omits the place where the depositions are to be taken; nor, if the magistrates meet on the day appointed, can they resume the taking of depositions at any future day without an adjournment to such day.

In the case of *Dunbar's Executors vs. Woodcock's Executor*, 10 Leigh, 629 (2d edition, 660), decided March, 1840, it was held: An interlocutory decree in chancery, deciding a question of fact in litigation, pronounced in the progress of an account, upon exceptions to a report, or instructions to a commissioner as to the propriety of items of debit or credit, is not such a final decree as precludes a party from taking new evidence touching the same question of fact, without having obtained a review or rehearing of the decree, and without showing that the new evidence had been discovered since the decree.

In the case of *Kincheloe vs. Kincheloe*, 11 Leigh, 393, decided August, 1840. A notice is given by the plaintiff to defendant for taking the depositions of several witnesses at a specified place in Missouri on six successive days, between certain hours of each day. Held: Considering the distance of the place appointed for taking the depositions, and the uncertainty of the precise time at which the party would be enabled to have things in readiness for taking them, the notice is sufficiently definite.

In the case of *Moore vs. Hilton*, 12 Leigh, 1, decided February, 1841. Under the structure of the statute of March, 1826, Supplement to Rev. Code, Chapter 103, Section 9, held: That after an interlocutory decree upon a hearing, deciding the questions of fact in issue between the parties, neither party has an

absolute right to introduce new evidence touching the questions so decided; the introduction of such evidence depends on the sound discretion of the court, and its judgment on its sufficiency of the excuse offered for the failure to have it before the court when the cause was heard and the interlocutory decree pronounced; and such excuse may be offered, either on motion upon notice or upon a petition for a rehearing of the cause.

See the case of *McCandlish vs. Edloe et als.*, 3 Grat., 330, *ante*, Section 3320.

In the case of *Unis et als. vs. Charlton's Administrator*, 12 Grat., 484, decided August 24, 1855, it was held: A deposition is taken by a plaintiff in another State, to be read as evidence in a cause depending here, and the justices certify that the defendants appeared by counsel and cross-examined the witnesses; and the deposition shows that counsel professing to represent the defendants did appear and cross-examine the witness. It does not appear, however, that the deposition was taken under a commission, or that the court here had ever authorized a commission to issue; nor was any notice to the defendant produced or proved. The deposition is taken without authority; and the justices having no authority to take the deposition, their certificate is no proof of the facts it states.

A deposition having been taken without authority or notice is not admissible as evidence; and the objection to it may be taken when it is offered to be read as evidence. The deposition of a witness having been introduced as evidence, it is not competent for the other party to impeach his credibility by the proof of statements made by him at another time inconsistent with, or contradictory of, the statement in his deposition, before the foundation for the introduction of such impeaching testimony is first laid by an examination of the witness touching the fact of his having made such statement. A deposition taken at so late a day that the other party cannot attend at the time and place of taking it, and then get to the court where the cause in which it is taken is to be tried by the commencement of the term, is not admissible evidence.

In the case of *Fant vs. Miller & Mayhew*, 17 Grat., 187, decided January 16, 1867, it was held: A party has a right to be personally present when depositions are taken by his adversary, and a notice which does not afford him an opportunity to be present is insufficient, and his exception to the deposition on that ground ought to be sustained.

If a party gives notice of the taking of several depositions at different places on the same day, so that the opposing party cannot be present to cross-examine all the witnesses, he may select which examination he will attend, and the other depositions will be suppressed.

An exception a to deposition, whether endorsed on it, or taken and entered on its face in the process of taking it, or written on a separate paper and filed in the cause (except on the ground of incompetency, in which case no exception is necessary), not having been brought to the notice of the court below, or passed upon by that court, ought to be considered as having been waived, and cannot be noticed by the appellate court; and a general judgment or decree of the court below against the party making the exception cannot be considered as involving a decision upon the exception.

In the case of *Peshine vs. Shepperson*, 17 Grat., 472, decided May 14, 1867, it was held: If depositions are read on a trial without objection, or if objection is made without an exception taken to their admission, upon another trial of the cause they will not be excluded for the failure to prove notice to take them, unless the party objecting has given notice to the other party of his intention to object to them in time to enable the party offering them to take them again, and the witnesses are alive at the time of such notice.

In the case of *Bartley vs. McKinney*, 28 Grat., 750, decided July, 1877, it was held: A deposition is taken to be read in a case in which Franklin Bartley is defendant, and that is the name given in the summons and to which he appeared, but the name in which the action is carried on is William F. Bartley. The person is obviously the same, and Franklin is a part of the defendant's name. The deposition cannot be objected to on this ground.

In the case of *Latham (by, etc.) vs. Latham*, 30 Grat., 307, decided July, 1878, it was held: Notice is given to take depositions at two distant places on the same day. The other party may attend at one of the places, and object to the depositions taken at the other place for want of notice; but if he attends by his counsel at both places, he cannot except to the depositions taken at either or at both places.

In the case of *Richardson vs. Duble et als.*, 33 Grat., 730, decided September, 1880, it was held: In such case, if no interlocutory decree has been rendered, or even though one has been rendered, a deposition taken and returned before a final hearing, as to any matter not adjudicating, may be read; but the right is not an absolute right. The statute does not say that the deposition shall be, but it may be, read.

In this case the cause having been referred to a commissioner and ample opportunity offered both parties to introduce their witnesses, and the commissioner had made his report and the cause was ready for a hearing, deposition afterwards taken by one of the parties as to a controverted matter in the report was, under the circumstances, properly disregarded by the court in deciding the cause.

The case of *Trevellyn vs. Lofft*, 83 Va., 141, decided April 14, 1887, follows the statute, not construes it. This is the case cited from 11 Va. Law Journal, 610.

SECTION 3364.

In the case of *Fant vs. Miller & Mayhew*, 17 Grat., 187, decided January 16, 1867, it was held, pp. 219-'22: If the circumstances of the case and justice require that a second examination of the same witness should take place, an order will be made to permit it, unless it was palpably improper to grant leave for the second examination of a witness; an appellate court will not for this cause reverse the decree, as the circuit court ought to possess much latitude of discretion in the decision of such questions.

In the case of *Carter et als. vs. Edmonds*, 80 Va., 58, decided January 15, 1885, it was held, p. 63: A confirmed report of an *ex parte* settlement of a fiduciary's accounts is *prima facie* correct, and can be surcharged or falsified only by a suit for the purpose within proper time. This is equally true *quoad* settlements of the accounts of the committee of a lunatic.

SECTION 3365.

See the case of *Collins vs. Lowry & Co.*, 2 Wash., 97 (1st edition, p. 75), cited *ante*, Section 3362.

In the case of *Minnis vs. Echols*, 2 H. & M., 31, decided March 2, 1808, it was held: The circumstance that a witness has been summoned and fails to attend is not sufficient to authorize the reading of his deposition taken *de bene esse*, but it must be proved that he is dead, or, if living, unable to attend.

In the case of *Tompkins & Co. vs. Wiley*, 6 Rand., 242, decided February, 1828, it was held: If there be no objection made to the regularity of the deposition in a court of law, the court of appeals will presume it was properly taken, although there is neither commission or notice in the record.

It is improper to read a deposition in a court of law on account of the absence of the witness, unless the party offering it proves that he has used due diligence to find the witness, or that he is not within the jurisdiction of the court and the reach of its process.

In the case of *Lynch vs. Thomas*, 3 Leigh, 682, decided May, 1832. Plaintiff having taken the deposition of an aged and infirm witness to be read *de bene esse*, fails to take out a *subpoena* and have it served on the witness to attend at the trial. Held: That upon satisfactory proof of the witness's inability to attend the trial by reason of ill-health, the deposition shall be read.

See the case of *Pollard's Heirs vs. Lively*, 2 Grat., 216, cited *ante*, 3359.

In the case of *Nuchol's Administrator vs. Jones*, 8 Grat., 267, decided October, 1851. In a case of probate the deposition of an aged witness taken *de bene esse*, is allowed to be read upon proof, either by witnesses, or by his own affidavit of his inability to attend the court. In a case of probate, a witness unable to attend the court is examined as to the handwriting of a testamentary paper which had been shown to him by the propounder of the will, but which was not before him at the time he gave his deposition. Held: That the testimony is admissible, its weight depending upon the certainty of the proof that the paper propounded for probate is the paper that was shown to the witness.

In the case of *Taylor vs. Smith*, 10 Grat., 557, decided January, 1854, it was held: The affidavit of a witness taken before a justice of the peace, that from his age and infirmities he was unable to attend the court without endangering his life, not having been objected to in the court below for want of notice, that objection cannot be made in an appellate court. Such an affidavit taken eight days before a cause is called for trial, is sufficient to authorize the deposition of the witness, which had been taken *de bene esse*, to be read as evidence.

SECTION 3366.

In the case of *Barnett & Woolfolk vs. Watson & Urquhart*, 1 Wash., 372 and 380, decided at the fall term, 1794. The declaration was against Barnett & Woolfolk; the writ was returned "no inhabitant" as to Barnett; Woolfolk entered appearance, pleaded, and the plaintiff got an order for taking depositions, after which Barnett appeared and acknowledged the service of notice of taking depositions, and afterwards Barnett & Woolfolk appealed on the ground that depositions taken in a suit against Joseph Woolfolk were not available in a suit against the firm. Held: The depositions were properly read, as the appearance was a joint defence. The deposition need not be subscribed by the witness where certified by two magistrates to be taken on oath.

In the case of *Marshall vs. Frisbee*, 1 Munf., 247 and 252, decided April 30, 1810, it was held: An order of court granting leave to take a deposition in the city of Philadelphia, being "by consent of parties that a commission issue to any four aldermen of the said city and W. K.," and a subsequent order also by consent, granting "new commissions to take depositions," a commission issuing afterwards "to R. K., alderman of the city of Philadelphia, and four other persons by name," not said to be aldermen (and omitting W. K.), "any three of whom to act if the whole cannot," should be presumed to have been directed to persons agreed upon by the parties, but whose

names were omitted by the clerk in entering the last order; no objection having been made in the court below on account of any real or supposed variance between the first and second orders and commissions.

A commission directed to five persons, "any three of whom to act," cannot be executed by one only, and a return by one that three others were present when the deposition was taken, is not sufficient. It should be certified by three, at least, who were present.

A deposition taken at a time and place not mentioned in the notice may be read as evidence; an agent of the party to whom the notice was given, duly authorized to attend to the taking of such deposition, having appeared at the time and place appointed and consented to a postponement to such other time and place; and if in other respects the commission be regularly executed and returned, the court will presume from circumstances that the person who gave the consent was the authorized agent of the party.

In the case of *Givens & Reynolds vs. Manns*, 6 Munf., 191, decided October 23, 1818, it was held: It seems that a deposition taken *de bene esse* by two magistrates, and with due notice (it appearing that an order of court was made awarding a commission to take it, and that the clerk charged a fee for issuing the commission), may be read as evidence, on proof of inability of the witness to attend, notwithstanding there be no other proof that it was taken by virtue of a commission delivered to the magistrates (no commission being found among the papers), and it be returned to the clerk's office, opened and unsealed, but without being shown to have been erased or altered.

In the case of *Cabell's Executors vs. Megginson's Administrators*, 6 Munf., 202, decided October 26, 1818, it was held: According to the practice in our court of equity, it seems that a bill to set up a lost bond need not be supported by the plaintiff's affidavit.

SECTION 3370.

In the case of *Templeman vs. Fauntleroy*, 3 Rand., 434, decided June, 1825, it was held: A court of chancery may direct the reference of a case to a master, with authority to examine the defendants on oath, and such examination will have the effect of an answer.

In the case of *Baker vs. Morriss's Administrator*, 10 Leigh, 284 (2d edition, 294), decided May, 1839. In a suit in equity to enforce payment of a bond debt twenty-eight years after the right to demand it accrued, there being no remedy under the circumstances of the case but in equity, the bill, to rebut the presumption of satisfaction arising from lapse of time, calls on the defendant to answer whether the debt has been paid or

not. Held: The defendant was properly compelled to answer that point.

Where assumpsit is brought at law, and the statute of limitations pleaded, the plaintiff may file a bill of discovery in equity, calling on the defendant to answer whether he has not made a new promise within the term of limitation, in order to use this matter on the trial of the action at law in avoidance of the bar of the statute, and the defendant shall answer the allegation of the new promise on oath.

In the case of *Vaughn & Co. vs. Garland*, 11 Leigh, 251, decided July, 1840, it was held: A plaintiff in an action at law, wishing a discovery from the defendant, files written interrogatories, under the statute, to which answers are given. At the trial the defendant offers to read to the jury as evidence the interrogatories and answers, to which the plaintiff objects. Nevertheless, the circuit court permits the same to be read, and a verdict and judgment are rendered for the defendant. The court of appeals reverses the judgment of the circuit court, and awards a new trial, with directions that the answers to the interrogatories are not to be read, unless introduced on the part of the plaintiff.

In the case of *Poindexter, etc., vs. Davis et als.*, 6 Grat., 481, decided January, 1850, it was held: A party to a cause is not bound to answer interrogatories which may subject him to a penalty or forfeiture. This rule is not confined to cases where the purpose of the action is to enforce the penalty or forfeiture, but extends to those where the discovery itself would expose the party to some action or suit, or to any criminal or penal prosecution tending to the like result.

If the court permits improper interrogatories to be filed, and directs them to be answered, the party to whom they are directed may answer them, and then, on trial of the cause, may object to their admission as evidence.

In the case of *Fant vs. Miller & Mayhew*, 17 Grat., 187, decided January 16, 1867, it was held: The rule in equity practice that the answer of the defendant upon any matter stated in the bill, and responsive to it, is evidence in his favor, applies when a material disclosure is called for by the bill and is made in the answer. A plaintiff cannot destroy the weight of the whole answer by proving that the defendant is unworthy of credit, nor can he incidentally do so by proving that the answer is defective in one respect, or in several respects, the only effect of such proof being to destroy the weight of the answer to the extent to which it is disproved by that amount of evidence which is required by the rule in chancery. The answer of a defendant to a pure bill of discovery, when used on a trial at law, is used as a matter of evidence, the whole of which is to be read as the

testimony of a witness, including not only admissions against the interest of the respondent, but all assertions in his favor, subject, however, to be credited or discredited, in whole or in part, by the court or the jury, according to its own intrinsic weight, or its relative weight in comparison with the other evidence in the action at law.

When a plaintiff goes into equity for relief on the ground of discovery, the court will give to the answer of the defendant the same effect that would be given to it in a court of law, except that the plaintiff cannot contradict the answer by other evidence, as he would thereby prove himself out of court.

A commissioner properly has much latitude of discretion in granting continuances of proceedings before him, and the court whose order he is executing will not overrule his action in that respect, unless it be plainly erroneous. Still less will an appellate court reverse a decree for that cause.

SECTION 3373.

In the case of *Evans vs. Stewart et als.*, 81 Va., 724, decided February 18, 1886, it was held: A person for seven years not heard of by those who, had he been alive, would naturally have heard of him, is presumed to be dead; but the law raises no presumption as to the precise time of his death.

The burden of proving that the death took place at any particular time within the seven years lies upon the person claiming a right to the establishment of which that fact is essential.

SECTION 3375.

See the references given to Section 2897.

In the case of *The Commonwealth vs. Morris*, 1 Va. Cases, 176 (referred to as 172), it was held: In a criminal prosecution for libel truth may be shown in mitigation of fine.

In the case of *Brooks vs. Calloway*, 12 Leigh, 466, decided December, 1841. The court, on the trial of an issue, makes a remark calculated to prejudice the minds of the jury against the defendant, but at the same time tells the jury that that remark has nothing to do with the cause, and ought not to influence their verdict; and a verdict is rendered for the plaintiff. Held: Such remark is no ground for reversing the judgment on the verdict.

In the case of *Moseley vs. Moss*, 6 Grat., 534, decided January, 1850, it was held: If in actions of slander under the statute, the truth of the words spoken may be given in evidence in mitigation of damages. Capell, P., and Baldwin, J., in the affirmative, and Allen, J., in the negative.

In the case of *Bourland vs. Edison*, 8 Grat., 27, decided July, 1851, it was held: In an action of slander, under the plea of not

guilty, the defendant may in mitigation of damages prove any facts, as to the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, which tend to excuse him for uttering the words, provided the facts do not prove or tend to prove the truth of the charge complained of, but in fact relieve the plaintiff from the imputation involved in it.

In the case of *Hogan vs. Wilmouth*, 16 Grat., 80-85, *et seq.*, decided August 30, 1860, it was held: In this case the truth of the words may be shown in mitigation of damages though the action is under the statute; but the court carefully refrained from deciding, and expressly said that they should not decide this rule to be universal.

See the case of *Dillard vs. Collins*, 25 Grat., 343, cited *ante*, Section 2897.

See the case of *Hansbrough et ux. vs. Stinnet*, 25 Grat., 495, cited *ante*, Section 2897.

See the case of *Chaffin vs. Lynch*, 598, cited *ante*, Section 2897.

CHAPTER CLXV.

SECTION 3376.

In the case of *Lyons (Surviving Executor of Claiborne) vs. Gregory*, 3 H. & M., 237, decided November 22, 1808, it was held: Where the records of a court have been destroyed, an imperfect minute of a judgment may be admitted to record under the act of assembly, in lieu of the original, provided the substantial parts thereof appear; and the record of such minute, made by order of the court, is good evidence on a plea of *null tiel* record, although the clerk has failed to endorse upon it that the original was lost or destroyed, and has also failed to make an entry to the same effect in the record-book.

What variances between a judgment and the recital thereof in a *scire facias*, or in the judgment thereupon, are not material.

In the case of *Smith vs. Carter*, 3 Rand., 167, decided February, 1825, it was held: Where a will has been regularly proved in a court of probate, and afterwards destroyed by the enemy, together with the book in which it was recorded, its contents may be proved by parol evidence.

The remedy pointed out here is only cumulative, and does not deprive a party of his remedy at common law.

In the case of *Bradshaw vs. Commonwealth*, 16 Grat., 507, decided September 3, 1860, it was held, p. 517: In a prosecution for a felony or a misdemeanor, if the indictment is lost at any time before the trial, though after arraignment and plea, the party cannot be tried.

The act authorizing a lost record or paper to be substituted

by an authenticated copy or proof of its contents, applies only to civil cases, and does not extend to records or papers in criminal proceedings.

In the case of *Corbett vs. Nutt (Trustee)*, 18 Grat., 624, decided April, 1868, it was held, p. 639: Plaintiff in unlawful detainer proves he deposited the original will of his testatrix with the clerk of the Circuit Court of Richmond, in 1864. He also proves that the witness had inquired for said paper of the said clerk at his office in the city of Richmond, in whose custody the said original paper had been left; that said clerk at his request made search for said paper, and reported it had been lost out of his possession, and destroyed at the time of the fire in April, 1865. In the absence of all suspicion of fair* dealing, this testimony is sufficient to let in a copy of the will, of the accuracy of which copy there is no question.

Upon proof that the will had been regularly admitted to probate in the Circuit Court of Richmond, such proof of the loss and destruction of the record will authorize the admission of an official copy of the record, certified by the clerk. And this official copy having been admitted to probate in the Orphan's Court of the District of Columbia, an official copy from that office is admissible.

In the case of *Dismal Swamp Land Company vs. Macauley's Administrators*, 85 Va., 16, decided June 4, 1888. The cause was on the docket of the circuit court at its last session before the war. All records of that court were destroyed during the war except such as were in the attorney's hands. In 1881 the cause was not on the docket, it not appearing that it had been legally removed. On motion it was reinstated. Held: No error.

In the case of *Hudson vs. Yost*, 88 Va., 347, decided July 23, 1891, it was held: It is sufficient compliance with the Code where sworn bill alleges and answer admits the destruction of the original papers in a cause wherein was a decree of sale of certain lands, and there is filed a certified copy of the papers from supreme court where the cause was on appeal, and an injunction will not lie to such sale on the ground that "no affidavit" of destruction was filed.

CHAPTER CLXVI.

SECTION 3378.

See the references given to Sections 3211 and 3287.

In the case of *White vs. Archer*, 2 Va. Cases, 201, decided by the General Court, June term, 1820, it was held: A *capias ad respondendum* was issued returnable to the rules, on the first Monday in April, and on that day common order was entered; the first Monday in May was the next rule day, on which day

* Query: "unfair."

the common order was confirmed in the office; on the same day the court sat. It was not regular to place that case on the office-judgment docket of that term, because the statute directs that the docket shall be made out before every term.

In the case of *Hale vs. Chamberlain*, 13 Grat., 658, decided February 10, 1857, it was held: In a proceeding under the statute to recover money due upon contract by notice, the notice must be returned forty days before the commencement of the term, and put upon the docket of the court, or it cannot be tried at that term.

The references to 29 Grat., 392 and 395, are errors.

SECTION 3380.

In the case of *Ex Parte Richardson*, 3 Leigh, 343, decided December, 1831, it was held: The statute of 1825-'26, Chapter 15, was intended to prevent unreasonable and causeless delays in suits in chancery, and, with that view, the 14th Section authorizes the court of appeals to award a *mandamus* to the courts of chancery to compel them to hear causes at the first term at which they are prepared for hearing, when no special cause appears for the refusal of the court to hear them, but the statute does not authorize a *mandamus* to compel a hearing of the cause, which the court of chancery, in its discretion, for reasons satisfactory to it, thinks proper to continue.

SECTION 3381.

In the case of *Pleasants, Shore & Co., and Anderson vs. Ross*, 1 Wash., 156, decided at the spring term, 1793, it was held: The issue in this cause was intended to satisfy the conscience of the chancellor. It appears that his conscience was satisfied, but this court has the power of examining and correcting his decrees and will be guided by the same conscientious principles.

In the case of *Southall vs. McKeand, Mayo, et als.*, 1 Wash., 336, decided at the fall term, 1794, it was held: The verdict in an issue directed out of chancery ought not to stand when there is a certificate of the judges therewith certifying that the weight of evidence is against such verdict.

In the case of *Pryor vs. Adams*, 1 Call, 382 (2d edition, 332), decided October 25, 1798, it was held: The court of chancery should judge on the proofs before it, and in a clear case should decree thereon without directing an issue.

In the case of *Wilson vs. Rucker*, 1 Call, 500 (2d edition, 435), decided May 4, 1799, it was held: The court of chancery may, on granting a new trial in the same court, order the verdict to be certified into the court of chancery, and proceed to make a final decree in the cause.

In the case of *Stannard vs. Blayde's Executors*, 2 Call, 369 (2d edition, 310), decided November 5, 1800, it was held: After three verdicts, the court of chancery did right in decreeing according to the opinion of the juries.

If the court before which the issues are tried is dissatisfied with the verdict, this dissatisfaction must be certified in the record of the court, or, if refused, it must be put on the record by a bill of exceptions. It cannot be supplied by affidavits, especially those of counsel in the cause.

The discretion of the chancellor is to be exercised on sound principles, of which this court may judge.

In the case of *Hooe vs. Marquess*, 4 Call, 416, decided October, 1798. The court of appeals, where a son had obtained a deed from his father for ninety acres of land and five slaves, in consideration of one pound sixteen shillings and maintenance for life, after which he sold the land to a third person, who filed a bill alleging that deed to have been recorded, but to have been afterwards destroyed, another substituted in its room, and the land sold again by the first donor to a purchaser with notice of the plaintiff's title, whose deed had not been recorded, ordered an issue to try whether there was such substitution of one deed for another, and, if so, what were the terms of the first deed.

In the case of *McCall vs. Graham*, 1 H. & M., 12, decided September 27, 1806, it was held: Where an issue is directed by the court of chancery to be tried at law, any papers may be read at the trial of such issue which were read upon the hearing of the cause, or at a former trial.

In the case of *Rowton vs. Rowton*, 1 H. & M., 91, decided November 5, 1806, it was held: The directing of an issue for the purpose of ascertaining disputed facts is discretionary with a court of equity, which may decide on the evidence relative to such facts without a jury.

In the case of *McRae's Executor vs. Wood's Executor*, 1 H. & M., 548, decided November 12, 1807, it was held: After two concurring verdicts for the same party on an issue directed by the chancellor to be tried at common law, he is not bound to direct a new trial, notwithstanding both verdicts were in opposition to the opinions of the judges before whom the issues were tried, and a verdict had originally been rendered in favor of the other party.

In the case of *Galt and Garland vs. Carter*, 6 Munf., 245, decided December 2, 1818, it was held: Upon a bill of injunction to prevent the sale, under execution, of slaves divided in trust, if the defendants allege that the *cestui que trust* was entitled to the slaves by five years' possession before the death of the devisor, and the truth of such allegation be doubtful on the evi-

dence, the chancellor ought to direct an issue to ascertain that fact.

In the case of *Cocke vs. Upshaw and Pritchett (Executors of Burnett)*, 6 Munf., 464, decided January 18, 1820, it was held: In such case, if the fact of the secret partnership be doubtful on the testimony, the court should direct an issue to ascertain it.

In the case of *Carter vs. Campbell*, 1 Va. (Gilmer), 159, decided October 25, 1820, it was held: In a case proper for an issue the verdict is conclusive when the evidence is conflicting.

In the case of *Samuel vs. Marshall and Wife et als.*, 3 Leigh, 567, decided March, 1832, it was held: If the evidence on a question of fact in a suit in chancery, though various and conflicting, be such as ought to satisfy the chancellor's conscience as to the truth of the case, he need not direct an issue to try the fact.

In the case of *Grigsby vs. Weaver*, 5 Leigh, 197, decided April, 1834. Upon a bill in chancery for relief against a contract alleged to be usurious, the chancellor directs an issue to be tried at law to ascertain whether the contract was usurious or not; the jury finds the contract not usurious; the judge of the court of law certifies that the verdict in his opinion is contrary to the law and the evidence, and certifies also the substance of the evidence adduced at the trial, some of which does not relate to the points put in issue by the pleadings in equity. The chancellor refuses to set aside the verdict (being himself satisfied it is right) and to order a new trial of the issue, and dismisses plaintiff's bill. Held: It was a matter of sound discretion whether the chancellor should direct the issue or decide the questions of fact himself, and like matter of discretion whether he should set aside the verdict on the issue or not; and in the exercise of such discretion in this case he properly refused to set aside the verdict and order a new trial of the issue; he was not bound to set it aside in deference to the certificate of the judge of the court of law against it.

In the case of *Watkins et ux. vs. Carlton*, 10 Leigh, 560 (2d edition, 586), decided January, 1840. Upon a trial at law of issues out of chancery, exceptions are filed to opinions of the court and made part of the record; the court of law certifies the verdict, but it does not expressly certify, nor is it asked to certify, the exceptions. Held: All the proceedings upon the trial of the issues spread upon the record thereof constitute part of the certificate of the verdict, and with it become part of the chancery record.

A court of chancery directs issues of facts to be tried at law without evidence regularly taken before the court touching the facts to which the issues relate, but there was evidence which, if regular, would have rendered the order for the issues proper.

Held: That if the appellate court should set aside the issues for being, in the actual state of the case, improperly ordered, it should, under such circumstances, remand the cause to the court of chancery, where the evidence may be regularly taken, and thereupon the issues ordered anew.

See the case of *Nelson's Administrator vs. Armstrong et als.*, 5 Grat., 354, cited *ante*, Section 2836.

In the case of *Isler and Wife vs. Grove and Wife*, 8 Grat., 257, decided October, 1851, it was held: Where the subject-matter in controversy is of the nature of estimated and unliquidated damages, and the accuracy and credit of the witnesses is impeached, an issue should be directed.

In the case of *Reed vs. Cline's Heirs*, 9 Grat., 136, decided August 2, 1852, it was held: In a suit in equity, if there be no conflict between different portions of the evidence, no ambiguity or uncertainty in it, but a simple failure to prove material facts, it is improper to direct an issue.

In the case of *Wise vs. Lamb*, 9 Grat., 294, decided August 28, 1852, it was held: It is error to direct an issue out of chancery when the only evidence which can be produced in support of the bill is clearly incompetent from any cause.

In the case of *Lee's Executor vs. Boak*, 11 Grat., 182, decided April, 1854, it was held: Where an issue is directed in a chancery cause, and a verdict is found to which no exception is taken, and a decree is rendered thereon, the facts found in the verdict must be regarded in the appellate court as the established facts of the case.

In the case of *Smith's Administrator vs. Betty et als.*, 11 Grat., 752, decided October, 1854, it was held: In a chancery cause, if upon the state of proofs at the time an issue is directed the bill should be dismissed, it is error to direct it; and although the issue is found in favor of the plaintiff, the bill should notwithstanding be dismissed at the hearing. When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to furnish two witnesses, or one witness and corroborating circumstances, in support of the bill, it is error to direct an issue. The *onus* must be shifted and the case rendered doubtful by the conflicting evidence of the opposing parties before an issue should be ordered.

In the case of *Beverly vs. Walden*, 20 Grat., 147, decided November, 1870, it was held: Whether a court of equity will direct an issue to be tried by a jury is a question of discretion; but it is a sound judicial discretion, and if improperly exercised an appellate court will direct it.

When the allegations of the bill are positively denied by the answer, and the plaintiff has failed to produce two witnesses, or one witness and strong corroborating circumstances in support

of the bill, it is error in the chancellor to order an issue; no issue should be ordered until the plaintiff has thrown the burden of proof on the defendant.

In the case of *Powell et ux. vs. Manson*, 22 Grat., 177, decided April 17, 1872, it was held: Upon the trial of an issue out of chancery, depositions taken in the cause in the chancery court are not to be read to the jury, unless proof be given that the witnesses are dead, or abroad, or otherwise unable to attend the trial.

Upon the trial of an issue out of chancery, the bill is not proof of its allegations, except so far as these allegations are admitted to be true by the answer. And the answer is not proof of the allegations therein contained, unless the allegations in the answer as to facts be positive, and responsive to some allegation of the bill; and to be responsive such allegations of the answer must not be either evasive or contradictory.

On the trial of an issue out of chancery, the rule of evidence is the same as on the hearing in the chancery court; and the allegations of the answer responsive to the bill must be taken as true, unless contradicted by two witnesses, or one witness and corroborating circumstances.

Upon a motion for a new trial of an issue out of chancery, on the ground that the verdict is contrary to the law and the evidence, the judge overruling the motion refuses to certify the facts proved because the testimony was conflicting; but all the oral testimony is certified. The court will consider not merely whether the evidence adduced before the jury warrants the verdict, but also whether, having regard to the whole case, farther investigation is necessary to attain the ends of justice. In such a case, although there may have been a misdirection by the court, or evidence may have been improperly rejected, a new trial will not be granted, if the verdict appears to be right, upon a consideration of all the evidence, including that which was rejected.

In the case of *Nagle vs. Newton*, 22 Grat., 814, decided December 11, 1872. N. sues J. in equity to rescind or enforce specific execution of a contract for the sale of land by N. to J. J. answers, not objecting to a specific execution, but insisting that he shall be compensated for injuries to which he has been subjected by the failure of N. to comply with his contract, and by the intermeddling of N. and his agents with J.'s possession of the land and the property upon it. Held: The case being a proper one for decreeing specific execution of the contract, the court has jurisdiction, as ancillary thereto, to decree compensation to J. for the damages he has sustained by the improper acts of N. and his agents.

The damages may be ascertained either by a commission or

by an issue of *quantum damnificatus* to be tried at the bar of the court.

In the case of *Lavell vs. Gold's Administrator*, 25 Grat., 473, decided September, 1874. In a chancery cause the court directs an issue to be tried at its bar. This issue is tried on the common law side of the court, and the verdict is certified to the chancery side of the court, and there is a motion to set it aside for a new trial. The court sets aside the verdict, and directs a new trial of the issue as amended by him, he being the same judge who presided at the trial of the issue. Held: It is not necessary for the judge sitting on the common law side of the court to certify to himself on the chancery side that he is dissatisfied with the verdict; but he may set it aside without such certificate.

Another judge holding a subsequent term cannot set aside the order of the judge at the previous term and reinstate the verdict.

If the party objecting to set aside the verdict is dissatisfied with the order, he should except to it, and have the facts proved on trial, or the evidence spread upon the record, and thus the order may be reviewed.

In the case of *Steptoe vs. Flood's Administrator*, 31 Grat., 323, decided January, 1879, it was held: On the trial of an issue out of chancery, the plaintiff in the issue relies upon a receipt to which there is an attesting witness, but both the principal and the witness are dead. The plaintiff having proved the handwriting of the witness, the defendant may introduce the testimony of witnesses to prove that the name of the principal to the receipt is not in his own handwriting.

There being great conflict of opinion among the witnesses as to the genuineness of the handwriting of the principal to the receipt, the verdict of the jury against it will not be disturbed.

The court will not set aside the verdict of the jury on the certificate or affidavit of two of the jurors, that they thought the receipt proved and ought to be considered; but the other members of the jury insisted that the receipt had nothing to do with the case, and they were persuaded against their judgment.

It is the general rule in ordinary trials that a verdict will not be disturbed upon the affidavits of jurors, and this is so in the case of an issue out of chancery especially.

In the case of *Snouffers (Administrator) vs. Hansbrough*, 79 Va., 166, decided July 22, 1884, it was held: Where, because of conflict in testimony, an issue is directed, the solution whereof depends on credibility of witnesses, and the verdict is sanctioned by the trial court, the settled rule is that the appellate court will consider not merely whether the evidence warrants the verdict, but also whether upon the whole farther investigation is necessary to justice, and though there may have been misdirection,

or improper rejection of evidence, it will not grant a new trial if, on considering all the evidence, including that rejected, the verdict appears to be right.

At trial of issue, whether vendee was induced to buy by vendor's misrepresentation as to boundaries, evidence of the value of the land at time of sale and since is admissible, as tending to disprove imposition. At such trial, though instructions that vendee must be held to have had notice, from the written contract of sale and the title papers therein referred to, that the purchased tract included one hundred and thirty-five acres of mountain land, might not have been directly relevant to the issue, the solution whereof depended on the credit the jury attached to the witnesses, yet the instruction could not affect the verdict, and, even if erroneous, is no ground of reversal. At such trial, that jury shall weigh defendant's answer instead of merely the parts responsive to the bill, though rather broad, is not error for which the verdict will be set aside. Where at such trial impartially had the verdict could not have been different had a certain instruction been given, the refusal to give the instruction is not error for which the verdict will be set aside. And the rule is the same where the court gives, in lieu of instructions asked for by a party, others substantially embodying the same ideas.

In the case of *Crebs vs. Jones*, 79 Va., 381, decided September 25, 1884, it was held: The object of trying by juries such issues is to satisfy the chancellor's conscience where the evidence is contradictory, but the court is not bound to direct an issue merely because the evidence is contradictory. The expense and delay of such trials are to be incurred only where the court, exercising sound discretion, thinks it necessary, except in certain cases where they are matters of right.

In the case of *Carter vs. Carter*, 82 Va., 624, decided December 2, 1886, it was held: Legal discretion lies in the chancellor to direct or refuse an issue to be tried by a jury; but the appellate court must judge whether or not such discretion has been soundly exercised, whenever the ruling impliedly involves a settlement of the principles of the case.

Where plaintiff avers that certain deeds were procured by the fraud of the prior grantee from their common grantor, when she was mentally incapable of conveying, and both the grantor and prior grantee, by their answers, positively deny every material averment, and plaintiff fails to present two witnesses, or one and corroborating circumstances, in support of the bill, or even to throw the burden of proof on the defendant, and to render the case doubtful by conflicting evidence, no issue need be directed.

This is the case cited from 11 Virginia Law Journal, 275.

In the case of *Loftus vs. Maloney*, 89 Va., 576, decided January 26, 1893, it was held: An issue out of chancery is not allowable except to aid and satisfy the chancellor in cases where the evidence is so conflicting as to make him doubt what his decision should be.

SECTION 3383.

In the case of *McMillion vs. Dobbins*, 9 Leigh, 422, decided July, 1838, it was held: In an action on the case, if there be an office-judgment against the defendant, with a writ of inquiry, and afterwards, without any plea in the cause, the jury be sworn as if there was an issue, and a verdict be found for the defendant, the verdict will be set aside and a new trial directed.

In the case of *Hewit vs. The Commonwealth*, 17 Grat., 627, decided April 19, 1867, it was held: A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case, and although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous.

As a general rule, where a witness for a party fails to appear at the time appointed for the trial, if such party show that a *subpœna* for the witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides a reasonable time before the time for the trial, and shall swear that the witness is material, and that he cannot safely go to trial without his testimony, a continuance ought to be granted, if there be reasonable grounds to believe that the attendance of the witness at the next term of the court can be secured, especially if the case has not been before continued for the same cause.

Where the circumstances satisfy the court that the real purpose in moving for the continuance is to delay or evade a trial, and not to prepare for it, then, though the witnesses have been summoned, and the party has sworn to their materiality, and that he cannot safely go to trial without them, the continuance should be refused.

In the case of *Harman vs. Howe*, 27 Grat., 676, decided June, 1876, it was held, p. 686: A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case, and although an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous.

Where the circumstances satisfy the court that the real purpose in moving for a continuance is to delay or evade a trial, and not to prepare for it, then, though the witnesses have been summoned, and the party has sworn to their materiality, and

that he cannot safely go to trial without them, the continuance should be refused.

Where the circumstances are such as to induce the court to doubt the motives of the parties in moving for a continuance, the court may require him to state what he expects to prove by the absent witness, and if such proof would not effect the result the motion should be overruled.

In the case of *Rousell vs. The Commonwealth*, 28 Grat., 930, decided January, 1877, it was held: R. is indicted for larceny in the Corporation Court of Norfolk, in October, 1875. The clerk, at her instance, twice sends a *subpœna* for C. as a witness to the sheriff of Surry, where C. lives, which are returned "came too late to serve." He sends another, which is not returned. In June the case is continued for the Commonwealth. The counsel of R., relying on the practice of other clerks to issue *subpœnas* for a witness directed to be summoned, does not direct the issue of one to the October term, and one is not issued, and C. is not present when, on the 2d of October, the case is called at that term. The court continues the case until the ninth, and the clerk by the first mail (the next day) sends a *subpœna* for C. to the sheriff of Surry, but on the ninth the writ is not returned nor is the witness present. Though the counsel for R. states in writing that he has conversed with C. and that he will prove material facts, which he states in favor of R., and R. swears that C. is a material witness for her, and she cannot go safely to trial without him, and that she can prove by him the facts stated by the counsel, the court is justified in refusing a continuance of the cause.

In the case of *Walton vs. The Commonwealth*, 32 Grat., 855, decided January 16, 1879. The principles governing the court on motions for a continuance in criminal cases as stated in Hewit's case, 17 Grat., 627-'29, approved and acted on.

SECTION 3384.

The case of *Syme vs. Jude (Executor)*, 3 Call, 522 (2d edition, 452), decided June 30, 1790, was submitted to the jury, who not agreeing, a juror was withdrawn by consent. In this stage of the proceedings the plaintiff was permitted to amend his declaration, the cause being in paper, notwithstanding the jury had been sworn, as no verdict was rendered, during which time amendments in favor of justice are within the discretion of the court.

In the case of *Tabb vs. Gregory*, 4 Call, 225, decided April, 1792, it was held: Amendment to the declaration may be allowed during the trial of the issue, but, if the defendant request it, the jury should be discharged, the defendant be permitted to amend his plea, or to plead anew, and the cause should be continued.

In the case of *Anderson vs. Dudley*, 5 Call, 529, decided October, 1805, it was held: Upon trial of the issue of *nul tiel record*, the court may allow an amendment of the declaration, and, if the defendant consent, may proceed with the trial.

See the case of *Perkins (Administrator) vs. Hawkins's Administrators*, 9 Grat., 649 and 653-'54, *ante*, Section 3298.

In the case of *Beasley vs. Robinson*, 24 Grat., 325, decided January, 1874, it was held: A notice is addressed by B. to R., late sheriff, and to his surviving sureties by name, survivors of themselves and of James Sims. On the trial B. introduces the bond, which is signed by R. and all the surviving sureties; but it is objected to as evidence, because the name described in the address of the notice as James Sims is written Jos. Sin. This is not a material variance, and the bond should be admitted as evidence. The court having excluded the bond for the variance, B. proposes to introduce the record of the court setting out the qualification of R. as sheriff, and the names of his sureties, of whom James Sims is one, who signed, sealed, and acknowledged the said bond. But the defendants objected to the introduction of said evidence and the admission of said bond. The record is proper evidence, and should be admitted. If it could be considered a case of variance between the pleadings and the proofs, it would have been such an one as might, and ought to, have been cured by an amendment according to the Code.

In the case of *The New York Life Insurance Company vs. Hendren*, 24 Grat., 536, decided March, 1874, it was held: In an action on a policy of insurance the declaration omitted one of the conditions endorsed upon it; and on the trial, when the policy is offered in evidence, it is objected to for the variance. The court may allow the plaintiff to amend the declaration by inserting the omitted condition, and may then proceed with the trial.

In the case of *Carter et als. vs. Grant's Adm'rs*, 32 Grat., 769, decided February 5, 1880, it was held, p. 777: On proceeding upon a forthcoming bond given on a distress for rent, whether by motion or by action on the bond, the plaintiff must prove the contract of rent for which the distress was sued out. On such a proceeding, though the warrant of distress was for more rent than was due, the plaintiff may have judgment for the less amount due.

In the case of *Forbes & Allers vs. Hagman*, 75 Va., 168, decided January 13, 1881, it was held, pp. 193-'95: The record in the action of *F. & A. vs. H. & G.* is competent evidence in the case for the plaintiffs, and slight variances between the declaration and the record, which would not prevent the record in the present case from being a bar to another action for the same cause, are not sufficient to exclude it.

In the case of *Alexandria & Fredericksburg Railroad Company vs. Herndon*, 87 Va., 193, decided December 4, 1890, it was held: At trial, in case of variance between declaration and evidence, the court may allow the former to be amended by striking out immaterial words without remanding the case to rules.

SECTION '3385.

In the case of *Washington and New Orleans Telegraph Company vs. Hobson & Son*, 15 Grat., 122, decided April, 1859, it was held: On an exception to an opinion of the court overruling a motion for a new trial on the ground that the verdict is contrary to the evidence, if the exception states neither the facts proved nor the evidence introduced on the trial, nor refers to another bill of exceptions in which all the facts or evidence given on the trial are shown to be stated, the appellate court cannot review the judgment of the court below.

It must appear from the record that a point decided by the court has been saved before the jury retires, though the exception may be prepared, and may be signed by the judge, either during the trial or after it is over, during the same term. If this appears from the whole record, it is sufficient, though not expressly stated in the bill of exceptions; but if it does not so appear from the record, the appellate court cannot review the judgment of the court below upon the point.

In the case of *Peery vs. Peery*, 26 Grat., 320, decided June 30, 1875, it was held, p. 324: Though a plaintiff moves the court, before the jury retires to consider of their verdict, to exclude certain evidence which had been given on the trial, which the court refuses to do if notice of a purpose to except to the ruling of the court is not given until the jury come into court with their verdict, the exception is too late.

In the case of *Winston vs. Giles*, 27 Grat., 530, decided March, 1876, it was held: In an action at law which is submitted to the judgment of the court without a jury the court renders a judgment to which one party excepts, and it being near the end of the term, the court gives the counsel time until the first day of the next term to prepare the bill of exception, but judgment is entered. The court cannot give such leave, and the bill of exception cannot be made a part of the record.

Even if the court had the authority to give the time until a day certain in the next term to prepare the bill of exception, if the bill of exception is not tendered to the court on that day it cannot afterwards be received.

In cases when it may be important to give time until the next term to prepare the bill of exception, the case should be kept open, and the judgment should not be entered until the next term.

In the case of *Page vs. Clopton*, 30 Grat., 415 and 427-'30,

decided July, 1878. On the 22d of March, 1878, C., a judge in court, imposed a fine on P., an attorney, for alleged contemptuous behavior in the presence of the court, and at the same time a motion was made by another attorney to remit the fine, which motion was continued until a further day. On the 25th of the same month, the court overruled the motion to remit the fine, and ordered the sergeant to take P. in custody and detain him until the fine was paid. P. was in court on both of these days, and no exception was taken to the action of the court. On the 27th of the same month, and during the same term, P., who had paid the fine under protest, appeared in court and offered to accept the judgment imposing the fine, and moved the court to certify the facts, which, for reasons stated by the court, was refused. No bills of exceptions appear to have been tendered this day, but on the 30th day of the same month, the last day of the term, P. tendered three bills of exceptions to the judgment and rulings of the court, which the judge refused to sign, and P. applied for a *mandamus* to compel him to sign the same. Held: The writ of *mandamus* will lie to compel the judge to sign bills of exceptions in this case, if "the truth of the case be fairly stated therein."

When a bill of exceptions is tendered which does not fairly state the truth of the case, it is the duty of the judge, with the aid of the counsel, to settle the bill, and when settled to sign it, and if he refuse to do this, *mandamus* will lie to compel him. The usual practice is to give notice of the exceptions at the time the decision is made, and reserve liberty to draw up and present the bill for settlement and signing, either during the trial or after the trial, and during the term at which final judgment is rendered; and it will be disregarded in the appellate court if signed after the end of such term as may be allowed by the court; but it must be signed during the term at which final judgment is rendered, and it will be disregarded in the appellate court if signed at the end of such term, although signed pursuant to a previous order allowing it, unless, perhaps, such order be made by consent of parties.

The rule as to notice of intention to take an exception, or of taking it at the time of the ruling, does not apply to a case like the present, in which the exceptant and the judge are the only parties concerned.

In the case of *Danville Bank vs. Waddill's Administrators*, 31 Grat., 469, decided February 6, 1879, it was held, pp. 474-478: If an instruction is given to the jury without objection at the time, and no exception, or notice of exception, is taken or given before the verdict is rendered, the giving of the instruction cannot be the ground for setting aside the verdict and granting a new trial of the cause.

In the case of *Harman vs. The City of Lynchburg*, 33 Grat., 37, decided March 11, 1880, it was held, pp. 43-44: When exception is taken to the admission or exclusion of evidence, or to the granting or refusing of instructions, or, indeed, to any other ruling of the court below at the trial, the bill should be so framed, by the insertion of the proper matter, as to make the error, if any, apparent; otherwise the exception will generally be unavailing.

In the case of *Powell, who sues for, etc., vs. Tarry's Administrator*, 77 Va., 250, decided March 15, 1883, it was held: Unless by record it appears that points decided by the court below were saved before the jury retired, they cannot be reviewed by the appellate court. But a bill of exceptions may be prepared and signed at any time during the term.

When evidence conflicts, the court may refuse to certify facts proved, but must certify the evidence on motion of any suitor.

Unless the evidence given is before the appellate court, it cannot pass on instructions given or refused.

Lack of time, or lapse of memory, is no excuse for a judge's refusal to certify the evidence on the trial of a cause before him, or to perform any other duty imposed on him by law.

To compel a judge to certify evidence a *mandamus* lies; but his refusal is error reviewable in the appellate court on complaint of the party injured. To deny certificate of evidence is to deny the suitor his right of appeal.

In the case of *Moses vs. Cromwell*, 78 Va., 671, decided March 13, 1884, it was held: A bill of exceptions cannot be properly and regularly added to the record of a case after the case is ended by final judgment, and the power of the court over it has ended by the close of the term.

In the case of *Brown vs. Hall*, 85 Va., 146, decided July 19, 1888, it was held: Though, to avoid confusion, it is better to take a separate bill of exceptions to each ruling of the trial-court, yet it is allowable in this State to embody in one bill exceptions to several rulings, set forth with sufficient particularity.

In the case of *Bransford (Treasurer) vs. Karn & Hickson*, 87 Va., 242, decided December 11, 1890, it was held: A refusal of a judge to sign a bill of exceptions, when the record does not show that the losing party excepted at the trial to the ruling of the court, cannot be maintained as error.

SECTION 3387.

In the case of *David Ross vs. Gill et ux.*, 1 Wash., 87, decided at the spring term, 1792, it was held: The court has no power to direct a non-suit, however destitute the plaintiff might be of a right to recover.

In the case of *Champ's Executor vs. Jett*, 1 Wash., 138, de-

cided at the fall term, 1792, it was held: When the court has directed a non-suit, to which the plaintiff submits, he abandons his cause, and cannot, in an appellate court, object to the opinion of the court below in granting it.

In the case of *Turpley's Administrators vs. Dobyns*, 1 Wash., 185, decided at the spring term, 1793. The plaintiff pursued his remedy at law, and, after a verdict for the defendant, sought relief in equity. Held: The plaintiff, when he discovered a disposition on the part of the defendant to avail himself of a legal advantage, should have suffered a non-suit, and have sought relief in equity if his case would bear it.

In the case of *Thweat & Hinton vs. Finch*, 1 Wash., 217, decided at the fall term, 1793, it was held: Upon a motion for a non-suit the court may give their opinion that the plaintiff has no cause of action, and may direct him to be called. But he may nevertheless appear and refuse to be non-suited, nor can the court compel him against his will.

In the case of *Calvert vs. Bowdoin*, 4 Call, 217, decided June, 1791, it was held: If the evidence differs from the statement in the declaration, judgment of non-suit will be given by the court of error, and the cause will not be sent back to the court below with a direction to call the plaintiff, or to instruct the jury that the evidence does not support the declaration.

In the case of *Pinner et als. vs. Price (Administrator)*, 6 Rand., 676, decided by the General Court, November, 1828, it was held: The damages of five dollars, given by the act of assembly in case of non-suits, ought to be awarded in all cases of dismissions and discontinuances produced by a voluntary abandonment of the cause by the plaintiff after the defendant's appearance, whether in the office or in court, and such dismissal ought to be entered up as non-suits. But the dismissal of a suit for a failure to give security for costs is not such a voluntary abandonment as authorizes this judgment. In the case of a *retraxit* these damages ought not to be awarded.

In the case of *Walkers vs. Boaz*, 2 Rob., 485, decided November, 1843. A non-suit in a writ of right having been suffered under a misapprehension on the part of the demandants and their counsel as to the legal effect of an instruction given at the trial, held: The court, in the exercise of a sound discretion, should, on the motion of the demandants, have set aside the non-suit; and this not having been done, the judgment overruling such motion was reversed.

SECTION 3388.

In the case of *Hansbrough et ux. vs. Stinnet*, 25 Grat., 495, decided November 19, 1874, it was held, p. 505: A deposition which has been read to the jury may be taken with them

in their retirement, if what is objectionable in it has been erased.

SECTION 3390.

In the case of *Baker vs. Morris's Administrator*, 10 Leigh, 285 (2d edition, 294), decided May, 1839, it was held: It seems that in an action of debt on a bond at law the surplus interest beyond the penalty may be given in the form of damages.

In the case of *Hepburn vs. Dundass*, 13 Grat., 219, decided March 7, 1856, it was held: Prior to this statute interest could not be allowed by a jury, in an ejectment, upon the profits; and the jury having allowed such interest it is mere surplusage, and the judgment will be for the principal sum and interest from the date of the verdict.

In the case of *Tazewell's Executors vs. Saunders's Executor*, 13 Grat., 354, decided May 23, 1856, it was held: Courts of equity will decree interest upon a bond or judgment beyond the penalty against the principal debtor.

In the case of *Lewis vs. Arnold*, 13 Grat., 454, decided August 27, 1856, it was held: Upon a judgment in an action for a tort depending when the statute went into effect, it is proper to charge interest from the date of the verdict.

In the case of *Robert's Administrator vs. Cocke, etc., Murphy vs. Gaskin's Administrator*, 28 Grat., 207, decided March, 1877, it was held: Where during the late war a creditor resided in the territory of one of the belligerent powers, and his debtor within that of the other said power, such debtor would, under the rules of public law, be entitled to an abatement of interest during the time the war lasted.

Where the debtor and the creditor resided within the same territory the mere existence of war does not alone furnish any legal ground for the abatement of interest upon contracts during the time such war lasted.

In contracts for the payment of a certain sum of money, interest on the principal sum is a legal incident of the debt, and the right to it is founded upon the presumed intention of the parties.

Wherever there is a contract, expressed or implied, for the payment of legal interest, the obligation of the contract extends as well to the payment of interest as it does to the payment of the principal sum, and neither the courts nor the juries ever had the arbitrary power to dispense with the performance of such contracts either in whole or in part.

In the case of *Cecil vs. Deyerle et als.*, 28 Grat., 775, decided July, 1877, it was held, p. 783: The act of the General Assembly approved April 2, 1873, entitled "An act to amend and re-enact Section 14, Chapter 187, of the Code of 1860 in relation to interest," so far as the said act confers upon courts and juries in the suits therein mentioned power to remit interest as

therein provided, on contracts entered prior to April 10, 1865, which said courts and juries did not have under the laws in force at the time such contracts were entered into, is repugnant to the Constitution of the United States and of this State, and is so far null and void. And so much of the said act as empowers the courts to review judgments and decrees upon motion, and to abate interest as in said act provided, is repugnant to the Constitution of the United States and this State, and therefore void. And this though the evidence of debt on which the judgments are founded does not provide in terms for the payment of interest, but the judgments are for interest.

In the case of *Kent's Administrator vs. Kent's Administrator*, 28 Grat., 840, decided July, 1877. On a bond dated June 6, 1845, payable on demand, in which there is nothing said about interest, on which judgment was rendered March 12, 1874, and in which judgment the circuit court, simply by virtue of the act of April 2, 1873, above recited, there being no evidence on the question of interest before it, abated the interest from April 17, 1861, to April 10, 1865. Held: The bond is payable presently, and bears interest from its date until it is paid; that there is an implied contract to pay said interest, and that said act allowing the abatement within the periods mentioned impairs that contract, and is therefore null and void.

In the case of *Cecil & Perry vs. Hicks*, 29 Grat., 1, decided September 1877. C. and P. executed their single bill dated October 18, 1871, whereby they promised six months after date to pay H. or order the sum of seven thousand dollars, with interest at the rate of 12 per centum per annum from date. Held: The contract for interest at the rate of 12 per cent. per annum was legal under the constitutional provision in force at the time of the contract, and it is not affected by the subsequent abolition of that provision.

The obligors in the bond are bound to pay interest at the rate of 12 per centum per annum not only up to the maturity of the bond, but after maturity and until the payment thereof.

In the case of *King vs. Buck et als.*, 30 Grat., 828, decided October 3, 1878, it was held, p. 831: Under Section 2821, the judgment is to be for the principal sum ascertained to be due after deducting the usury and interest on that principal from the date of the judgment.

In the case of *Brewster vs. Wakefield*, 22 Howard, 118, decided December, 1859. While Minnesota was a territory the following statute was passed:

Section 1. Any rate of interest agreed upon by the parties in contract, specifying the same in writing, shall be legal and valid.

2. When no rate of interest is agreed upon or specified in a note or other contract, 7 per cent. per annum shall be the legal rate.

Where a party gave two promissory notes, in one of which he promised to pay twelve months after the date thereof a sum of money, with interest thereon at the rate of 20 per cent. per annum from the date thereof, and in another promised to pay another sum, six months from date, with interest at the rate of 2 per cent. per month, the mode of computing interest under the statute was to calculate the interest stipulated for up to the time when the notes became due, and after that time at the rate of 7 per cent. per annum.

In the case of *Burnhisel vs. Firman*, 22 Wallace, 170, decided October, 1874, it was held: When a party agrees by note to pay a certain sum at the expiration of the year, with interest on it at a rate named, the rate being higher than the customary one of the State or territory where he lives, and does not pay the note at the expiration of the year, it bears interest not at the old rate, but at the customary or statute rate.

In the case of *Cromwell vs. The County of Sac*, 96 U. S. S. C. Reports, 51, decided October, 1877, it was held, p. 61: When at the place of contract the rate of interest differs from that at the place of payment, the parties may stipulate for either rate, and the contract will govern.

In the case of *Holden vs. Trust Company*, 100 U. S. S. C. Reports, 72, decided October, 1879, it was held: In the District of Columbia, the legal rate of interest is six per cent. per annum, but parties may, in writing, stipulate for any other rate, not exceeding ten per cent. Where a party made there his promissory note, whereby he promised to pay a certain sum named therein, "with ten per cent. interest," held: That interest should be computed at that rate up to the maturity of the note, and thereafter at six per cent.

In the case of *Ewell vs. Daggs*, 108 U. S. S. C. Reports, 143, decided March 26, 1883, it was held: When the amount of the face of a note represents a principal sum and interest thereon at a rate higher than the legal rate, and nothing is said in the note itself about interest, the note, after maturity, will bear interest at the legal rate.

In the case of *Stayer vs. Long*, 83 Va., 715, decided September 22, 1887, it was held: Where a debtor lawfully agreed to pay interest at the rate of ten per cent. per annum, the court will compel payment, though the debtor's lands are placed in a receiver's hands at the creditor's instance.

In the case of *Stuart, Buchanan & Co. vs. Hurt*, 88 Va., 343, decided July 23, 1891, it was held: In an action of debt, on a decree for an amount of interest thereby found due the plaintiff from the defendant, interest on the amount of the decree may be recovered in the shape of damages for its detention, though the decree makes no provision for the payment of interest thereon.

SECTION 3391.

In the case of *Kerr & Co. vs. Love*, 1 Washington, 172, decided at the spring term, 1793, it was held: Where accounts are unliquidated and disputed, interest should only be allowed from the commencement of the suit.

In the case of *McConnico vs. Curzen*, 2 Call, 358 (2d edition, 301), decided October 30, 1799, it was held: Interest cannot be allowed on unliquidated accounts.

In the case of *Deanes vs. Scriba et als.*, 2 Call, 416 (2d edition, 350), decided October 22, 1800, it was held: The court of chancery, on debts not bearing interest in terms, cannot carry interest down below the decree.

In the case of *Waggoner vs. Gray's Administrators*, 2 H. & M., 603, decided October 8, 1808, it was held: Interest on an unliquidated account ought not to be allowed.

In the case of *Clanton's Heirs vs. Howell's Administrator*, 1 Munf., 557, decided May 16, 1810, it was held: Interest on the hire of slaves ought not to be charged where the right to the slaves was in dispute, and it was doubtful to whom the money, when collected, should be paid, no proof appearing that the executors or administrators received any interest, or made any profit.

In the case of *Snickers vs. Dorsey*, 2 Munf., 505, decided November 23, 1811, it was held: In general, since the first of May, 1804, when interest is allowed in equity, it should not stop at the time when the balance of account is struck, nor at the date of the decree, but should run to the payment of such balance.

In the case of *Baird vs. Bland et als.*, 5 Munf., 492, decided March 19, 1817, it was held: When a person who bought a slave with lawful notice of a better title is decreed to deliver him and pay profits, interest ought to be charged against him upon the hires actually received from other persons from the dates of his receipts, but not upon the profits of such slave while in his own possession without being hired, the same being unliquidated and merely conjectural sums, and which he was in no default in not paying.

In the case of *Beull vs. Silver*, 2 Rand., 401, decided March, 1824, it was held: A creditor having obtained judgment against his debtor, without running interest, his execution is obstructed by a fraudulent conveyance made by the debtor of his property. A suit in chancery is then brought to remove the obstruction of the conveyance and for general relief. The chancellor ought to decree the interest, as well as to set aside the conveyance; the prayer for general relief being sufficient to cover the demand for interest.

In the case of *Selden vs. Buchanan (Executor)*, 6 Rand., 465, decided May, 1828, it was held: The vendee of land on a credit

to whom a deed is given, is not excused from paying interest on the purchase-price, the payment of the principal having been delayed by a third party, who set up an adverse claim (and commenced a course of litigation which continued for ten years, but which terminated in favor of the vendee's title), the vendee having continued all that time in possession, and enjoyed the issues and profits.

The vendor only covenanted to sell and convey a perfect title (which was so conveyed, as proved by the result of the trial), not that there should be no claimants who would sue for it; he therefore committed no breach of his covenant, and this is no ground to excuse the vendee from paying interest.

The trouble and expense of defending the suit is what every, one who is sued is exposed to, and the vendee's costs cannot be set off against the interest.

To excuse the vendee from paying interest during the time that the adverse claim is in suit, it is not sufficient that he should be ready and willing to pay the principal; it ought also to appear clearly that he did in fact keep the money useless and unproductive by him, and that he gave the vendee notice that it was so unproductive. Although the adverse claim in this case was by the Commonwealth, who proceeded to escheat the land by inquisition (which was opposed by the vendee by a *monstrans de droit*, who defeated the claim), the supposed seisin in law into the hands of the Commonwealth by the office found, and the supposed liability of the vendee to the Commonwealth for the rents and profits, did not prevail over the actual seisin of the vendee, and as he actually enjoyed the issues and profits during the whole time, and by the result became exempted from all liability for them to the Commonwealth, that supposed legal seisin of the Commonwealth forms no excuse to the vendee for not paying the interest to the vendor.

In the case of *The Auditor of Public Accounts vs. Dugger & Foley*, 3 Leigh, 241, decided November, 1881. A claim against the Commonwealth is presented to the auditor, which is yet doubtful, and therefore the auditor disallows it, and an appeal is taken from the auditor to a court of justice, which adjudges the claim against the Commonwealth. Held: In such case the court ought not to allow the interest.

In the case of *Waller's Administrator et als. vs. Byrd's Administrators*, 3 Leigh, 729, decided May, 1832, it was held: Interest upon estimated hires and profits of slaves should be allowed only from the date of decree, and it is error to allow interest from the date of the report ascertaining the amounts of such hires and profits.

In the case of *Mercer's Administrator vs. Beale et als.*, 4 Leigh, 189, decided January, 1833. In covenant by M. against

B., judgment is recovered by M. in 1792 for two thousand five hundred pounds damages; *fi. fa.* is sued out by M. and returned *nulla bona*; then both parties die; and afterwards the executor of B. makes sundry payments at sundry times to M.'s administrator. Held: All such payments shall be applied to the principal of the debt due on the judgment, and M. is only entitled to the balance of principal, with interest from the date of the judgment, and shall not be allowed to compute interest on the whole debt from date of the judgment, and apply the partial payments first to the satisfaction of interest so computed, and then to the principal.

In the case of *Eubank et als. vs. Ralls's Executor*, 4 Leigh, 308, decided February, 1833. Judgment upon *nil dicit* in county court, entered on the minute-book "for specialty and costs," and then entered at large by the clerk in the order-book for debt, with interest from March 1, 1817, the date of the specialty, though the day of payment appointed in the condition was March 1, 1818, the clerk, in his entry in his order-book, following not the conditions of the bond but a memorandum thereon endorsed, that the debt, if not punctually paid, should bear interest from the date of the bond. Held:

1. It was error to give interest from the date of bond, instead of the day of payment.

2. This error was a clerical mistake, amendable by the court at a subsequent term.

In the case of *Roper et als. vs. Wren's Administrator, etc.*, 6 Leigh, 38, decided February, 1835, it was held: Interest should not be allowed on estimated rents and profits.

See the case of *D. & W. Kyle vs. Roberts's Executor et als.*, 6 Leigh, 495, cited *ante*, Section 2840.

In the case of *Dunbar's Executors vs. Woodcock's Executor*, 10 Leigh, 629 (2d edition, 660), decided March, 1840. A commissioner's report shows a balance due from the defendant, consisting entirely of interest found due on an account never before settled, and states that that balance of interest is to bear interest from a remote day; there is no exception to the report, and the court decrees the balance with interest accordingly. Held: The decree was erroneous in giving interest upon the interest from a remote day; interest ought to be allowed only from the date of the final decree.

In the case of *Wilson vs. Spencer*, 11 Leigh, 260, decided August, 1840. In debt on a bond with collateral condition, the jury who try the issues find the same for the plaintiff, and assess his damages and allow interest thereon; and their judgment is entered for the damages so assessed, with interest and costs, instead of being entered for the penalty of the bond and costs, to be discharged by the damages, interest and costs.

Held: Though the judgment is not entered in proper form, yet the error in the form producing no injury to the defendants, the judgment will not be reversed therefor.

In the case of *Allen's Executor vs. Carr et ux. et als.*, 1 Rob., 196 (2d edition, 208). From the time that the guardianship terminates, the account between the guardian and ward will be stated upon the ordinary principle that prevails between debtor and creditor. Sums paid after that time by the guardian to the ward will be credited at the respective dates of such payment, so as to stop interest *pro tanto* from those dates.

In the case of *Cross (Curatrix) vs. Cross's Legatees*, 4 Grat., 257, decided January, 1848, it was held: An administratrix or other fiduciary whose duty it is to hire out slaves for the benefit of the *cestui que trust*, will be held to account for the interest on their estimated hires.

In the case of *Rosser (Executor of Wood) vs. Depriest et als.*, 5 Grat., 6, decided April, 1848, it was held: An executor takes bonds for purchases made at a sale by himself of testator's personal property, and it does not appear when these bonds were paid off. He will be charged with the principal of the bonds in the year when they fell due, but with interest thereon only from the end of that year.

See the references given to Sections 2606 and 2607.

In the case of *Lewis's Executor vs. Bacon's Legatee and Executors*, 3 H. & M., 89, decided October, 1808, it was held: A creditor kept an account-current with his debtor, and also an interest-account, on which he charged interest on the several items of debit to a particular period, and gave credit by interest on the several payments to the same period, and charged in the account-current the balance appearing in the interest account. A balance being then struck, and a new account being opened, in which interest was charged on that balance, thus consisting of principal and interest, it was held to be compound interest, and not allowable.

In the case of *Childers vs. Deane and Page*, 4 Rand., 406, decided July, 1826, it was held: Compound interest will not be allowed, except under special circumstances. An agreement at the time of the loan, that at the end of the year interest shall become principal, or, after interest has become due, an agreement that it shall bear interest previous to such agreement will not be permitted, as tending to usury. But where a settlement of accounts takes place after interest has become due, and an agreement is then made that interest due shall hereafter carry interest; or where the principal and interest are computed in a master's report, and the same is confirmed; in these cases compound interest is lawful.

In the case of *Pindall's Executor, etc., vs. The Bank of Mari-*

etta, 10 Leigh, 481 (2d edition, 502), decided July, 1839. A debtor owing a debt consisting of principal and interest, it is agreed between him and his creditor that he shall, in the first place, pay off the principal, and that the interest may for a time remain unpaid. The creditor, having received money from the debtor, applies it in satisfaction of the principal. Afterwards many years elapse without payment of the interest. Held: The creditor is only entitled to the interest due at the time the principal was paid, and not to interest on that interest, there having been no agreement to pay interest on interest.

In the case of *Fultz vs. Davis*, 26 Grat., 903, decided December 2, 1875, it was held, page 911: Where payments are made from time to time on a debt bearing interest, the interest is to be computed on the debt up to the time of payment, and the payment is to be deducted from the amount, principal and interest. It is error to compute interest on payments to a future day, when the debt is paid or settlement is made, and then to credit the payment and interest upon the debt, principal and interest.

In the case of *Gilbert vs. The Washington City, Virginia Midland, and Great Southern Railroad Company*, 33 Grat., 586 and 599, decided October 7, 1880. One of the railroad companies, not having been able to pay the interest on their bonds, gave to the holders of the interest-coupons the coupon bonds of the company for the amount of said interest. Held: The coupons for interest bore interest from the time they were payable.

SECTION 3392.

In the case of *Borland vs. Barrett*, 76 Va., 128.

8. *Idem*.—Excessive Damages. In this case, as the record does not disclose a single mitigating circumstance in favor of the defendant, held: The damages are not excessive, but if they were, the verdict would not be disturbed unless it showed that the jury were actuated by passion, prejudice, or undue influence, or unless the amount be grossly excessive.

9. Jurors.—Tampering, etc. It is highly reprehensible for the parties to converse with the jurors, and, however innocent, it is calculated to impair confidence in the impartiality of verdicts, and it should be frowned upon by the courts. But casual conversations between parties and jurors during recess of court have never been considered sufficient of themselves to set aside a verdict.

10. Jurors.—Non-Payment of Capitation Tax. The point that one of the jurors had not paid his capitation tax was not raised until after the verdict, which is met by Poindexter's case, 33 Grat., 766.

In the case of *Ambler vs. Wyld*, 2 Wash., 47 (1st edition, 37),

decided at October term, 1794, it was held: If the parties in an action at law are at liberty by the issue to go fully into the examination of evidence, and, having done so, a verdict is found, after a fair trial, a court of chancery ought not to direct a new trial; otherwise if part of the evidence was suppressed by the court.

In the case of *McRue vs. Woods*, 2 Wash., 103 (1st edition, 80), decided at October term, 1795, it was held: If the plaintiff at law recover more than he is in conscience entitled to, and there is no standard by which a court of equity can ascertain the amount of the excess unrighteously recovered, that court will set aside the verdict *in toto*.

In the case of *Picket vs. Morris*, 2 Wash., 325 (1st edition, 255), decided at October term, 1796, it was held: Whenever a case is fully and fairly tried in a court of law, the decision is so far binding that it can only be examined by an appellate court; chancery cannot intervene. But if the court of law refuse to decide points of law, or to reserve them, it will submit such point to the jury, and if they decide inequitably chancery may interfere.

In the case of *Wilson vs. Rucker*, 1 Call, 500 (2d edition, 435), decided May 4, 1799, it was held: The court of chancery may, on granting a new trial in the same court, order the verdict to be certified into the court of chancery, and proceed to make a final decree in the cause.

In the case of *Terrell vs. Dick*, 1 Call, 546 (2d edition, 474), decided April 16, 1799, it was held: After a cause has been once fully decided by a court of common law, equity will not grant relief.

In the case of *Foushee vs. Lea*, 4 Call, 279, decided April, 1795, it was held: If the defendant's counsel means to move for a new trial because the finding of the jury is contrary to evidence, he is not bound to do it at the time the verdict is rendered, but may postpone it to another day of the term.

If the chancellor refuses to dissolve the injunction, and the parties consent that the new trial shall be had in a particular county, the chancellor, on the motion of either party, may direct the trial to be at a different place without the assent of the other.

In the case of *Meredith vs. Johns*, 1 H. & M., 585, decided November, 1807, it was held: After a verdict for the plaintiff in an action sounding in damages, and a refusal by the court of law to grant a new trial, a court of equity ought to cautiously interpose.

In the case of *Anderson vs. Fox*, 2 H. & M., 245, decided April, 1808, it was held: An executor having sold certain slaves which were specifically bequeathed by his testatrix, having be-

come the purchaser himself, and afterwards recovered damages in an action of trespass against the sheriff for seizing and selling them as the property of the specific legatee, in whose possession they were found, a court of equity will require an account of his administration, to ascertain whether the sale at which he was himself the purchaser was necessary for the payment of debts, and (even if the sale and purchase by himself be justified by the result of the investigation) will grant a new trial of the issue in the action of trespass (although no motion to that effect was made at law) in case the damages were excessive and produced by erroneous impressions on the mind of the jury; and where the damages are evidently excessive the testimony of the jurors will be received to declare the motives which induced them to give such damages.

In the case of *Price (Executor) vs. Fuqua's Administrator*, 4 Munf., 68, decided February, 1813. An executor being sued on a bond of his testator of more than twenty years' standing, was advised by his counsel to rely on the presumption of payment arising from the length of time, and, supposing such presumption a sufficient defence, neglected to fortify it by other testimony which was in his power; in consequence of evidence given by one of the jurors in the jury-room a verdict was found against him. He moved for a new trial on that ground, but was denied it. He afterwards obtained a new trial by applying to a court of equity on the ground of mistake and accident.

In the case of *Faulkner's Administrators vs. Harwood*, 6 Rand., 125, decided February, 1828, it was held: After a trial at law, a court of equity will not grant a new trial merely because injustice has been done; but the party applying for a new trial must show that he has done everything that could be reasonably expected of him to obtain relief at law.

A bill of discovery to obtain evidence which might have been useful in a trial at law must be filed pending the suit at law, unless some sufficient excuse is shown why it was not filed at that time.

In the case of *Knifong vs. Hendricks et als.*, 2 Grat., 212, decided July, 1845, it was held: Upon an application to a court of equity to enjoin a judgment at law, and grant a new trial in the case, it is error in the court to perpetuate the injunction, set aside the judgment, and grant a new trial of the cause, which had been terminated, and to finally dispose of the suit in equity.

In such a case the judgment at law is a security for anything the plaintiff at law may be entitled to, and a court of equity should continue the injunction and direct proper issues, and upon the coming in of the verdict should perpetuate the injunction, or dissolve it in whole or in part, according to the finding of the jury.

The justices composing a court before which a cause is tried, having left the bench after the verdict was rendered, so that a motion for a new trial could not be made to them, a court of equity has jurisdiction to award it.

In the case of *Griffiths vs. Thompson*, 4 Grat., 147, decided October, 1847. An action is brought in 1835 and tried in 1839 upon an issue made upon the plea of *non-assumpsit*, and there is a judgment for plaintiff.

Defendant then applies for an injunction to the judgment on the ground that he had offsets which he had intended to plead, but that owing to the sickness of his family at the time when the court sat, and for some time before, he was not able to attend the court or prepare for trial, and that his counsel to whom he had communicated his defence was also absent. It appeared that offsets were neither pleaded nor filed, and though one of the defendant's counsel was present, no application for a continuance was made, nor was any affidavit filed upon which such an application could have been based. Held: There was no cause for an injunction and new trial.

In the case of *Rust et als. vs. Ware*, 6 Grat., 50, decided April, 1849, it was held: Judgment at law is enjoined on the ground of mistake by the jury ascertained by after-discovered evidence.

The subject of the action being accounts, the court of equity will not direct a new trial at law, but will refer the accounts to a commissioner, and will itself give the proper relief.

In the case of *Slack vs. Woods*, 9 Grat., 40, decided July 19, 1852, it was held, pp. 42-'3: The party applying for a new trial, to entitle himself to it, must show that he has been guilty of no laches, that he has done everything that could be reasonably required of him to render his defence effectual at law.

The reference to 10 Grat., 2333, is an error.

In the case of *Green & Suttle vs. Massie*, 21 Grat., 356, decided August, 1871, it was held: If at the hearing of a cause the case made upon the pleadings and proofs is one of which a court of equity has no jurisdiction, the bill should be dismissed, though the defendant has made no objection to the jurisdiction, either by demurrer, plea, or answer, but has defended himself on the merits. And in such a case an appellate court will reverse a decree in favor of the plaintiff, and dismiss the bill, though no objection to the jurisdiction was taken in the court below.

In the case of *Adams vs. Hubbard*, 25 Grat., 129, decided June 17, 1874. An injunction to a judgment is obtained, and whilst it is pending the matter in dispute is referred to arbitrators, who, after reading the pleadings and depositions and hearing oral evidence, including that of the parties, make an award that the injunction be dissolved. On a motion to set aside the

award on the ground of after-discovered evidence, held: The rules governing courts of equity in awarding new trials in actions at law on the ground of after-discovered evidence apply equally to motions to set aside an award on that ground. Where all the evidence that was before the arbitrators is not before the court on the motion to set aside the award, the motion must fail. Though the evidence in the cause before the reference was made might have warranted the court to direct a new trial, yet the award is in fact a new trial, and the party is not entitled to another trial on that evidence.

In the case of *Wynne vs. Newman's Administrator, etc.*, 75 Va., 811, decided November, 1881. A bill was brought to obtain a new trial of an issue in an action at law, in which there was a verdict and a judgment for the defendant. At the hearing the court annulled the judgment, set aside the verdict, and ordered a new trial in the action at law. A court of chancery under our system of jurisprudence is invested with no such power as this. It may act on the parties, but not directly on the judgment, nor on the court which rendered it. Such judgment by a court having jurisdiction to render it can be vacated only by some direct proceeding at law, either in the court in which the judgment was recovered or in some other court having appellate jurisdiction.

There are cases in which the court has required the defendant in chancery to submit to a new trial, and restrained him from enforcing the judgment complained of. But the regular course, it seems, would be for the chancery court to order such issues as may be proper, and to base its decree on the finding of the jury at the hearing, either dissolving or perpetuating the injunction in whole or in part, according to circumstances.

In the present case, if a new trial was proper the court should have ordered an issue, the same as in an action at law, to be tried as other issues out of chancery are tried, the verdict of the jury, if the trial was in the law court, to be certified to the chancery court, and in the meantime continue the injunction until the hearing of the cause; and if the finding was for the defendant, and approved, dissolve the injunction; if for the plaintiff, perpetuate the injunction and decree for the complainant according to the verdict.

Courts of equity as well as courts of law sometimes grant new trials on the ground of after-discovered evidence, but always with great reluctance, and never except under special circumstances, which may be summed up thus: 1. The evidence must have been discovered since the trial. 2. It must be evidence that could not have been discovered before the trial by the plaintiff or defendant, as the case may be, by the exercise of reasonable diligence. 3. It must be material in its object, and

such as ought on another trial to produce an opposite result on the merits. 4. It must not be merely cumulative, corroborative, or collateral.

Evidence newly discovered is said to be cumulative in its relation to the evidence on the trial when it is of the same kind and character. If it is dissimilar in kind, it is not cumulative in a legal sense, though it tends to prove the same proposition; and the discovery of evidence, though not strictly cumulative, is not sufficient if it does not bear directly on the issue, but is collateral only.

The appellate court—and this is equally applicable to a chancery court considering a bill for a new trial on the ground of after-discovered evidence—will not on that ground interfere with the decision of the trying court, unless it has before it all the evidence heard in the latter court; and the observance of this rule is necessary to prevent the granting of new trials in consequence of the discovery of merely cumulative facts and circumstances relating to matters which may have been controverted on the former trial.

In the case of *Smith vs. Rawlings's Administrator et als.*, 83 Va., 674, decided September, 1887, it was held: Plaintiff claimed, as purchaser at a sale under execution, the property levied on by defendant; the issue was tried on the first day of the term, in plaintiff's absence; written evidence of plaintiff's title was produced; defendant testified to statements of plaintiff that he had released the property to the execution debtor; verdict was for the defendant. During the term plaintiff filed his affidavit that he had started in time for the trial, and had failed to reach the court-house in time on account of delays in the trains and their failure to connect; that he never made said statements, and that never having released, he still owned, the property. He was entitled to a new trial.

In the case of *Bertha Zinc Company vs. Black's Administrator*, 88 Va., 303, it was held: While under this section the question of a new trial, where the damages are too small or too large, is under the control of the court, yet the verdict will not be disturbed unless it shows the jury were actuated by passion, prejudice, or undue influence.

SECTION 3393.

In the case of *Atwell (Administrator) vs. Towles*, 1 Munf., 175, decided April 19, 1810, it was held: In an action of debt on a bond the judgment is always entered for the penalty, to be discharged by the principal and interest.

In the case of *Tennant (Executor) vs. Gray*, 5 Munf., 494, decided March 22, 1817, it was held: Where the principal and interest due on a bond amounts to more than the penalty, and

damages are found by a verdict, judgment ought not to be entered for the penalty and costs, to be discharged by the principal and interest, with the damages so assessed and the costs, but for the penalty and damages if not exceeding those laid in the writ.

In the case of *Waller vs. Long*, 6 Munf., 71, decided January 20, 1818, it was held: If a bond be given in the usual form with a penalty, conditioned to be discharged by payment of the principal at a future day, "with interest from the date if not punctually paid," such back interest is to be considered an additional penalty, and not recoverable. The clause in our act of Assembly which prescribes the sum for which judgment is to be rendered on a bond meant, that in cases of penalties by way of security the final justice of the case should be attained in the courts of law, in effectuating which object those courts are to be governed by the same considerations which influence the courts of equity.

In the case of *Moore vs. Fenwick*, 1 Va. (Gilmer), 214, decided March 28, 1821, it was held: Judgment on a penal bond should be for the penalty, to be discharged by the payment of the sum actually due.

In the case of *Jenkins vs. Hurt's Commissioners*, 2 Rand., 446, decided May 22, 1824, it was held: In a joint action upon contract, the plaintiff must have judgment against all the defendants before the court, or he can have judgment against none.

If errors in the pleadings or proceedings are cured by the statute of *jeofails* as to one defendant, they are cured as to all defendants.

In the case of *Baker vs. Morris's Administrator*, 10 Leigh, 285 (2d edition, 294), decided May, 1839, it was held: Full interest is given on the bond though it exceed the penalty. It seems, that, in an action of debt on a bond at law, the surplus interest beyond the penalty may be given in the form of damages.

In the case of *Fleming vs. Toler*, 7 Grat., 310, decided April 21, 1851, it was held: The penalty and condition of a bond for the payment of money is in the same sum. It is proper to treat it as a single bill, and to give judgment for the amount of the bond, with interest from the time of payment.

In the case of *Tazewell's Executors vs. Saunders's Executor*, 13 Grat., 354, decided May 23, 1856, it was held: Courts of equity will decree interest upon a bond or judgment beyond the penalty against the principal debtor. A commissioner having by mistake omitted a credit in ascertaining the amount due upon a bond, the appellate court will correct the decree in this respect, and affirm it with costs.

In the case of *Collier vs. The Southern Express Company*, 32

Grat., 718 and 725-'26. E. was employed by the Southern Express Company as freight clerk at P., and whilst so employed executed a bond with sureties, by which, after reciting that, whereas E. is to be hereafter employed by the Southern Express Company in its business of forwarding by different railroads, etc., packages of any and all kinds, and movable property, including money and securities for money, E., in consideration of said employment and the compensation he is to receive from said company for his services, covenants, etc., that he will well and truly perform all the duties required of him in said employment, and truly account for all money, etc., which may come to his possession or control by said employment, etc., and E. and his sureties bound themselves for the faithful performance of the above covenants by E. in the penalty of \$2,000. After the execution of this bond E. was raised to the office of principal agent of the company at P., and whilst acting as such principal agent embezzled money which came to his hands. Held: There being no dispute about the facts it is for the court to construe the instrument, and the jury are bound to take the construction of the court as correct.

The obligation, by its terms, extends to any employment of E. whilst acting as principal agent of the company at P.

SECTION 3394.

In the case of *Bibb vs. Cauthorne*, 1 Wash., 91, decided at the spring term, 1792. Upon a sheriff's bond for breach of the condition, it was held: Upon new breaches alleged and suing out a *scire facias* for future injuries a recovery may be had.

In the case of *Call vs. Ruffin*, 1 Call, 333 (2d edition, 289), decided May 5, 1798, it was held: In a suit for the penalty of a bond, the penalty not being exhausted, new breaches may be assigned, and on *scire facias* being sued out, farther damages assessed.

The reference to 3 Munf., 249, is an error.

In the case of *McDowell vs. Burwell's Administrator*, 4 Rand., 317, decided June, 1826, it was held: An action of debt will not lie against the surety of a sheriff on his official bond to recover the penalty imposed by law for failing to return an execution. Such penalty can only be recovered by motion, and an action of debt will only lie for the damage actually sustained by the sheriff's failure to return the execution.

An averment of the breach of the condition of a bond, although it may not entitle the plaintiff to all the demands, will entitle him to recover what he is legally entitled to in consequence of the breach.

In the case of *Governor (for Davis) vs. Roach*, 9 Grat., 13, decided July 12, 1852. In an action on a constable's official

bond, the assignment of the breach did not set out specifically the claims put into the constable's hands, but stated that the relator had placed divers claims in his hands for collection, which were particularly set out in a receipt given by him as constable, and which was thereto annexed, marked A., and then proceeded to aver the collection of the moneys by the constable, and his failure and refusal to pay over to the relator. Held: On demurrer to the breach, that it was well assigned.

In the case of *Sangster et als. vs. Commonwealth*, 17 Grat., 124 and 135-'37, decided October 29, 1866, it was held: Other actions may be maintained on an official bond, though in previous action judgment has been rendered for the penalty to be discharged by the sum assessed in that action, and of such further sums as might be afterwards assessed or found due, upon *scire facias* assigning a new breach.

SECTION 3395.

In the case of *Steptoe vs. Read*, 19 Grat., 1, decided October 27, 1868, it was held. At common law in a joint action against several parties there can be but one final judgment, and it must be for or against all the defendants; and the rule is the same, whether the contract sued on is joint, or joint and several, or whether the action is founded on several and distinct contracts, as the maker and endorsers of a negotiable note.

This general rule does not apply where the plea of one of the defendants admits the contract and sets up a discharge by matter subsequent, as bankruptcy, or where he sets up a personal disability at the time of the contract sued on, as infancy, and these exceptions apply equally, whether the contract is joint, or joint and several.

The statute applies only to cases in which some of the defendants are discharged upon grounds merely personal, and where the ground of defence goes to the foundation of the entire contract the case remains as at common law.

In the case of *Moffett vs. Bickle*, 21 Grat., 280, decided August, 1871, it was held: In an action of debt by the holder of a negotiable note against the maker and four endorsers, upon the plea of usury by the endorsers, the jury found that the note was endorsed by the first three endorsers for the accommodation of the maker, and was sold by him at a usurious rate of interest to the fourth endorser, who afterwards, and before it became due, endorsed it to the holder for value. Upon this verdict the court should render a judgment in favor of the maker and the first three endorsers, and against the fourth endorser.

In the case of *Bush vs. Campbell*, 26 Grat., 403, decided July 8, 1875. In an action of debt upon a bond against five persons, upon one of whom the process is not served, by direction of the

plaintiff, the four plead usury in the bond, and three of them plead severally *non est factum*, but cannot agree on the plea of usury. There is a judgment in favor of the three, and the case is continued as to the fourth. Afterwards there is a verdict against the fourth, and he moves in arrest of judgment. Held: Under the statute there may be judgment in favor of the three at one time, and a judgment in favor of the plaintiff against the fourth defendant at another time.

In the case of *Muse et als. vs. The Farmers Bank of Virginia*, 27 Grat., 252, decided January, 1876. B. brings an action of debt against F. & M. as late partners and as makers of a negotiable note, and against C. and G. as endorsers. The case stands on the office-judgment docket at the next term of the court, when F. files his plea of *nil debet*, which is sworn to; and on the motion of B. by his counsel, the cause is discontinued as to F. The other parties not appearing, there is a judgment by default against them. Held: The judgment is a valid judgment.

SECTION 3396.

In the case of *Moss vs. Moss's Administrators*, 4 H. & M., 293, decided October, 1809, it was held: In an action against several defendants, the *capias* being returned executed in part only, who appeared and defended the suit, and a discontinuance as to the rest having taken place by a failure to take out further process against them, a judgment against the defendants in general terms must be understood as against those only who appeared, notwithstanding the declaration charged them all as "in custody," etc., and the caption of the entry of the judgment in the order-book mentioned the names of all.

Where there was an action on a joint or several bond against six obligors, and the *capias*, which was against all, was executed on two only, it was held: That the plaintiff was not bound to send out further process against the rest, but might take judgment against those two. In such a case it seems indifferent whether the declaration be against those two only, or against all those named in the writ, provided the bond be properly described.

In the case of *Shields vs. Oney*, 5 Munf., 550, decided April 3, 1817, it was held: If, by direction of the plaintiff, the writ be served on one only of two partners in trade, when the declaration shows that the plaintiff knew the names of both, and he gets a verdict upon the plea of *non-assumpsit* pleaded by the partner upon whom the writ was served, judgment ought to be arrested.

In the case of *Jones vs. Doe (Lessee of Carter)*, 6 Munf., 105, decided February 5, 1818, it was held: Upon a *scire facias* against heirs and devisees, to revive a judgment in ejectment,

if one of the defendants confess the plaintiff's right to revive the judgment in the *scire facias* mentioned, and thereupon judgment be entered against him that the plaintiff have execution for the whole tract of land in question, there is no error in such judgment of which he can take advantage.

In the case of *Jenkins vs. Hurt's Commissioners*, 2 Rand., 446, decided May 22, 1824, it was held: In a joint action upon contract the plaintiff must have judgment against all the defendants before the court, or he can have judgment against none.

In the case of *Peasley vs. Boatwright*, 2 Leigh, 195, decided June, 1830. In joint action of debt against two, there is judgment by default against one; the other pleads to the action, and there is trial, and verdict against him. Held: There should be one and the same joint judgment against both.

In the case of *Early vs. Clarkson's Administrator*, 7 Leigh, 83, decided January, 1836, it was held: Upon a *scire facias* to revive a judgment against two persons jointly, and in all joint actions against two persons on a joint contract, it is error to enter final judgment against one until the plaintiff has matured the case against the other also, so that a joint judgment may be entered against both, or has proceeded against the other as far as the law authorizes, or enables him to proceed.

See the case of *Bush vs. Campbell*, 26 Grat., 403, cited *ante*, Section 3395.

The reference to 27 Grat., 252 and 257, is to the case cited *supra*, Section 3395.

In the case of *Beazley's Administrators vs. Sims (Administrator)*, 81 Va., 644, decided April 15, 1886, it was held: In an action *ex contractu* against several defendants, the common law rule was that all should be summoned actually, or constructively, by prosecution to outlawry, before judgment could be had against any. Code changes this for another rule, whereby judgment may be had against one defendant served with process, and a discontinuance as to the others, or at the plaintiff's election, subsequent service of process, judgment in the same suit against the other defendants.

In the case of *Corbin vs. Planters National Bank*, 87 Va., 661, decided April 26, 1891, it was held: The discontinuance provided for by this section is a discontinuance as against any one or more defendants upon whom process has not been served.

In the case of *Dillard et als. vs. Turner's Administrator*, 87 Va., 669, decided April 16, 1891, it was held: Action against seven. Summons returned executed as to four, and "no inhabitants" as to two, and as to the other, "I understand he is dead." At the rules the six plead in abatement for misjoinder of surviving with dead obligor, and clerk abated action as to those returned "no inhabitants," and the "dead" one. The court, how-

ever, rejected the plea and entered judgment against the four who had been summoned. Held: No error.

CHAPTER CLXVII.

SECTION 3397.

In the case of *Hess vs. Rader et ux.*, 26 Grat., 746, decided October 12, 1875. W. is appointed a commissioner to sell lands at public auction, but he is not to act under the decree until he gives bond, etc., faithfully to perform this and any future decrees made in the cause. He does not execute the bond, but he sells the land at private sale to H., which he reports to the court. The court confirms the sale, and directs him to collect the money and invest it; and H. pays him the whole purchase-money; only part of which he invests, and dies insolvent. Held: The sale having been made by a commissioner under a decree of the court, and that sale having been confirmed by the court, it is a judicial sale, whether made at public or private sale; it only becomes a sale at all when confirmed by the court, that constitutes such sale a judicial sale.

W. not having given the bond as required, had no authority to receive the purchase-money, and H. is responsible to the party who is entitled to the proceeds, for so much as has not been properly invested by W., and cannot be made out of W.'s estate.

The statute is imperative that a bond shall be given, and it is the duty of a purchaser at a judicial sale to see that the bond has been given before he pays his money to the commissioner, or he does it at his own risk.

In the case of *Lloyd vs. Erwin's Administrator*, 29 Grat., 598, decided November, 1877, it was held: A purchaser at a judicial sale of land pays the purchase-money to the commissioner; but the commissioner has not executed the bond required by the decree, or the bond executed by him is disapproved by the clerk. The purchaser has paid in his own wrong, and the land is liable for the purchase-money received by the commissioner and misapplied, though the land has been conveyed by the commissioner to the purchaser, as the decree directed to be done when the purchase-money was paid. In such a case the parties entitled to the fund are not bound to proceed against the commissioner and his sureties in the bond he executed, but which the clerk disapproved, before proceeding against the land to have it subjected to the payment of the purchase-money misapplied by the commissioner.

In the case of *Tyler vs. Toms et als.*, 75 Va., 116, decided December 17, 1880. Where two commissioners are appointed to sell land, and they are required before proceeding to act to

execute a bond with security conditioned according to law, each executes a separate bond with the other as his surety. Held: This is not a compliance with the decree, and that though the bonds were given in court. The sale on the land is to be on the credit, and the bonds to be taken for the several deferred payments, and the title to be retained. The sale is made, the bonds taken, and the sale reported to the court; but there does not appear to have been a decree confirming the sale. As the bonds fall due the purchaser pays the money to one of the commissioners, and he deposits it as collected in a bank to his credit as commissioner, not using it or mingling it with his own, but it is lost by the failure of the bank. Held:

1. The purchaser is bound to pay the purchase-money of the land again.

2. The commissioner having received the money without authority to receive it, is liable to the purchaser for the amount so paid.

3. The commissioner may be proceeded against by rule in the cause, and an execution of *feri facias* may be sued out against him for the money.

In the case of *Hurt vs. Jones and Wife*, 75 Va., 341, decided March 10, 1881. A purchaser of land under a decree of a court of equity, after the sale is confirmed, is the equitable owner of the land, subject to be compelled to comply with his contract by payment of the purchase-money. When such a purchaser fails to comply with his contract, and a court directs a resale of the land, it is resold as the land of the purchaser and at his risk. If, on such resale, it does not bring enough to discharge the unpaid purchase-money of the former sale, and the cost and expenses of the resale, he is liable for the deficiency. If it brings more than enough for these purposes he is entitled to the surplus.

Under a decree in a suit for partition, M. bought the land for seven thousand dollars, and the sale was confirmed. He paid no part of the purchase-money, but went into bankruptcy, giving in the land as part of the assets and the debt of seven thousand dollars as one of his liabilities. Subsequently M. and his assignee in bankruptcy, with the sanction of the bankrupt court, conveyed their interest in the land to H., on the consideration that H. should pay to the parties entitled the said seven thousand dollars, and this H. does. Held: H. has a valid equitable title to the land.

Upon the failure of M. to pay the purchase-money, there was a decree appointing H. a commissioner to resell the land, and whilst such commissioner he made the arrangement with M. and his assignee in the bankruptcy, and he paid all the other parcellers their shares of the seven thousand dollars, retaining the

one-sixth to which his wife was entitled, and they conveyed all their rights and interests in the land to H.; and this was reported to the court, was approved and confirmed, and H. was authorized to retain his wife's share of the money. The wife of H. afterwards died, never having given birth to a child, and L., her sister, was her heir. Held:

1. That the fact that H. was a commissioner to sell the land did not avoid his purchase from M.; and the parties having all that they were entitled to claim, cannot object to it.

2. The court in the partition suit having confirmed what was done, that cannot be called in question in another suit.

3. The one-sixth interest of the wife of H. passed by the sale in the suit for partition; and her interest, therefore, was her share of the purchase-money retained by H. under the decree of the court.

4. The bill by L. being purely for partition of the land, not noticing the suit in which the land had been sold, and the court holding that L. has no title to the land, she is not entitled under the prayer to have general relief to have a decree against H. for the money, even if L. is entitled to it; nor is it a case in which the plaintiff will be permitted to file an amended and supplemental bill to recover the money; but this bill will be dismissed without prejudice.

The reference to 75 Va., 815-833-'34, is an error.

In the case of *Lee vs. Swepton*, 76 Va., 173 and 178:

1. Commissioner of Sales.—The bond with security required of him is for the benefit of those entitled to the proceeds. If he collects without giving bond, and they ratify his act and look to him for payment, no one else can complain or claim that any equity is raised in his favor.

2. *Idem.*—Subrogation.—If purchaser should have to pay a second time, he would be substituted to the creditor's rights under a decree requiring the commissioner to pay them.

Idem.—Lien of Decree.—Case at Bar.—Commissioner made sale under decree, and received one-third of purchase-money without giving bond as required; sale reported and confirmed, and decree entered directing him, out of funds reported in his hands, to pay certain creditors therein mentioned, which he failed to do. The decree was docketed, and five days later he conveyed in trust his own real estate to secure his creditor, L. On bill by creditors in the decree mentioned to enforce it against that real estate, he having become insolvent, held:

1. The decree against commissioner had effect of a judgment, and being docketed, L. was affected with notice of same, though purchaser paid commissioner in his own wrong.

2. L. has no claim to be subrogated to the rights of the creditors against the purchaser, having no equity superior to that of the latter.

In the case of *McAllister vs. Bodkin et als.*, 76 Va., 809 and 815. The statute requires a bond of commissioners of sale, and it must be given before they receive any money under the decree, whether it be therein directed or not.

In the case of *Stimpson vs. Bishop*, 82 Va., 190, decided July 1, 1886, it was held: In judicial sales of property embraced in deeds of trust and other instruments, where the terms of sale are agreed on, the contract governs, and the court hath no discretion as to terms.

This is the case cited from 10 Va. Law Journal, 593.

In the case of *Whitehead vs. Bradley et als.*, 87 Va., 676, decided April 23, 1891, it was held: Where purchaser at sale made under decree of court pays the purchase-money to sale-commissioner, who has not given the bond required by law, such payment is invalid, unless certificate of clerk that such bond has been given was published with advertisement of sale.

In the case of *Roberts vs. Roberts*, 13 Grat., 639, decided February 3, 1857, it was held: A sale of a tract of land made by a commissioner under a decree of the chancery court on day so inclement that persons intending to be present and to bid for a part of the land are deterred from attending, and where there was but one bidder present, who lived at the place, will be set aside without weighing the evidence, which is conflicting, as to the sufficiency of the price at which it was sold.

According to the practice in Virginia, upon objection to a sale of land made by a commissioner it is not necessary to ask that the biddings may be opened by the offer of a substantial advance upon the price reported; but the court will consider the objections to the sale, and confirm or set it aside as the merits of the case may require.

In the case of *Effinger vs. Ralston et als.*, 21 Grat., 430, decided August, 1871, R. sold land to E. and retained the vendor's lien. E. sold parts of the land to F. and Q. E. not paying R., R. filed a bill against E., F., and Q., to enforce the lien. The court decrees a sale of that in possession of E. first, and, if that is not sufficient, then of that bought by F. and Q. The sale is made and F. and Q. buy the parts they had before bought of E. at less than they were to give E. The commissioner reports the sales good. E. objects to the confirmation of the sale, on the ground of the inadequacy of price, but he does not move to open the biddings, or offer an advance. Held: There was no error as to R. in directing the sale of the parts by F. and Q. instead of confirming the sale of E. to them, especially as Q. alleged that E. had defrauded him, and he did not intend to pay him. If E. objected to the sale for inadequacy of price he should have moved the court to open the biddings and have offered an advance on the price bid; this objection to

the confirmation of the sale without more was no ground for refusing to confirm it.

In the case of *Hudgins vs. Lanier, Bro. & Co.*, 23 Grat., 494, decided June, 1873. Judgments are recovered against H. and docketed. He afterwards makes a deed, in which his wife joins, conveying certain real estate to T., in trust to sell upon demand of a majority of his creditors and pay his debts ratably; but if any have obtained liens, they to be first paid. He, at the same time, conveys to T. other real estate, in trust for the separate use of his wife, stated upon the express consideration of executing the deed. The judgment does not name any creditor or enumerate the debts. L., one of the judgment creditors, files a bill to enforce the payment of his debt. He says he does not mean to give up any right he has, but is willing to proceed first against the land conveyed in the deed. He makes H., T., and the judgment-creditors defendants, and the bill is taken for confessed as to all the defendants. A commissioner states the debts of the judgment-creditors, and there is no exception to the report, and there is a decree appointing commissioners to sell the land conveyed in the deed at auction, but with the consent of H. there may be a private sale. H. negotiates with R. for a sale of a part of the property at \$4,500 which he proposes to the commissioners, and they are disposed to accept the offer, but before it is closed M. offers \$5,000, and then H. protests against the sale to M., and insists that it shall be sold at auction, but R. declining to give more, the commissioners accept the offer of M., and H. excepts to the reports. H. then files his answer, insisting that T. shall elect whether he will proceed under his judgment-lien or under the deed, and insists that under the deed only a majority of the creditors could direct a sale. And he files a petition saying that R. had offered \$5,100 for the property, and proposing to give bond and security, that if accepted the offer will be complied with in five days after the rising of the court. Held: The deed not naming the creditors, the only mode of proceeding open to them was by bill in equity, where the necessary parties might be convened, their rights and liabilities ascertained and adjusted, and the trust enforced under the supervision of the court. There having been no objection for want of proper parties, the want of such parties is no objection to the proceeding.

If there were other creditors besides those named in the bill they could have asserted their claims before the commissioner.

The creditors before the court made no objection to a sale under the deed, and as the bill was taken for confessed as to them, it is to be presumed that they desired the sale. If they did not constitute a majority of the creditors, it was for H. to show it. He alone knew their names or numbers.

H. having consented to a private sale by the commissioners to R. at a certain price, and the commissioners having sold to M. at a higher price, he could not withdraw his consent to a private sale so as to set aside a sale as made, as not made in pursuance of the decree.

It is no just cause for vacating a judicial sale, that only a few bidders were present. The only inquiry for the court is whether the terms for the decree have been pursued, and the property sold at an adequate price.

The advance of one hundred dollars upon the price paid for the property is no such substantial and material advance upon the price obtained by the commissioners as would justify the court in annulling the sale and in ordering a new sale.

In the case of *Brock vs. Rice et als.*, 27 Grat., 812, decided September, 1876, it was held: Whether the court will confirm a sale made by commissioners under its decree must, in a great measure, depend upon the circumstances in each case. It is difficult to lay down any rule applicable to all cases, nor is it possible to specify all the grounds which will justify the court in withholding its approval. In a case where there is reason to believe that fraud or mistake has been committed, to the detriment of the owner or the purchaser, or that the officer conducting the sale has been guilty of any wrong or breach of duty, to the injury of the parties interested, the court will withhold a confirmation of the sale. In such a case either party may object to the report of the commissioner; and the purchaser himself, who becomes a party to the sale, may appear before the court and have any error corrected.

The court, in acting upon a report of sale, does not exercise an arbitrary, but a sound legal, discretion, in the interests of fairness and prudence, and with a just regard to the rights of all concerned.

An auctioneer or crier making a sale cannot properly act for himself or for any other person in bidding for the property.

In the case of *Curtis vs. Thompson*, 29 Grat., 474, decided November, 1877. A tract of land was fairly sold by commissioners, pursuant to a decree of court, to a purchaser for \$27.50 per acre, subject to a contingent right of dower. The tract was assessed in 1870 at thirty dollars, and thirty dollars per acre was the value fixed upon the land by a commissioner of the court, whose report in the cause had been confirmed without exception, in which valuation no allowance was made for the contingent right of dower. The owner of the land objected to a confirmation of the sale, on the ground of inadequacy of price, and affidavits touching the value of the land were filed by both parties. The court below set aside the sale and ordered a re-sale, whereat the same party became the purchaser at the same

price. In the meanwhile the assessment of the land had been reduced to twenty dollars per acre. The owner of the land again objected to a confirmation of the sale, on the same grounds as before, and the court again refused to confirm the sale, and again ordered a resale. Held: The first sale should have been confirmed, and the decree setting it aside and all the subsequent proceedings were erroneous.

In the case of *Roudabush vs. Miller et als.*, 32 Grat., 454, decided November, 1879, it was held: The English practice of, as a matter of course, reopening the biddings of a sale made by the master under a decree of the court, upon the offer of a reasonable advance bid, has not been adopted in Virginia. Whether the court will reopen the bids after such a sale is a question addressed to the sound discretion of the court, subject to the review of the appellate tribunal, and the propriety of its exercise depends upon the circumstances of each case, and it can be exercised only when it can be done with a due regard for the rights and interests of all concerned, the purchaser as well as all others. When a sale has been fairly made, and for a fair price, it should never be set aside when there is a good reason to believe that the upset price has been offered to gratify ill-will towards the purchaser.

In the case of *Merchants Bank of Baltimore et als. vs. Campbell et als.*, 75 Va., 455, decided April 21, 1881. In a creditor's suit there is a sale of a tract of land, and the sale is confirmed by the court; but before the purchase-money is paid creditors apply by petition to set aside the order confirming the sale, on the ground of the fraudulent concealment by the purchasers of a cave under it, which gives great value to the tract. Held:

1. In a judicial sale, if it should be made to appear, either before or after the sale has been ratified, that there has been an injurious mistake, misrepresentation, or fraud, the biddings will be reopened and the reported sale rejected, or the order of ratification will be rescinded, and the property again sent into the market and resold.

2. On the evidence in this case, the purchasers, having discovered the cave, used means to conceal it, and made false representations in relation to it; and upon this ground the order confirming the sale should be set aside.

In the case of *Berlin vs. Melhorn*, 75 Va., 639, decided September, 1881, it was held, p. 642: After a judicial sale has been confirmed by the court which ordered it, it will not be set aside except for fraud, mistake, surprise, or other cause for which equity would give relief if the sale had been made by the parties in interest instead of by the court. Where the objection is to the confirmation, the rule is more liberal as to the principles applicable to such a case.

In the case of *Hansucker vs. Walker*, 76 Va., 753. The court is of opinion that the sale of the land in the bill and proceedings mentioned ought to be set aside and a resale ordered. The commissioners, in their report of the sale, say that the sale is believed to be much below its value. The commissioner in chancery, to whom the matter of taking the accounts was referred, reports the land as worth \$4.50 more per acre than the price for which it was sold, making a difference of more than eight hundred dollars. In an affidavit given by three of the adjoining land-holders it is stated that the land is worth \$32.50 per acre, which is twelve dollars per acre in excess of the price it commanded at the commissioners' sale. It seems, also, that an upset bid of ten per cent. was made by a responsible party with good and sufficient security. Against these facts there is not a scintilla of opposing testimony. It does not appear that the purchaser at the sale insisted on its confirmation. So far as the record discloses, he was not represented by counsel in the court below, nor is he here insisting on the affirmance of the decree.

In the case of *Langyher (Trustee) vs. Patterson & Bash*, 77 Va., 470, decided May 3, 1883. Where such sale has been confirmed by the court, it cannot be set aside except upon petition or motion, after proper notice to parties interested and for good cause shown.

Commissioner empowered to sell mill property for one-fourth cash and the balance in one, two, and three years, reported sale of same to L. at \$1,000, receiving in cash \$56.50, and the purchaser's notes for balance, payable in three equal annual instalments, and that he found it impossible to sell at any advantage on terms of decree. No exception. On hearing, sale confirmed. During same term, two years later, upset bid of 10 per cent. offered. No money or security tendered, no affidavit or suggestion that the price was inadequate. Without notice to purchaser who had left court, decree was entered rescinding confirmation, ordering the property to be set up on the terms ordered, and started at \$1,100. On appeal, held: The decree of rescission of confirmation of the sale was erroneous.

Subsequent confirmation is equivalent to previous authority, cures departures from the terms prescribed, and supplies all defects in the execution of the decree, except those founded in lack of jurisdiction. It makes the sale the court's own act and renders it no longer executory, but executed. Public policy requires that purchasers at such sales should be entitled to certainty and security of their rights under their purchases, and they should not be refused confirmation simply because they may have got a good bargain.

In the case of *Effinger vs. Kenney (Trustee)*, 79 Va., 551, de-

cided November 20, 1884, it was held: It is a settled rule that in suits to sell real estate to satisfy liens by judgments or deeds of trust it is premature and erroneous to decree sale before account is taken of liens and their priorities.

In the case of *Terry vs. Coles (Executor) et als.*, 80 Va., 695, decided September 24, 1885, it was held: Sale made by an order of a court of competent jurisdiction *pendente lite* is a judicial sale. An executioner having authority under the will to sell land declines to exercise his authority, but applies to the court for instructions and directions, and is ordered to make sale and report it to the court for confirmation, whereupon he makes and reports the sale to the court as ordered, such sale is a judicial sale.

Bidder acquires no rights until his bid is accepted and the sale confirmed by the court. Whether the sale will be confirmed depends on the circumstances of each case and the sound discretion of the court in view of fairness, prudence, and the rights of all concerned. No general rules will apply to all the cases.

Where sale of land is decreed to pay specific legacies, and the residue to four residuary legatees, and the land is bid in by one of those legatees, and the other legatees opposed the acceptance of the bid and the confirmation of the sale, and show by numerous witnesses well acquainted with the land that though the sale was open and fair, yet the price bid was grossly inadequate, and that the land, if divided and sold in parcels, would, on the usual terms of payments in such cases, bring two or three times the price bid, there was no error in the court rejecting the bid, and refusing to confirm the sale and directing a resale.

In the case of *Yost vs. Porter et als.*, 80 Va., 855, decided October 8, 1885, it was held: Sale for purchase-money will not be decreed where the property remains encumbered for purchase-money due from plaintiff, without providing for discharge of such encumbrance. Terms of the sale are within court's discretion, and no complaint against them will be heard without evidence that the price would have been better had the terms been more liberal.

Where after-sale fairly made for adequate price has been confirmed, an upset bid is offered, and the sale is set aside upon condition that the said bid be made after a certain time, when the resale should take place upon terms which would not extend the deferred payments beyond the time at which the bonds taken at the previous sale were to become due, and no complaints of said terms were made below, and no proof offered that upset-bidder could have complied with his bid had the terms been more liberal, there is no ground on this account for complaint in the appellate court.

In the case of *Clarkson vs. Reade*, 15 Grat., 288, decided July, 1859, it was held: A judicial sale of land is partly on a credit, and the purchaser pays the cash payment and executes his bonds with security for the deferred payments, and the sale is confirmed by the court. When the bonds become due, the purchaser fails to pay them. He may be proceeded against by a rule made upon him to show cause why the land shall not be sold for the payment of the purchase-money, and upon that proceeding a decree may be made for a sale of the land.

In the case of *Long et als. vs. Weller's Executors et als.*, 29 Grat., 347, decided November, 1877, it was held: An objection to the title of land by a purchaser at a judicial sale must be made before the sale is confirmed by the court. Ordinarily an objection after confirmation comes too late.

The title to an easement on the land to which it is appurtenant, is necessarily connected with the title to the land, and an objection referring to such easement must be governed by the same rules.

An objection by such a purchaser after the sale has been confirmed, that owing to his misinformation as to the boundaries of the land he does not get certain water privileges which he would have had if he had been rightly informed as to the said boundaries, can only be sustained on the grounds of fraud or mistake, and if mistake is relied on, it must be the mistake of both parties.

An objection of the kind should be made to the court as soon as it is discovered by the purchaser.

Where a judicial sale of land is made upon a credit, and the title retained as security, upon a rule against the purchaser to show cause why the land should be resold for his failure to pay the purchase-money before making a decree for the sale, the court should ascertain how much of the purchase-money is due, and should in the decree give him a day in which to pay it, and if not paid in that time, the commissioner is to sell.

Whether the whole or any part of the land should be sold, or whether as a whole, or in parcels, must be referred to the discretion of the court, and his act will not be disturbed unless plainly erroneous.

In the case of *Thornton vs. Fairfax et als.*, 29 Grat., 669 and 677-'78, decided January, 1878. In a suit for the sale of land to satisfy liens upon it, there was an order for an account of the liens and their priorities, and in 1860 the account was returned arranging the debts in twenty-four classes, of which the second, third, and thirteenth were debts reported to be due to S. In 1866 the report was confirmed and there was a decree for the sale of the land, one-tenth cash and the balance at one and two years. The sale was made to J. and confirmed, and J. directed to pay the money to the receiver. In 1870 T. filed his petition

in the cause, claiming that the debts mentioned in the said second, third, and thirteenth classes were his, acquired in 1864, and asking that the receiver might be required to show how much of the purchase-money he had received and what he had done with it, and if it had not been paid, for a resale of the land. The case was referred to the commissioner, and J. appeared before him, claiming that said debts were his, and contesting the claim of T. S. did not claim them. Held: That it was competent for T., though not a party to the suit, but who had acquired subsequently the liens of one who was a party, by petition or motion to require a report from the receiver showing the amount of the purchase-money in his hands, and to have it applied to the satisfaction of the liens according to their priorities, and to direct a resale of the land for the balance of the purchase-money due, pursuant to the decree of sale.

It was necessary that he should have proceeded by bill for that purpose, or to have made the purchaser a party defendant to his petition, or to have required him to answer.

If S. had disputed the claim of T. then it would have been proper for T. to have asserted his claim by supplemental bill or by an original bill in the nature of a supplemental bill.

Before there could be a decree for a resale of the property it was proper and necessary that the purchaser should have notice of the proceeding. The approved practice has been to proceed by the service of a rule upon the purchaser, to show cause why the lands should not be resold.

Though no rule was served on the purchaser in this case, he had notice of the proceeding and came forward to show cause in his own chosen way. There was no need therefore for a rule.

The purchaser might have moved the court for leave to answer the petition of T. or he might have filed a supplemental bill or an original bill in the nature of a supplemental bill, and put the matters in issue on which he relied.

For reference to 75 Va., 639 and 642, see *supra*, this Section.

In the case of *Boyce vs. Strother et als.*, 76 Va., 862 and 864. Where the purchaser is in default in paying the purchase-money and a rule is awarded requiring him to show cause why there should not be a resale of the land, the objection that the rule is returnable to the same term at which it is issued is without force, provided sufficient time is given to answer the rule.

In the case of *Ogden vs. Davidson et als.*, 81 Va., 757, decided December 10, 1885, it was held: Decree is merely null as to persons not named as parties in the bill, and against whom no allegations are made and no relief is prayed.

In the case of *Thurman et als. vs. Morgan (Receiver)*, 79 Va., 367, decided August 14, 1884, it was held: Creditor instead of

proceeding at common law to recover his claim obtains an order for its payment on a summary rule to show cause. This is a departure from the established modes of procedure, and the order so obtained has not the force of a judgment, but is void on its face.

In the case of *Anthony vs. Kasey*, 83 Va., 338, decided May 19, 1887, it was held: When purchaser at a judicial sale fails to pay his bonds, and upon rule against him and his surety a personal decree is rendered against the surety, such decree is extra judicial and void.

SECTION 3398.

In the case of *Eggleton vs. Dinsmore & Kyle*, 84 Va., 858, decided May 3, 1888. A commissioner sold land under a decree and received the price without giving a bond or accounting for it. Purchaser had to pay it over, and the land was resold for that purpose. Commissioner gave a trust deed to indemnify the purchaser. In creditor's sale trust subject was sold. Held: Purchaser was entitled only to the amount he paid, with interest and costs of the resale.

In the case of *Newberry vs. Sheffey (Commissioner)*, 89 Va., 286, decided July 6, 1892, it was held: Under Code, Section 3396, judgment on a forthcoming bond may be had against the sureties, though the principal has never been served with notice of the motion.

SECTION 3403.

In the case of *Moran vs. Johnston*, 26 Grat., 108, decided April 1, 1875, it was held: After a decree for the sale of real estate to satisfy creditors having liens thereon, and an appeal from that decree by the debtor, the court below in which the suit was pending may appoint a receiver to take possession of the property and rent it out, and collect the rents until the further order of the court, etc.

If the sergeant of the city in which the property is located, is appointed the receiver, it is not necessary to require him to give bond for the faithful performance of his duty, as it is covered by his official bond.

SECTION 3405.

In the case of *Beverly vs. Brooke et als.*, 4 Grat., 187, decided October, 1847, it was held: The suit in which the receiver was appointed, embracing other matters beside the trust-fund which is in dispute, all these matters are adjudicated and settled, and the disputed subject is silently dropped in that suit, and the cause sleeps, or is finally decided; but the controversy as to the disputed subject goes on in the other suit, and the receiver, not having been formally discharged, continues to hold the disputed subject. The plaintiff in the second suit, though he was not a

party to the first, having succeeded in the controversy, is entitled to an account and to a decree against the receiver in his own suit.

In the case of *Thornton vs. The Washington Savings Bank*, 76 Va., 432.

1. Chancery Practice.—Receiver.—An order appointing a receiver is in the nature of an injunction or writ of sequestration, preventing any alienation of, or interference with, the property without the consent of the court. Any meddling with the control or possession of the receiver, whether forcibly or by legal proceedings, without the permission of the court, is contempt of court, and is punishable.

In the case of *Melendy & Russell vs. Barbour (Receiver)*, 78 Va., 544, decided February 7, 1884, it was held: One aggrieved by the decree of the court which appointed the receiver for or against whom the decree is rendered, may appeal, in a proper case, to this court, even if the receiver cannot question the decree of the court appointing him.

The established rule is, that when a railroad company is in the hands of a receiver appointed by a court of equity, the receiver cannot be sued at law without the permission of the appointing court. Such receiver may be held responsible for the damage actually sustained by a shipper of freight through the negligence of the receiver's agents and employees in any case in which the company could be so held.

In the case of *Barton vs. Barbour*, 104 U. S. S. C. Reports, 126, decided October, 1881, it was held: The rule that a receiver cannot be sued without leave of the court of equity which appointed him applies to suits against him on a money demand, or for damages, as well as to those the object of which is to recover property which he holds by order of that court. The fact that by such order he is in possession of a railroad, and is engaged in the business of a common carrier thereon, does not so take his case out of the rule as that an action will lie against him for an injury caused by his negligence, or that of his servants, in conducting that business. If the adjudgment of a demand against him involves disputed facts, that court may, in a proper case, either of its own motion, or on the prayer of the parties injured, allow him to be sued in a court of law, or may direct the trial of a feigned issue to settle the facts.

The determination by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of trust property in its possession, does not impair the constitutional right of trial by jury.

In view of the public and private interests involved, a court of equity, having in its possession for administration as trust assets a railroad or other property, may authorize the receiver

to keep it in repair, and to manage and use it in the ordinary way, until it can be sold to the best advantage of all interested therein. Without leave of that court, a court of another State has, under such circumstances, no jurisdiction to entertain suits against him for causes of action arising in the State wherein he was appointed and wherein the property is situated, which are based on his negligence, or that of his servants, in the performance of their duty in respect to the property.

SECTION 3409.

The case of *Walton vs. Williams*, here quoted as "not yet reported," has never been reported.

In the case of *Carr's Administrators vs. Morris*, 85 Va., 21, decided May 10, 1888. A receiver is ordered by the court to lend a trust fund at six per cent. per annum interest on bond secured by trust deed on real estate, payable to himself, with interest recoverable by suit upon default, and entire debt to be payable upon two successive defaults of interest, and to make report of his actions. He lends this money at eight per cent. per annum on notes payable to another, secured by trust deed on real estate, and neglects to enforce the debt upon default and to report. The trust-money is lost. Held: The receiver is chargeable with the loss, though no bad faith is shown.

SECTION 3418.

In the case of *Farley vs. Shippen*, Wythe Chancery Reports, 254, the points here referred to are not considered.

In the case of *Guerrant vs. Fowler*, 1 H. & M., 5, decided September 22, 1806, it was held: A person being within the Commonwealth may be decreed to execute a conveyance for lands lying in another State, or to cancel a deed for such lands obtained by fraud.

In the case of *Cocke's Administrator vs. Gilpin*, 1 Rob., 20 and 45 (2d edition, 22). In a suit by one partner against his co-partner for a settlement of the partnership accounts, and for a moiety of a tract of land purchased by the defendant in his own name, and paid for out of the partnership funds, a decree having been made declaring the land partnership property, and directing a settlement of the accounts, and the cause afterwards coming on to be further heard upon the report of the commissioner, the court decrees that the plaintiff pay to the defendant a sum of money appearing due by the report, and that the defendant thereupon convey to the plaintiff a moiety of the land; but if the plaintiff shall not, within six months from the date of decree, pay the said money, that the marshal sell the moiety of the land, and out of the proceeds of sale, after defraying the expenses, pay to the defendant the money so decreed,

and the residue, if any, to the plaintiff. And the court further decrees that the outstanding debts due to the firm be equally divided between the parties, and that the costs of the suit be equally borne by them. Held: This decree is interlocutory, and it may be reviewed upon an appeal, although there has been such lapse of time between the rendition of the decree and the appeal as would preclude its being reviewed if the decree were final.

The references to 3 Grat., 148 and 167, and to 8 Grat., 351 and 411, are errors.

In the case of *Barger vs. Buckland et als.*, 28 Grat., 850, decided July, 1877, it was held: Pending a suit by judgment-creditors against their debtors and others to set aside a deed of trust or subject the surplus to payment of their debts, the debtor is declared a bankrupt on his own petition, and in the suit he claims his exemption and homestead out of the surplus of the purchase-money of the land, after satisfying the debt secured by the deed of trust; the circuit court dismisses the debtor's application and makes a decree distributing the fund. The bankrupt has such an interest in the case as entitles him to take an appeal.

In such a case the trustee in a deed did not sign it, and it does not appear that he accepted or acted under it, and he lives out of the State and is not a party to the suit. The court may decree a sale of the land and appoint a commissioner to make the sale. A part of the tract of land lies in Virginia and a part in West Virginia. The court may decree a sale of the whole tract.

See the case of *Hurt vs. Jones and Wife*, 75 Va., 341 and 394, cited, *ante*, Section 3397.

In the case of *Muller vs. Dows*, 94 U. S. S. C. Reports, 444, decided October, 1876, it was held: A decree foreclosing a mortgage executed by the Chicago and Southwestern Railroad Company of its entire railroad and franchises, and ordering a sale of them, passed by the Circuit Court of the United States for the District of Iowa, which in a suit there pending had jurisdiction of the mortgagor and the trustees in the mortgage, is not invalid because a part of the property ordered to be sold is in the State of Missouri.

In the case of *Poindexter vs. Burwell*, 82 Va., 507, decided October 8, 1886, it was held: A court of one State cannot decree so as directly to affect land in another State; *e. g.*, to sell land. But it can act upon the person, if he be within its jurisdiction, and compel him to convey the land, or otherwise comply with its decree.

This is the case cited from 10 Va. Law Journal, 738.

In the case of *Gibson vs. Burgess*, 82 Va., 650, decided December 9, 1886, it was held: It is well settled that the courts of

this State are without jurisdiction to sell and convey land situated beyond the limits of this State.

This is the case cited from 11 Va. Law Journal, 297.

SECTION 3420.

In the case of *Dunscomb vs. Dunscomb*, 2 H. & M., 11, decided September 21, 1807. A sole trustee appointed by will to manage the estate of infants having died, the court of equity appointed his successor and required him to give bond and security for the faithful performance of his duty in a penalty double the amount of the trust estate, payable to the judge of the court and his successors in office.

In the case of *Pate vs. McClure*, 4 Rand., 164, decided March, 1826, it was held: Where a debtor who has given a deed of trust enjoins a sale of the property, and pending the suit the trustee dies, the chancellor, upon dismissing the bill, may direct the property to be sold by his marshal.

In the case of *Terry vs. Fitzgerald et als.*, 32 Grat., 843, decided March, 1879. T. conveyed to S. a tract of land of eleven hundred and seventeen acres in trust, to secure a debt of one thousand four hundred dollars, with interest, to F., and the deed provided that the trustee should sell the land, or so much as should be necessary to pay the debt. S. declining to act, F. has R., who was his counsel, and was insolvent, substituted as trustee, and R. advertises the land, or so much as might be necessary to pay the debt, for sale. T. then applies for and obtains an injunction, on the grounds that R. was insolvent and the counsel of F., and because they refused to divide the land and sell it in parcels, alleging that there were four separate improvements on the land, and insists that the trustee shall not sell without giving security for the safety of the trust fund. Held: Insolvency does not disqualify a person to act as trustee, but when money of the trust fund is to pass through the hands of an insolvent trustee, upon the application of one who is interested in the right disbursement of the money, and who is apprehensive that it may be misapplied or misused, a court of equity ought undoubtedly to require of the trustee security before he is allowed to proceed with the execution of the trust.

Although R. was substituted as trustee by an order of the court, on motion of which T. had notice, he is not therefore precluded from applying to a court of equity to require of him bond and security before he proceeds to execute the trust.

The trustee being the agent of both parties, it was his duty to sell the land as a whole, or in separate parcels, as would be conducive to its bringing the most money. It was his duty to sell so as to get the best price for it.

If the land will bring a better price by dividing it and selling

in separate lots, and the owner desires and requests it, and the trustee refuses, the owner may invoke the intervention and assistance of a court of equity, in a proper case, to control the trustee in the exercise of his discretion.

The court having possession of this case, ought, instead of dissolving the injunction, to have retained the case, and directed the execution of the trust. It had authority to appoint commissioners to view the land and take testimony, and to report whether it was susceptible of division into different tracts and in what way, with power to employ a surveyor to lay it off into as many different tracts as would promote an advantageous sale. And if upon the coming in of the report the court is satisfied from it and the testimony that it would conduce to an advantageous sale to have it so divided and sold in separate parcels, it would have authority to decree a sale in that way, and the order in which the tracts should be sold to pay the debt, interest and expense.

In the case of *Diehl vs. Marchant*, 87 Va., 447, decided February 12, 1891, it was held: Decree dissolving injunction awarded grantors in trust deed restraining purchaser from taking possession of the land because substituted trustee had been appointed without notice under this section, is conclusive on the grantors' rights, who failed to appeal in time, and is a bar to their petition based on same ground for rehearing order of appointment.

SECTION 3421.

In the case of *Reynolds vs. The Bank of Virginia et als.*, 6 Grat., 174, decided July, 1849. A debtor conveys a large property, real and personal, in trust to secure numerous creditors, who are divided into three classes: The first two classes are creditors by judgment. The trustees, not having signed the deed, refuse to act; and thereupon two of the creditors of the first class file a bill on behalf of themselves and the other creditors secured by the deed against the grantor and the trustees; and the prayer is for appointment of other trustees and for general relief. The grantor appears and demurs to the bill for want of proper parties plaintiff. Held: In such case one or more creditors may sue for themselves and the other creditors secured by the deed. In such case it is error simply to appoint trustees in the place of those named in the deed. But the court should have the trust administered under its own supervision and control. The appointment of commissioners to sell and administer the trust under the supervision and control of the court is authorized either under the prayer for the appointment of trustees or under the prayer for general relief.

In the case of *Hogan vs. Duke et als.*, 20 Grat., 244, decided January, 1871, it was held: On a bill to enjoin a sale of land

by the trustee, the answer denies all the grounds of equity stated in the bill; and there is no proof to sustain them. The court may dissolve the injunction and have the sale made and the proceeds distributed under its direction. In such case the trustee having been declared a bankrupt, it was especially proper for the court to retain the cause and have the trust administered under its direction, and to require the trustee to give security for the faithful performance of his duties.

The references to 21 Grat., 334-346, are errors.

In the case of *Robinson vs. Mays (Trustee)*, *Obenshain et als.*, 76 Va., 708 and 715.

Whether a court, on dissolving injunction to sale under trust deed, should dismiss the bill, or retain it with a view of supervising the administration of the trust, lies within the discretion of the court.

SECTION 3422.

In the case of *Stayer vs. Long*, 83 Va., 715, decided September 22, 1887, it was held: In a suit to annul a deed of settlement by debtor to trustee for his wife and children, it is the court's duty, upon the trustee's death, to appoint a substitute, though it is provided that his personal representative shall execute the trust.

SECTION 3424.

In the case of *Brown vs. Armistead*, 6 Rand., 594, decided December, 1828, it was held: Although it is a general rule that an infant defendant is not bound by a decree, if, when he arrives at age, he can show error in it, yet it seems that, where a decree is obviously for his benefit, his rights may be absolutely bound by it.

In the case of *Zirkle vs. McCue*, 26 Grat., 517, decided September 24, 1875, it was held: It is well settled in Virginia that an infant, as a general rule, is as much bound by a decree against him as a person of full age. He is not permitted to impeach such decree, except on the same grounds as a person of full age may impeach it, such as fraud, collusion, and error. But in suits for partition, whenever the court sells and conveys an infant's inheritance, he is entitled to an opportunity of making a defence at any time within six months after he arrives at full age.

The errors for which a judicial sale of an infant's land may be set aside must be substantial errors. A fair purchaser is not bound to go through all the proceedings and to look into all the circumstances and to see that the decree is right in all its parts. He has the right to presume that the court has taken the necessary steps to investigate the rights of parties, and that upon such investigation it has properly decreed a sale. He will

not be affected by any imperfection in the frame of the bill if it contain sufficient matter to show the propriety of the decree. The propriety of the sale must be tested, and its validity determined, by the circumstances then existing and the surrounding circumstances. The only matter for inquiry is, Did the court have jurisdiction of the subject-matter? Were the proper parties before it? Were the proceedings regular? Was the sale proper under all the circumstances then surrounding the parties? If so, the title of an innocent purchaser is not to be disturbed because, from subsequent events, the sale has proved unfortunate for the infants.

In the case of *Parker vs. McCoy*, 10 Grat., 594, it was held: A fair purchaser is not bound to go through all the proceedings, and to look into all the circumstances, and to see that the decree is right in all its parts, and that it cannot be altered in any respect.

In the case of *Walker's Executor vs. Page*, 21 Grat., 636, it was held: The right of an infant to show cause against a decree which affects his interests, after he arrives at age, must be limited to the extent of showing cause existing at the rendition of the decree, and not such as arose afterwards.

In the case of *Voorhees vs. The Bank of the United States*, 10 Peters's Reports, 449, it was held by the United States Supreme Court: The principles which must govern this and all other sales by judicial process are general ones adopted for the security of titles, the repose of possession, and the enjoyment of property by innocent purchasers, who are the favorites of the law in every court and by every code.

SECTION 3425.

In the case of *Taylor vs. Cooper*, 10 Leigh, 317 (2d edition, 327), decided July, 1839. Where a sale is made under a decree, if, before it is confirmed, the value of the property be materially increased or diminished, the purchaser, under the English practice, has neither the benefit in the one case, nor the burden in the other.

After the sale is confirmed, the confirmation relates back to the sale, and the purchaser is entitled to everything that he would have been entitled to had the confirmation and conveyance been contemporaneous with the sale. On the 30th of October, 1834, a decree was made for the sale of a tract of land on a credit of six, twelve, and eighteen months. Before the decree, there had been a contract to rent the land, and, pursuant to that contract, a lease was made for a year, commencing the 25th of December, 1834, and ending 25th of December, 1835. During this year, to-wit, on the 10th of January, 1835, sale was made under the decree, that sale being confirmed, and a con-

veyance being executed to the purchaser. Held: The purchaser must be considered complete owner from the date of the sale, and as entitled to the rent which became due afterwards. In such case, if the rent has been paid to the representative of the former owner, the purchaser may recover it from him by an action of assumpsit for money had and received.

In the case of *J. & H. Brian vs. Pittman & Co.*, 12 Leigh, 379, decided November, 1841. In proceeding by foreign attachment in chancery, held: Error to decree for plaintiff without affidavit of defendant's non-residence. Error to decree sale of lands without requiring bond with surety from plaintiff, in double the reported value of the lands, with condition for performing future orders or decrees.

Error to decree a sale of lands for cash.

Error to direct payment of money to creditor and conveyance of land to the purchaser before the sale is reported and confirmed.

In the case of *Flemmings vs. Riddick's Executor*, 5 Grat., 272, decided October, 1848. A decree directs the defendants to pay to the plaintiff certain sums of money. Upon appeal, the appellate court reverses the decree, and proceeding to render such decree as the court below ought to have rendered, dismisses the bill, and this decree is entered in the court below. Pending the appeal, executions are issued on the decree of the court below, and the defendants pay the money. Held: They may proceed by motion to the court below upon notice to have restitution of the money so paid by them, and this though the decree of the appellate court does not direct restitution.

In the case of *Cooper vs. Hepburn et als.*, 15 Grat., 551, decided April, 1860, it was held: One of the infant defendants being over fourteen years of age when the bill was filed, it was irregular not to require her to file her answer. But the sale having been decreed, and it having been made more than six months after the decree, and confirmed without objection, it is too late for the purchaser eighteen months afterwards to object to the irregularity.

In the case of *Dixon et als. vs. McCue's Administratrix et als.*, 21 Grat., 373, decided August, 1871. In November, 1860, M. was appointed a commissioner to sell infant's land on a credit of six, twelve, eighteen, and twenty-four months. M. reports that after three trials to sell he had failed, and suggests that it be rented out for the present, and in June, 1861, there is an order that M. be authorized to rent out the land for the time, and on such terms as he might think judicious, and he rents it out for that and the next year. In March, 1863, M. reports that in that month he has sold the land on the terms of the decree to S. and D., and the report is confirmed, and he is directed to collect the

purchase-money as it falls due, and pay it to the receiver of the court if the parties entitled decline to receive it. M., without giving bond as required by the statute, but which was not directed by the decree, collects the first three payments as they fall due, and pays the money into a bank which has been appointed receiver of the court. The last payment was not made by S. and D., one of them being in the army, and the other a prisoner. After the war they propose to pay the last payment, and the parties entitled object to the sale and also to the payments made, which were in Confederate currency. Held: The decree of November, 1860, for the sale of the land, continued in force, notwithstanding the order of June, 1861, for renting it, and the commissioner had authority to sell in March, 1863.

The sale having been made more than six months after the decree for a sale, and having been confirmed, the sale cannot be set aside as to the purchasers. When the sale was confirmed in March, 1863, the court must have understood and intended that the sale was for Confederate currency, and the purchase-money was to be paid in such currency.

The payments made to M. and his payments to the receiver of the court were valid payments, though M. had not given the bond required by the statute, and the purchasers and M. are not liable for this part of the purchase-money.

S. and D. were, under the circumstances, excused for the non-payment of their fourth bonds as they fell due, and upon paying these bonds they are entitled to have the land conveyed to them.

The references to 32 Grat., 305-320, is an error.

SECTION 3426.

In the case of *Patterson vs. Eakin et als.*, 87 Va., 49, decided November 6, 1890, it was held: Testator owning a store-house whereon was a vendor's lien and a farm, devised the latter to wife and children. Store-house and lot, in a suit to enforce the lien, were sold for enough to pay the lien. By an account in that suit it was ascertained that the only other debt was an unsecured one, which, with the lien, had been assigned to the purchaser. Later, in suit by the devisees to sell the farm, and after paying the debts, to distribute the proceeds, sale of the farm was decreed, and the causes consolidated. Sale was made and confirmed in vacation without notice to the creditors. Held: The creditor, as purchaser, became party to the first suit, and by the consolidation, also to the last suit, and as such party was under this section entitled to notice of the sale made in vacation; but the confirmation will not be set aside unless he was prejudiced by want of notice.

CHAPTER CXLVIII.

SECTION 3435.

In the case of *Triplett vs. Wilson*, 6 Call, 47, decided April, 1806, it was held: A bill of review must suggest error in law or newly discovered matter, or it cannot be sustained.

In the case of *Banks vs. Anderson*, 2 H. & M., 20, decided June 3, 1808, it was held: A bill of review ought not to be granted to an interlocutory decree; but if such decree be erroneous it may be corrected by motion or petition to the court.

In the case of *Quarrier vs. Carter's Representatives*, 4 H. & M., 242, decided October, 1809, it was held: It is not necessary to state in a decree in chancery that all the preliminary steps towards maturing the cause for hearing were taken, it being intended, where the cause is set for hearing, that it was regularly done, unless the party attempting to impugn the decree show to the contrary.

In the case of *Braxton vs. Lee's Heirs*, 4 H. & M., 376, decided November, 1809, it was held: It should appear that defendants, against whom a decree is entered, had answered the bill, or stood out process of contempt; and if this be omitted, a bill of review may be filed on the ground of error on the face of the decree.

In the case of *Hodges vs. Davis*, 4 H. & M., 400, decided June, 1808, it was held: A cause may be reheard upon a petition presented before the term has passed in which the final decree was pronounced; but not afterwards, except by bill of review.

In the case of *Roberts's Widow and Heirs vs. Stanton*, 2 Munf., 129, decided May 30, 1810, it was held: It is error to enter a decree against infant defendants without assigning them a guardian *ad litem*; and though the infancy did not appear in the original proceedings, yet, if it be alleged in a petition for rehearing (the decree being interlocutory), a guardian *ad litem* should be appointed.

In the case of *Winston vs. Johnson's Executors*, 2 Munf., 305, decided June 5, 1811, it was held: Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report so soon, are not sufficient reasons for a bill of review, such objections not having been taken (as they ought to have been) before the rendition of the decree. New matter is no ground for a bill of review, unless it was discovered since the decree was pronounced.

In the case of *Shepherd vs. Larue*, 6 Munf., 529, decided March 15, 1820, it was held: A bill of review to decree pronounced before February 11, 1814, could not be received after five years had elapsed from the date of such decree. It is not

necessary to plead the act of limitations against a bill of review; for it ought to appear in the bill itself that it is exhibited within the time prescribed by law, or that the complainant is protected by some of the savings in the act; otherwise, it ought not to be received. In such case, if the fact alleged to prevent the operation of the act be not true, it may be denied by the answer of the other party; and, on the proofs (if in his favor), the bill of review should be rejected.

In the case of *Royall's Administrators vs. Johnson et als.*, 1 Rand., 421, decided May, 1823, it was held: When a decree is made as to one of several defendants whose interests are not at all connected with each other, with a direction for the payment of costs as to that defendant, such decree is final as to him, although the cause may be still pending in the court as to the rest.

In the case of *Thornton vs. Stewart*, 7 Leigh, 128, decided January, 1836, it was held: To a final decree to S. against T., the latter files a bill of review for errors in law in the proceedings and decree; S. cannot, in an answer to the bill of review, allege any new matters of fact.

In the case of *Laidley vs. Merrifield*, 7 Leigh, 346, decided March, 1836. A party against whom a decree interlocutory in its nature has been rendered, files a bill which he styles, and which is in form, a bill of review, alleging errors on the face of the decree, as well as new facts in relation to the matter of controversy, and praying that the decree be reviewed and reversed. Held: Notwithstanding the form of the bill, it shall be taken as a supplemental bill in the nature of a bill of review and a petition for releasing.

In the case of *Carter vs. Allen et als.*, 21 Grat., 241, decided August, 1871. C., committee of D., a lunatic, files a bill for the sale of D.'s land. There is a decree for a sale, and S., the commissioner, sells, and reports to J., the purchaser, and returns his bonds with C. as his surety. The report is confirmed, and S. reports that he has collected the purchase-money and paid it to C., the committee, and returns the receipts of C. with his report. This report is confirmed, and a commissioner is directed to convey the land to J. as he shall direct; and the commissioner, by direction of J., conveys it to C. Afterwards C. and his wife, who is a sister of D., convey the land to G. in trust to secure a large debt to B. After the death of D. and of C., J., and S., the widow of C., one of the heirs of D., files her bill against the administrator of C., and against the trustee G., and against B., to set aside the sale and the conveyances to C. and G., on the ground that C. was in fact the purchaser, which was forbidden by the statute. She does not allege in her bill any error on the face of the proceedings, or after-discovered

evidence; nor does she allege or approve notice of the fact that she relies on, by G. or B., and they demur and deny notice. Held: The bill is fatally defective as a bill of review for failing to show defect in the proceedings, or to allege that she had discovered evidence since the decree that she could only by reasonable diligence have ascertained before. It is fatally defective as a bill to impeach the decree for fraud, as against B., for failing to charge him with notice of the fraud.

In the case of *J. B. Campbell's Executors vs. A. C. Campbell's Executor*, 22 Grat., 649, decided September 25, 1872, it was held: Where the court of appeals makes a decree and sends the cause back for further proceedings, there cannot be a bill of review to correct the decree of the court of appeals for errors apparent on the face of the record, but there may be such a bill to correct the decree on the ground of after-discovered evidence. But to sustain a bill of review in such a case the greatest caution should be observed; and the new matters, to be sufficient ground for the reversal of the decree, ought to be very material, and newly discovered, and unknown to the party seeking relief at the time the decree was rendered, and such as could not have been discovered by the use of reasonable diligence.

In the case of *Ambrouse's Heirs vs. Keller*, 22 Grat., 769, decided October 28, 1872, it was held: If the plaintiffs present their bill of review, verified by oath, and ask leave to file it, if the decree was interlocutory, the court should treat the bill as a petition for a rehearing of the cause, and, if the decree was erroneous, should rehear and reverse it.

An appeal from the decree of the court refusing to allow the bill of review to be filed, if the decree was final, brings up for consideration the correctness of the first decree, and, if the decree was interlocutory, brings up the whole case.

In the case of *Sands vs. Lynham (Escheator)*, 27 Grat., 291, decided March, 1876. H., of foreign birth, died in 1867, seised and possessed of real estate in R., intestate and without any known heirs. The real estate of which he died seised vested in possession in the State without office found, or other proceedings at law.

After the death of H., G. sued his curator, S., for a large debt, alleged to be due from H., and there was judgment by default. G. then sued S., the curator, in equity, to subject the real estate of which H. died seised for the payment of the judgment. There was a decree for a sale, and a sale in pursuance of a decree, when J. became the purchaser of a part of the property. Held: The State not having been a party to the suit, the decree and sale are nullity as to her, and gave J. no title to the property purchased by him.

If J. was a *bona fide* purchaser, he is entitled to be substi-

tuted to the rights of the creditor, G., and upon showing that the claim of G. is just, to have the real estate subject to his payment.

After the death of H., an inquisition of escheat was executed in 1868, and the jury, after finding the death of H. without known heirs seized of the real estate, stated that certain parties were in possession, claiming under said sale. The escheator returned the inquisition in June, 1869, when the property was advertised as escheated. J. then filed his petition in the proper court, stating he had held the property under his purchase, and asking for an injunction. The escheator and register were made parties, but before the escheator answered, the court made a decree perpetuating the injunction. The escheator then filed a bill to review the decree. Held: It was error to make a decree upon the rights of the purchaser of the property, and perpetuating the injunction without the answer of the escheator.

As the title of the estate does not depend upon the inquisition, it cannot be effected by any errors or irregularities in the proceedings of the escheator.

The decree of the court was a decree by default, and the bill of review by the escheator may be treated as a petition for a rehearsing of the decree. But it was a proper case for a bill of review.

In the case of *Kendrick et als. vs. Whitney et als.*, 28 Grat., 646, decided July, 1877, it was held: There is no statutory bar to the time within which a petition may be filed to correct error in an interlocutory decree. Whether in such a case a rehearing shall be granted depends upon the sound discretion of the court upon all the circumstances of the case.

The motion to correct error in a judgment or decree by default is barred after the lapse of five years from the date of the judgment or decree. That statutory remedy is, however, cumulative, and has not superseded or abolished petitions for rehearing, which may still be had according to the course of equity in the same manner as before the enactment of that statute. Though the motion here is barred by the lapse of time, still, inasmuch as the notice on which that motion was founded was signed by counsel, was served upon all the parties in interest, and was regularly filed and contained all the requisites of a petition for a rehearing, it will be treated as a petition for a rehearing and relief given accordingly.

In the case of *Conolly vs. Conolly et als.*, 32 Grat., 657 and 660-'61, decided January, 1880. On a bill under the statute to invalidate the probate of a will which had been admitted to probate as the will of C., there was a final decree in the cause establishing the paper as the will of C., and this was affirmed on appeal. A relation of C., interested in his estate, who was

an infant at the time, and was not made a party, or represented in the case, may file a bill to review the decree. And the bill stating the fact that the plaintiff was an infant at the time of the decree, and was not a party, or represented in the case, and also the discovery of evidence since the decree which is stated is of great importance and not cumulative, held: Upon application for leave to file the bill, the statements of the bill must be taken as true. The grounds stated in the bill are sufficient to authorize the bill of review.

In the case of *Rawlings (Executor) vs. Rawlings et als.*, 75 Va., 76, decided December 9, 1880, it was held: If the decree in this case was interlocutory, and the bill treated as petition for rehearing after the long acquiescence by the parties in the decrees settling the questions in the cause, and all the circumstances of the case, the rehearing should not be granted.

In the case of *Whitten, etc., vs. Saunders, etc.*, 75 Va., 563, decided August 11, 1881, it was held, p. 573: Upon asking leave to file a petition for a rehearing, or bill of review, on the ground of newly-discovered matter, the new matter must be so stated in the bill as to enable the court to see, on inspecting it, that if it had been brought forward it would probably have changed the character of the decree; and it must be so stated that the defendant can answer it understandingly, and thus present a direct issue to the court. It is not sufficient to say that the party asking the leave expects to prove certain facts. He must state the evidence distinctly on which he relies, and file affidavits of witnesses in support of his averments.

In the case of *Davis vs. Morriss's Executors, etc.*, 76 Va., 21.

Bills of Review.—Every distinct averment must be taken as true upon a mere application to file a bill of review.

In the case of *Thomas et als. vs. Brooke et als.* 76 Va., 160.

Idem.—**Appeal.**—**Review.**—If errors of judgment in the determination of facts be complained of by bill of review, the errors must be such as appear on the face of the decrees, opinion of the court, orders and proceedings in the cause, arising on facts either admitted by the pleadings or stated as facts in the decrees (or opinions of the court); and the evidence in the case cannot be looked into in order to show the decrees to be erroneous in the statement of the facts.

In the case of *Hancock vs. Hutchison*, 76 Va., 609.

1. **Equitable Jurisdiction.**—**Bill of Review.**—**Appeal.**—One court cannot review the decree of another court upon a bill of review. Acts of 1872-'73, Chapter 395, Section 6, Paragraph 383, gives the circuit court no such jurisdiction over the final decrees of the county courts, and only removed from the latter to the former such causes at law and in chancery as were pend-

ing on the day the act took effect. The only remedy is an appeal from the decree of the county court.

2. *Idem.*—Errors in Law.—Errors in Judgment.—On bill to review decree error in law, the error must appear on the face of the decrees or orders or proceedings in the cause, arising on facts either admitted by the pleadings or stated as facts in the decrees. But if the errors be errors of judgment in the determination of facts, such errors can be corrected only by appeal. The evidence cannot be looked into in order to show that the decree is erroneous in its statement of facts.

In the case of *Norfolk Trust Co. vs. Foster*, 78 Va., 413, decided February 7, 1884, it was held: Bill of review for new matter must not only set out the discovery of the new matter after the decree, and state the nature thereof, but must be accompanied by affidavit that it could not have been discovered by reasonable diligence in the original cause.

In the case of *Wayland et ux. vs. Crank's Executor*, 79 Va., 602, decided December 4, 1884, it was held: There is not statutory bar to the time within which a petition may be filed to correct error in an interlocutory decree, and rehearing is granted or denied at the sound discretion of the court.

In the case of *Pracht & Co. et als. vs. Lang et als.*, 81 Va., 711, decided February 18, 1886, it was held: Bill of review may be filed by infant defendants against whom a decree has been rendered at any time before or within three years after attaining majority, and may be asked to be taken as a petition for rehearing, and thereby the infant is entitled to show any good cause existing at date of rendition against the original decree.

In the case of *Trevelyan's Administrators vs. Lofft*, 83 Va., 141, decided April 14, 1887, it was held: Petition is the appropriate mode of applying for a rehearing of interlocutory decrees, and bill of review of final decrees; and the evidence sought to be introduced must be shown by affidavit to be not only new, but discovered after decree, and not discoverable by due diligence before decree, and not merely cumulative, but such as should produce a different decree.

This is the case cited from 11 Va. Law Journal, 610.

In the case of *Armistead vs. Bailey*, 11 Va. Law Journal, 620, decided April 28, 1887. In a creditor's suit to subject lands of a decedent to payment of his debts, his former wards came in by petition, claiming a balance due them, which was ascertained by a commissioner, and the proceeds of the land were applied to its payment. Several years thereafter A. filed his petition in the cause, claiming to be the assignee of a claim against the decedent, and alleging that during the lifetime of the decedent, and after their majority, the wards had received and accepted certain bonds from decedent in full satisfaction of their claims, and had

sued for and collected the same, and were therefore not entitled to any part of the fund arising from the sale of decedent's land, which he prayed to have refunded by them and applied to the payment of his claim, and praying a rehearing of the former decree. The petition set forth no newly discovered evidence, and was not supported by affidavit that the facts relied on could not, with reasonable diligence, have been used before the decree sought to be reheard was made. Held: A demurrer to the petition was properly sustained.

SECTION 3436.

In the case of *Ambler vs. Wyld*, 2 Wash., 47 (1st edition, p. 36), decided at October term, 1794, it was held: The court of one county may on its equity side relieve against a judgment at law rendered in another county by way of original jurisdiction, and though it cannot award a new trial at the bar of that other court, yet it may direct an issue to be tried at its own bar. And if the relief be afforded without the trial of an issue, where that is proper, the high court of chancery may upon an appeal after reversal retain the cause and direct an issue to be tried.

In the case of *Randolph's Executors et als. vs. Tucker et als.*, 10 Leigh, 655 (2d edition, 688), decided March, 1840, the statute giving jurisdiction to each of the judges of the circuit superior courts to award injunctions to judgments rendered, or to proceedings apprehended, out of his own circuit, but directing that in such a case the order for the process of injunction shall be directed to the clerk of the court of that county wherein the judgment is rendered, or the apprehended proceedings are to be had, gives the judge jurisdiction only to award the injunction, not to hear and determine the cause. Therefore, when the judge of the Circuit Superior Court of James City awarded an injunction to proceedings to be had in the county of Charlotte, and directed the order for the process of injunction, not to the clerk of the court of Charlotte, but to the clerk of the court of James City, though the defendant whose proceedings were enjoined was the judge of the court of Charlotte, yet it was held: The process and the subsequent proceedings in the court of James City, which were founded on it, were without authority, and erroneous.

In the case of *Beckley vs. Palmer et als.* 11 Grat., 625, decided July, 1854, it was held: A defendant in an execution files a bill to enjoin the execution, on the ground that a previous execution, sued out on the same judgment, had been levied by the sheriff on the property of another defendant in the execution sufficient to discharge it. In such case the bill must be filed in the county in which the judgment was recovered; and the circuit court of another county has no jurisdiction of the case.

In the case of *Winston et als. vs. The Midlothian Coal Mining Company et als.*, 20 Grat., 686, decided March, 1871, it was held: Where a bill seeks relief, and asks for an injunction to restrain the sale of real estate in another county as ancillary to the relief sought, the court of the county or city where the defendants, or some of them, reside has jurisdiction of the cause, and the order for the injunction properly proceeds from the court of that county or city.

In the case of *Muller, etc., vs. Bayly et als.*, 21 Grat., 521, decided November, 1871, it was held: This statute applies only to a pure bill of injunction, not to a bill seeking other relief, to which the injunction sought is merely ancillary. In a case of a pure bill of injunction to restrain a sale of real estate in one county, if the plaintiff institutes his suit in one county or corporation, where the defendants answer and do not object to the jurisdiction, the plaintiff cannot afterwards make the objection, and the court may, under its general jurisdiction, hear and determine the case.

Both plaintiffs and defendants being present by their counsel, the court makes an order removing a cause to the court of another county, assigning as a reason for making it that it appears that the cause has been improperly brought in this court. If this reason was unfounded in fact it would not invalidate the order which the court had power to make, and to which there was no exception.

A cause having been removed, and received by the clerk, the defendant may, upon notice in vacation, before the next term of the court to which the cause is removed, move the judge to dissolve the injunction which had been granted. In such a case the judge may, in vacation, dissolve the injunction, but he cannot then dismiss the bill.

In the case of *Fredenheimer vs. Rohr*, 87 Va., 764, decided April 30, 1891, it was held: Where a court below, or a judge thereof, refuses an injunction, the remedy is by application to a judge of this court, accompanied by the original papers and the order of refusal.

In the case of *The N. & W. R. R. Co. vs. Postal Telegraph Cable Company*, 88 Va., 936, decided March 24, 1892, it was held: The Chancery Court of the city of Richmond cannot enjoin an act to be done in the county of Prince George.

SECTION 3437.

See the case of *Randolph's Executors et als. vs. Tucker et als.*, 10 Leigh, 655, cited *ante*, Section 3436.

SECTION 3438.

In the case of *Jaynes et als. vs. Brock*, 10 Grat., 211, decided

July, 1853, it was held: An injunction refused by a judge of a circuit court is presented to a judge of a supreme court of appeals, who also refuses it. The injunction may be awarded by another judge of the court of appeals.

In the case of *Wilder vs. Kelly*, 88 Va., 274, decided July 16, 1891. Where a circuit court judge refused to award an injunction, the remedy is by application, accompanied by the original papers and the order of refusal to a judge of this court, who may review and reverse the action of the circuit court judge, and award the injunction, which injunction so awarded, it is the province of the circuit court judge to enforce and restrain any disobedience thereto by attachment or other proper process. Nor does it matter that the injunction in question is the second or supplemental bill for an injunction, since a motion to reinstate an injunction on additional evidence is in the nature of an original application for an injunction, and where the circuit court refuses to enforce obedience to such injunction so awarded by a judge of this court, the writ of *mandamus* may be issued.

SECTION 3441.

In the case of *Holliday et ux. vs. Coleman et ux.*, 2 Munf., 162, decided March 25, 1811, it was held: The power of a court of equity to rule a tenant for life, of slaves or other personal property, to give security that the property shall be forthcoming at his or her death, is to be exercised, not as a matter of course, but of sound discretion, according to circumstances.

SECTION 3442.

In the case of *Woodson vs. Johns*, 3 Munf., 230, decided April, 8, 1812, it was held: The security in a bond for the prosecution of an injunction is not liable for the costs and damages which may accrue on an appeal to a superior court.

In the case of *Fox & Vowles vs. Edwards (Executor)*, 6 Munf., 36, decided December, 1817, it was held: In an action upon a bond for prosecuting an injunction to stay proceedings on a judgment at law for a debt bearing interest, which injunction is dissolved and the bill dismissed, the plaintiff is entitled to a verdict for the amount of the principal sum, with lawful interest to the time of finding such verdict, the costs at law and in chancery (costs being awarded to the plaintiff by the decree), with damages on the said principal at the rate of 10 per cent. per annum during the pendency of the injunction, although the condition of the bond be for payment of the judgment and costs of the injunction (if ruled to be paid "by the complainant"), without mentioning interest or damages.

In the case of *Ashby vs. Kiger et als.*, 1 Va. (Gilmer), 153, de-

aided October 2, 1820, it was held: The judge failing to direct a release of errors on granting an injunction, this court will respect the principle.

In the case of *Lomax vs. Picot*, 2 Rand., 247, decided February 7, 1824, it was held: It is error in the chancellor to grant an injunction without requiring security, except in the case of executors, administrators, and other fiduciary characters.

In the case of *White vs. Clay's Executors*, 7 Leigh, 68, decided January, 1836. The condition of an injunction bond is broken by a dissolution of the injunction in part, as well as by a total dissolution; so that an action lies on a bond, whether the injunction be partly or wholly dissolved.

To debt on an injunction bond, defendant pleads that the injunction cause is still pending on a bill of review in the court of appeals, concluding with a verification; plaintiff replies that the bill of review mentioned in the plea has been decided by the court of appeals, concluding to the country; and issue joined. Held:

1. The first fault in pleading, if fault it was, having been committed by the defendant, he cannot complain of the same fault in the pleading of plaintiff; but,

2. It was necessary in such case to conclude to the court, with a verification by the record.

On the trial of an action of debt on an injunction bond, extracts from the record of the injunction cause of the decrees in the cause are competent and sufficient evidence without producing the whole record.

An injunction bond not strictly pursuing the directions of the statute is yet held a good statutory bond.

See the case of *Bentley vs. Harris's Administrator*, 2 Grat., 357, cited *ante*, Section 2893.

In the case of *Harman vs. Howe*, 27 Grat., 676, decided June, 1876. A bond is given upon an injunction to a judgment for money, and in penalty it is said "in the just and full sum of seven hundred and seventy-six lawful money of Virginia." The word "dollars" is obviously left out by mistake, and the bond will be treated as if the word was in it.

The clerk states at the foot of an injunction bond that it was signed, sealed, and delivered in the presence of the court, and it is dated and endorsed as filed on the 23d October, on which day it appears from the records of the court that it was not then in session. Held: The statute does not require the bond to be executed in the presence of the court, but before the clerk of the court in which the judgment was. Though its being given before the court, if it was, cannot vitiate it.

The judge granting an injunction to a judgment for money endorses on the bill, "Injunction granted on the usual terms," without stating on what terms it was to become operative. The injunction bond is given in penalty about double the amount of the judgment, and is in other respects as directed by the statute. The penalty being about double the amount of the judgment, and that being the amount of the penalty generally prescribed in such cases, this would seem to be a compliance with the order, and the order a compliance with the law, which directs that the judge shall prescribe the amount of the penalty. But however that may be, the obligors to the bond are estopped from denying that penalty of the bond conformed to the direction of the judge who awarded the injunction.

In the case of *Warwick and Wife and Another vs. Norvel*, 1 Leigh, 96, decided February, 1829, it was held: Where a party defendant in a suit at law, before judgment, resorts as plaintiff to equity, praying relief against the claim asserted at law, on equitable grounds, and an injunction to stay proceedings at law, the injunction should be granted only on condition that he confess judgment at law, though he may have grounds of defence at law distinct from the grounds of relief preferred to the court of equity.

Where an injunction has been granted in such a case, and the chancellor dissolves the injunction, unless the plaintiff in equity will confess judgment at law, on appeal from such order this court will not examine the merits, though at the time the order was made the cause stood for hearing.

In the case of *The Great Falls Manufacturing Company vs. Henry's Administrator*, 25 Grat., 575, decided December, 1874, it was held: When a defendant in an action at law files a bill to make his defence in equity, and asks for a stay of proceedings in the law court, it is a matter in the discretion of the chancellor, in granting the injunction, whether he will or will not require a confession of judgment in the action at law. In such a case, if the confession of judgment in the action at law is required, the order should require the judgment to be taken to be dealt with as the court shall direct.

Though the order requiring the confession of judgment is absolute, yet, if the court dissolves the injunction and dismisses the bill on the ground that the plaintiff's defence to the action is legal, and that the court of equity has no jurisdiction, the decree should direct that the judgment at law should be set aside and that the case be reinstated as it was when the injunction was granted; and if this is not done, the chancery court will, on motion afterwards made, direct the judgment to be set aside.

In the case of *Staples vs. Turner (Administrator) et als.*, 29

Grat., 330, decided November, 1877. S., who is executor of his father, A., and M., who is administrator of T., have a settlement of accounts between S. individually and as executor of T., and A. in his lifetime, said accounts extending through many years, and embracing many items. All these items, whether as executor or as individual, are brought into the statement, and there is a balance against S. of \$1,176.10. At the foot of of the statement S. says that he is only to be individually responsible for what appeared to be due from him in his individual character. M. sues S. upon this account, and S. applies for an injunction to stay proceedings, which is granted upon his confessing judgment. In his bill he points out a number of what he alleges are errors in the account, and items which are against his testator's estate. Held: It is a proper case for relief in equity. The injunction should have been granted without requiring S. to confess judgment in the action at law. The court should direct the accounts as individual and as executor to be taken separately. Though S. should not have been required to confess a judgment in the action at law, it may be held as a security for any amount found, upon settling the accounts, to be due from him individually.

In the case of *Thornton vs. Thornton*, 31 Grat., 212, decided November, 1878, it was held: If it was proper to require a confession of judgment, it should expressly provide that the judgment so confessed was thereafter to be dealt with as the chancery court might direct.

Although there is no such express provision in the order granting the injunction, the court, if of opinion that the bill should be dismissed for want of jurisdiction, should, in the order of dismissal, direct that the judgment at law be set aside.

SECTION 3444.

In the case of *Radford's Executor vs. Innes's Executor*, 1 H. & M., 7, decided September 23, 1806, it was held: A motion to dissolve an injunction ought never to be continued unless from some very great necessity.

The court of chancery is always open to reinstate as well as to grant injunctions.

The complainant should always be ready to prove the allegations in his bill of injunction, even before the answer is filed.

In the case of *North's Executor vs. Perrow and Others*, 4 Rand., 1, decided January, 1826, it was held: On a motion to dissolve an injunction, it ought not to be required of the defendant to invalidate, by full proof, the allegations of the bill, but the burden of proof lies on the plaintiff to support them. All that is required of the defendant is to show that the evidence of the plaintiff is entitled to no credit.

In the case of *Randolph vs. Randolph*, 6 Rand., 194, decided March, 1828, it was held: It is an irregular proceeding in a chancellor to dissolve an injunction in court, with a direction that the order of dissolution should not go out, and then, in vacation, to direct that the order should go out.

In the case of *Kahn vs. Kerngood*, 80 Va., 342, decided March 19, 1885, it was held: From an order overruling an injunction and adjudicating the principles of the cause, an appeal lies.

When on bill and answer denying all equity in the bill, there is motion to dissolve the injunction, it is customary to dissolve, but for good cause the motion may be overruled, and the injunction continued until the hearing, without any adjudication of the principles of the cause.

In the case of *Jenkin & Cutchin vs. Waller & Jordan*, 80 Va., 668, decided September 17, 1885. It rests in the sound discretion of the court to dissolve an interlocutory injunction upon the coming in of the answer denying the equities of the bill, or to continue it to a final hearing, especially where fraud is the *gravamen* of the bill, or where dissolution would result in greater injury than continuance till hearing.

Mercantile firms having on hand large stocks of perishable goods confessed judgments for large sums in favor of certain preferred creditors. Executions were issued and levied, and the goods advertised for sale. Unpreferred creditors bring their bill, charged fraud in the confession of said judgments, usury in the debts whereon the judgments were founded, want of jurisdiction in the courts wherein they were confessed, etc., and obtain injunction to sale and appointment of receiver to take charge of the goods and sell same publicly or privately, upon giving bond of sufficient penalty. Judgment-creditors present their answers to the bill, and move to dissolve the injunction in vacation. No deposition had been taken, but affidavits sustained the allegations of the bill, and receiver had executed ample bond and taken possession of the goods. The motion to dissolve was overruled, and the injunction continued to the hearing on the merits, the decision of all questions being reserved until then. Held: Such action is sustained by the sound discretion of the court under the circumstances, and should be affirmed.

SECTION 3445.

See the case of *Fox & Vowles vs. Edwards (Executor)*, 6 Munf., 36, cited *ante*, Section 3442.

In the case of *Garnett vs. Jones*, 4 Leigh, 633, decided December, 1833. Execution is awarded on a forthcoming bond against the principal and the surety therein bound; the principal alone obtains an injunction to stay proceedings at law,

which injunction is dissolved. Held: The surety is not liable for the damages incurred by the principal for retarding the execution by an injunction; and if an execution issue against the surety as well as against the principal for such damages, it ought, on surety's motion, to be quashed. The execution should be so moulded as to exempt the surety from the damages, and to make the principal, who incurred them, alone liable therefor.

In the case of *Washington's Executor vs. Parks*, 6 Leigh, 581, decided July, 1835, it was held: Upon the dissolution of an injunction on a judgment, the damages for retarding execution by the injunction should be computed on the aggregate of principal, interest, and costs, appearing due on the judgment at the date of the injunction.

And the damages should be ascertained, and the precept to levy them inserted in the body of the execution.

In the case of *Medley vs. Pannill's Administrator; Same vs. Tunis's Executors*, 1 Rob., 63 (2d edition, 67).

Where, pending an injunction to a judgment for money, the judgment-creditor dies, and there is a revival in the name of his administrator of the suit in equity, but not of the judgment at law, it is not regular, though the object be to avoid the delay that would take place after a dissolution of the injunction in reviving the judgment, to make a decree in the suit in equity for the money which will be payable to the creditor upon such dissolution. The court of equity is to dissolve or perpetuate the injunction, or perpetuate it in part and dissolve it for the balance, and it may in the latter case, if it shall appear just, direct that no damages shall be paid by the complainant; but it is not, in any injunction case, not even where the injunction is wholly dissolved, to make a decree for the damages payable to the creditor on the dissolution.

In the case of *Jeter vs. Langhorn*, 5 Grat., 193, decided July, 1848, it was held: An injunction is dissolved, and on appeal the decree is affirmed. Ten per cent. damages is to be computed from the time when the injunction was granted to the date of the dissolution thereof in the court below; but not for the time it was pending in the appellate court.

In the case of *Michaux's Administrator vs. Brown et als.*, 10 Grat., 612, decided January, 1854, it was held: A judgment is a lien upon an equity of redemption in land, and will be referred to a subsequent purchaser of the equity of redemption not having the legal title; and the lien of the judgment extends to the whole equity of redemption. Though the judgment was enjoined at the time of the purchase, yet upon the dissolution of the injunction the lien relates back to the date of the judgment, and so has priority over the equity of the purchaser. The damages on the dissolution of an injunction to a judgment

become, as to the party obtaining it, a part of the judgment, and are embraced in the lien of the judgment upon the equity of redemption.

A judgment being rendered for the penalty of a bond to be discharged by the payment of the principal sum due and interest, and the payment of the money having been delayed by an injunction until the principal due and the interest exceed the penalty, the lien of the judgment only extends to the penalty, the damages upon the dissolution of the injunction and the costs at law, without continuing interest.

In the case of *Claytor vs. Anthony*, 15 Grat., 518, decided April, 1860, it was held: If a person not a party to the judgment enjoins it and the injunction is dissolved, he is liable to pay the ten per cent. damages prescribed by the statute. Though the condition of the injunction bond provides for the payment of such damages as may be awarded by the court, and the court simply dissolves the injunction and dismisses the bill, yet the order of dissolution necessarily imports that the damages are to be paid, unless they are expressly remitted by the terms of the order.

Where upon a bill of review an injunction is granted which is afterwards dissolved, the damages are to be computed, not upon the amount of the judgment at the time it was first granted on the original bill, but on the amount of the judgment at the time it was granted on the bill of review. If the judgment, principal, interest, costs and damages on the injunction bond, yet the plaintiff in the judgment having sued out execution on the judgment and made the money, principal, interest and costs, may recover the damages by suit upon the bond.

SECTION 3446.

In the case of *Franklin vs. Wilkinson*, 3 Munf., 112, decided March 17, 1812, it was held: After an injunction bond has been wholly dissolved, if the cause be set for hearing on motion of the defendant in equity, he cannot take advantage of the circumstance that the bill should have been dismissed under the act of assembly.

In the case of *Hough vs. Shreeve*, 4 Munf., 490, decided November 8, 1815, it was held: The third section of the act of January 20, 1804, "concerning the proceedings in courts of chancery," does not apply to a bill which is not merely a bill of injunction, but has the farther object in view of obtaining a decree for conveyance.

In the case of *Singleton vs. Lewis et als.*, 6 Munf., 397, decided October 13, 1819, it was held: Again decided, viz.: that a bill of injunction ought not to be dismissed at the next term after dissolution, under the third section of the act of January 20,

1804, if such bill have such objects besides those embraced by the injunction.

In the case of *Pulliam vs. Winston et als.*, 5 Leigh, 324, decided April, 1834, it was held: The statute directing the dismissal of bills of injunction at the next term, etc., after the dissolution of the injunction, unless cause be shown to the contrary, does not apply to cases in which the bill claims other relief besides the injunction.

The case of *Adkins vs. Edwards*, 83 Va., 300, supports and cites the case of *Pulliam vs. Winston*, 5 Leigh, 324, *supra*.

CHAPTER CLXIX.

SECTION 3447.

In the case of *Reid's Administrators vs. Strider's Administrators*, 7 Grat., 76, decided May 14, 1850, it was held: A writ of error *coram vobis* does not lie to the supreme court of appeals.

SECTION 3448.

In the case of *Worsham vs. McKensie*, 1 H. & M., 342, decided June 22, 1807, it was held: After a confession of a judgment by an executor in an action brought on his executorial bond for the purpose of recovering against him and his securities for a devastavit, he cannot resort to a court of equity for relief on the ground that he had fully admitted the assets of his testator.

In the case of *Hite's Heir vs. Wilson*, 2 H. & M., 268, decided April, 1808, it was held: If a release of errors be pleaded to a *supersedeas* and found for the defendant in error, the judgment should be, not that the judgment of the court below be affirmed, but that the plaintiff be barred of his writ of *supersedeas*.

The reference to 2 H. & M., 575, is an error.

In the case of *Edmonds vs. Green*, 1 Rand., 44, decided January, 1822, it was held: A confession of judgment on a motion on a forthcoming bond will operate as a release of errors in the original judgment. Therefore, where an office-judgment is erroneously entered up against the principal and special bail, the latter afterwards giving a forthcoming bond and confessing judgment on the said bond, he cannot avail himself of the error in the original judgment.

In the case of *McRae vs. Turnpike Co.*, 3 Rand., 160, decided February 10, 1825, it was held: The confession of a judgment on a forthcoming bond is a release of errors, if any exist, in the original judgment.

In the case of *Stanard vs. Timberlake*, 3 Leigh, 681, decided May, 1832, it was held: A confession of judgment on a forthcoming bond is a release of all errors in the previous proceedings.

In the case of *Richardson's Executor vs. Jones*, 12 Grat., 53, decided January 29, 1855, it was held: An entry that the defendant, relinquishing his plea of payment, saith he cannot gainsay the plaintiff's action for the sum of, etc.; and judgment accordingly is a judgment by confession, and releases all previous errors in the proceeding in the cause.

In the case of *Brockenbrough's Executrix et als. vs. Brockenbrough's Administrator et als.*, 31 Grat., 580 and 599, decided March, 1879. L. brings an action on a bond against B., which is on the office-judgment of the court at its March term, which commences on the third of the month, and the office-judgment is confirmed on the fifth, which is the last day of the term of the court. On the first day of the same term of the court B. goes into court and confesses a judgment in favor of S., no suit having been instituted against B. Held: The judgment in favor of S. is valid, though no suit had been instituted by him against B. That the judgment of L. relates back to the first day of the term, and the law not regarding a fraction of a day, both judgments stand as of the same date.

In the case of *Alexander vs. Alexander et als.*, 85 Va., 353, decided August 23, 1888, it was held: A power of attorney to confess a judgment need not be under seal. Power of attorney to confess a judgment executed by a firm, and the judgment confessed thereunder, are valid.

SECTION 3449.

In the case of *Jones vs. Bradshaw*, 16 Grat., 355, decided February 18, 1863, it was held: If pending an appeal in the court of appeals the defendant has satisfied the decree, upon a reversal of it the circuit court should make an order of restitution in his favor.

In the case of *Green & Suttle vs. Massie*, 21 Grat., 356, decided August, 1871, it was held, p. 362-'64: If a discovery from the plaintiff is necessary to enable the defendant to make his defence at law, he must file his bill for the discovery before the judgment has been rendered against him; and he cannot go into equity for discovery and relief against the judgment after it has been rendered.

In the case of *O. A. & M. R. R. Co. vs. Miles*, 76 Va., 773.

Demurrer to Evidence.—By defendant company's demurrer, it must be held to admit all plaintiff's evidence, and all inferences justly deducible therefrom, and to waive all its own evidence conflicting with the plaintiff's, and all inferences deducible from its own evidence (though not in conflict with plaintiff's) which do not necessarily result therefrom.

In the case of *Salamone vs. Keiley et als.*, 80 Va., 86, decided January 15, 1885, it was held: Where a bill fails to state a case

proper for relief in equity, the court will dismiss it at the hearing, though no objection has been made in the pleadings. But a defective bill may be aided by the answer and the evidence.

In the case of *Roanoke Land and Improvement Company vs. Karn & Hickson*, 80 Va., 589, decided June 25, 1885, it was held, p. 595: Judgment will not be reversed for defect, imperfection, or omission in the pleadings, unless in court below there was a demurrer. But a failure to state any cause of action at all is not cured by the statute.

In the case of *N. & W. R. R. Co. vs. Wysor*, 82 Va., 250, decided July 8, 1886, it was held: Counts *ex delicto* cannot be joined in the same declaration with counts *ex contractu*, such misjoinder makes the declaration bad on demurrer. But unless a demurrer has been filed and overruled, such misjoinder will not be grounds for a motion in arrest of judgment or writ of error.

SECTION 3450.

In the case of *Dabney vs. Preston's Administrators*, 25 Grat., 838, decided February 18, 1875, it was held: The decree in the court below was made when there was no replication to the answer of D., and after an appeal from the decree by D. was perfected, the court, on the motion of the plaintiffs, made an order permitting the plaintiffs to file the replication *nunc pro tunc*. If it was a proper case for such an order, the court should have allowed D. to take testimony to meet the new phase of the case presented by the issue thus taken on his answer.

The reference to 31 Grat., 13, 18 and 19, is an error.

In the case of *Simmons vs. Simmons's Administrator*, 33 Grat., 451 and 458-'59, decided July, 1880. With the answer of a defendant a bond of the plaintiff's decedent is filed. The plaintiff filed no replication, but pleaded *non est factum* to the bond filed with the answer. On the evidence being heard, the court below decided that the bond was not the deed of the plaintiff. Held: While it was irregular and improper to have allowed a plea to have been filed to an answer, and the proper course was for the plaintiff to have filed a general replication to the answer, accompanied by an affidavit, putting in issue the execution of the bond, which would have been sufficient to require the defendant to prove such execution, yet, as the plea which was sworn to can be now treated as an affidavit, as the parties took issue on on it and testimony, and the appellant has not been prejudiced by the irregular proceedings and trial on said plea, as such the decree will not now be reversed for such irregularities, substantial justice having been done between the parties.

In the case of *Jones vs. Degge*, 84 Va., 685, decided April 5, 1888, it was held: Where defendant has taken depositions as if

there had been a replication, the decree shall not be reversed for want of a replication.

SECTION 3451.

In the case of *Erwin vs. Vint*, 6 Munf., 267, decided January 18, 1819, it was held: A final decree by default may be set aside at a subsequent term for good cause shown, in a case where relief cannot be given by bill of review, or bill to impeach the decree for fraud in obtaining it.

In this case circumstances shown were that the defendant against whom the decree was rendered was prevented by mistake and accident from filing his answer, and that, in fact, his title was good to the land in controversy.

In the case of *Richardson's Executor vs. Jones*, 12 Grat., 53, decided January 29, 1855, it was held: A judgment by confession entered by mistake of the clerk instead of a judgment *nil dicit* cannot be corrected at the next term of the court.

In the case of *Davis (Sheriff) vs. The Commonwealth*, 16 Grat., 134, decided March 5, 1861, it was held: If a party obtains a *supersedeas* to a judgment by default, before applying to the court in which the judgment was rendered, or to the judge thereof, to correct the errors of which he complains, his *supersedeas* will be dismissed as improvidently awarded.

In the case of *Ballard et als. vs. Whitlock*, 18 Grat., 235, decided January, 1867, it was held: A judgment and an award of execution upon a forfeited forthcoming bond having been entered by default upon a day prior to that to which the notice was given, the court in which the judgment and award of execution was rendered has jurisdiction on the motion of the plaintiff to set aside the judgment and to quash the execution, upon reasonable notice to the defendants. The plaintiff having given a second notice to the obligors in a forthcoming bond for a judgment and an award of execution thereon, and they appearing and objecting to the rendering of the judgment and the award of execution asked, the court may, at the same time, quash the first judgment and execution, and render another judgment and award of execution on the bond; and the obligors being present by their counsel, they had reasonable notice of the motion to quash.

When a judgment is set aside, the execution which has issued upon it falls with it, without an express order to quash the execution.

In the case of *Ragland & Co. vs. Butler*, 18 Grat., 323, decided January, 1868, it was held: The court having refused to give an instruction to the jury asked for by the defendant, that the plaintiff must prove the offer to deliver merchantable lumber cut from the merchantable timber upon the land, etc., and

afterwards having instructed the jury that if they believed that the plaintiff cut from the land, etc., merchantable pine timber, and sawed it into lumber, without saying that the lumber must be merchantable, this instruction, after the refusal of the first, was calculated to mislead the jury, and the judgment will be reversed.

In the case of *Goolsby, etc., vs. St. John*, 25 Grat., 146, decided June, 1874. In 1866 S. sues G. & R., partners, in debt. The sheriff returns on the process, "Executed on G. by leaving copy at his house with sister, and on R. by leaving copy at his house with wife." On his return there is an office-judgment confirmed. The stay law prevents an execution on this judgment, but there is a judgment upon notice for a year's interest upon this judgment, in 1867, and also in 1868. In 1870 execution is issued on the judgment, when G. & R. enjoin it on the ground that the credit of \$100 endorsed on the note should have been \$600, and that the process was not properly served, and they had no notice of the suit. S. demurs to the bill for want of equity. Held: G. & R. having had notice of the judgment within the time limited for a motion to quash it, they had a remedy at law by motion to quash the sheriff's return, and therefore they are not entitled to relief in equity. The judgment is a judgment by default in the sense of the statute.

In this case, in September, 1871, the court made a decree perpetuating the injunction, setting aside the judgment, and remanding the cause to the rules. In March, 1872, S., by leave of the court, filed a bill of review for errors apparent in the decree; and on the 2d of September, 1872, the court made a decree in the bill-of-review case, reversing and annulling the decree; and on the same day the original case of G. & R. against S. was reinstated on the docket; and, on the motion of S., it was decreed that the injunction be dissolved. Held: It was a proper case for a bill of review. The court should not only have dissolved the injunction, but should have dismissed the original bill. The bill of review is a continuance of the original suit, and there should not have been two decrees, but the whole should have been embraced in one decree, and the appellate court will so regard them. If the case had not been a proper one for a bill of review, still, an appeal from that decree brings up the whole case, and the appellate court will go back to the first error, and reverse the decree of September, 1871.

In the case of *Kendrick et als. vs. Whitney et als.*, 28 Grat., 646, decided July, 1877, it was held: There is no statutory bar to the time within which a petition may be filed to correct error in an interlocutory decree. Whether, in such a case, a rehearing shall be granted, depends upon the sound discretion of the court upon all the circumstances of the case. The motion to

correct error in a judgment or decree by default, given by statute, is barred after the lapse of five years from the date of the judgment or decree. That statutory remedy is, however, cumulative, and has not superseded or abolished petitions for rehearing, which may still be had, according to the course of equity, in the same manner as before the enactment of that statute.

Though the motion here, if treated as made under the statute, is barred by the lapse of time, still, inasmuch as the notice on which that motion was founded was signed by counsel, was served upon all the parties in interest, and was regularly filed, and contained all the requisites of a petition for a rehearing, it will be treated as a petition for a rehearing, and relief given accordingly.

In the case of *Dillard vs. Thornton*, 29 Grat., 392, decided November, 1877. On September 30, 1867, a summons in debt on a single bill was sued out, returnable to the succeeding October rules, to which rules it was returned executed on the 3d of October; and the plaintiff filed his declaration; and the defendant not appearing, a conditional judgment was entered against him, which was confirmed at the succeeding rules held October 28, 1867, and final judgment was entered against the defendant on the last day of the succeeding term of the circuit court, which was October 31, 1867, which was less than one month after the service of the process on the defendant. Held: The entry of final judgment against the defendant within one month after he was served with process was erroneous.

According to the true construction of our statutes, where less than one month has elapsed between the service of process and the end of the succeeding term, the conditional judgment will become final at the term next succeeding the expiration of one month after the service of process.

The aforesaid judgment of October 31, 1867, having been set aside in the court below on the motion of the defendant, the court should have reinstated the cause upon the docket, with liberty to the defendant to plead, and to set aside the office-judgment upon the usual terms, the said judgment to become final in case of his failure to set it aside.

Where under such judgment a *fi. fa.* is issued, and there is a proceeding by suggestion against persons indebted to the defendant, such defendant may, upon proper notice, appear in such proceeding and have the judgment vacated, and all proceedings thereunder quashed.

A notice to reverse or correct a judgment by default, or to quash an execution, need not be in writing; all that is requisite is, that there should be a reasonable notice.

It is too late to make the objection in the appellate court that

the notice was insufficient, when the parties appeared and made no such objection in the court below.

The court below having vacated the judgment of October 31, 1867, upon a motion of the defendant, where all parties appeared by their counsel, it had no jurisdiction to correct its action in that regard, but the proper remedy was by appeal.

In the case of *Dilliard's Administrator vs. Dilliard et als.*, 77 Va., 820, decided October 11, 1883, it was held: Under Code 1873, Chapter 177, Section 5, upon notice to the opposite party, his agent or attorney-at-law, or, in fact, the court wherein the decree is rendered, may, on motion, correct such decree as to any clerical error therein, where (as in the case at bar) there is sufficient in the record to enable the court to safely amend the same.

In the case of *Saunders vs. Griggs's Administrator et als.*, 81 Va., 506, decided March 11, 1886, it was held: The notice need not specify the errors for which the court is asked to correct or reverse its judgment by default, or decree in bill taken for confessed.

In the case of *Stotz vs. Collins*, 83 Va., 423, decided June 16, 1887. Where the defendant moves the judge in vacation to reverse a judgment by default upon a defective return of a substituted service of the summons, and to remand the case for trial. Held: The court may allow the sheriff to amend his return so as to show a proper service, and dismiss the defendant's motion.

In the case of *Thompson vs. Carpenter*, 88 Va., 702, decided January 28, 1892. A county court, upon the merits, refused to open a road. The circuit court reversed it in 1889, remanded the case and gave costs. Afterwards circuit court set aside its previous order, and later, in October, 1890, made an order reversing the county court's order, and directing the road to be opened. Held: The last order of the circuit court was erroneous, it being without jurisdiction over the case after its final order of 1889.

This section applies only to judgments by default and to decrees on bills taken for confessed, and to cases of mistake or misrecital, or miscalculation, for which no appeal lies to this court.

CHAPTER CLXX.

In the case of *Moran vs. Johnston*, 26 Grat., 108, decided April 1, 1875, it was held: After a decree for the sale of real estate to satisfy creditors having liens thereon, and an appeal from that decree by the debtor, the court below, in which the suit was pending, may appoint a receiver to take possession of the property and rent it out, and collect the rents until the further order of the court, etc.

In the case of *Adkins vs. Edwards*, 83 Va., 316, decided May 5, 1887, it was held: After decree to sell real estate, and appeal from that decree, the court below may appoint receiver to rent out the real estate.

SECTION 3453.

In the case of *Grymes's Administrators vs. Grymes*, 1 H. & M., 404, decided July 10, 1807, it was held: An appeal or *superse-deas* to a judgment ought not to be granted to any person not appearing to be interested in the matter in controversy.

In the case of *Cogbill vs. Cogbill*, 2 H. & M., 467, decided May 12, 1808, it was held: In a contest about a will, a person who was not a party in the county court may, by becoming interested after an appeal to the district court, be admitted a party there and carry up the cause to the court of appeals, but on reversing the judgment of the district court, and affirming that of the county court, such party can only recover the costs in the district court.

In the case of *Wingfield vs. Crenshaw*, 3 H. & M., 245, decided November 9, 1808, it was held: A *supersedeas* is the proper remedy only where the error is apparent on the face of the proceedings, and where the person seeking to reverse the judgment is a party in the court below.

In the case of *Bohn vs. Sheppard*, 4 Munf., 403, decided January 26, 1815, it was held: Although in controversies concerning mills, roads, the probate of wills, and granting administrations, the superior court of law, to which an appeal is taken from the county or corporation court, may hear new evidence upon questions submitted to its revisal by the record, it ought not to receive any evidence but that of the record itself to prove what questions were in fact tried in the court below.

The reference to 1 Rob., 263, is an error.

The reference to 3 Grat., 468, is an error.

In the case of *Fairfax vs. Fairfax (Executors)*, 7 Grat., 36, decided May 11, 1850, it was held: To the judgment of a county court refusing to permit a person named as executor in a will to qualify as such without giving security, an appeal demandable as of right lies to the circuit court.

In the case of *Seuiter vs. Pugh*, 9 Grat., 260, decided August 24, 1852, it was held: An appeal to the circuit court is demandable as of right from an order of the county court discontinuing a public road.

In the case of *Jeter vs. Board et als.*, 27 Grat., 910, decided December 7, 1876, it was held: There may be an appeal as of right from an interlocutory order of a county court in a controversy concerning the establishment of a road.

In the case of *Neale vs. Farinholt*, 79 Va., 54, decided April

24, 1884, it was held: Judgments of courts of competent jurisdiction are always presumed to be right until contrary is shown; and in appellate court one alleging error in court below must show it in the record in the regular way, else the presumption of correctness must prevail.

Where petition of privilege to erect wharf, etc., is contested and dismissed by the county court, petitioner may appeal as of right and give bond during the term. Then the petition is heard *de novo* on extrinsic testimony in the circuit court. But if petitioner obtains writ of error, judgment of county court must be reviewed on the record; and if there has been taken to the rulings of the court below no bills of exceptions spreading the evidence and points decided on the record, the judgment will be presumed to be right, and will be affirmed. And so in this court *quod* judgment of circuit court, except that appeals to the former from the latter are always appeals for errors which must appear in the record. But when petitioner goes to circuit court on writ of error, and circuit court hearing petition on extrinsic evidence reverses judgment of county court, and grants the prayer of the petition, and the case comes to this court without exceptions, spreading the evidence and points decided on the record, and no error appears in the record of the county court, this court will reverse the judgment of the circuit court and affirm that of the county court.

In the case of *Leighton vs. Maury*, 76 Va., 865.

Construction of Statutes.—Liquor Licenses.—County Courts. The object of the statute, Acts 1879-'80, p. 148, was to depart from the former laws on the subject of licenses to sell ardent spirits, as construed by this court in *Yeager's* case, 11 Grat., 655, where it was held that the county courts had unlimited discretion on the subject, and that their decisions were not liable to review by any appellate tribunal. The present statute is mandatory, and the right of appeal is to the circuit court, where it is heard *de novo*.

In the case of *Ailstock vs. Page et als.*, 77 Va., 386, decided April 19, 1883. The purpose of the legislature in framing the act of March 3, 1880, was to require the county courts to grant a license to sell liquor to every applicant who brought his case within the requirements of the law. The purpose and effect of the change by the legislature by its act of March 6, 1882, of the word "shall" to the word "may," was to conform the act of March 3, 1880, so amended, to the law in this respect, when the case of *French vs. Noel*, 22 Grat., 454, was decided, and to so leave it discretionary with county courts to grant or refuse such licenses. This, however, is a sound legal discretion, subject to the appeal specifically allowed by the statute to the applicant.

Before these acts of 1880 and 1882, there was from the de-

cisions of county courts granting or refusing licenses to sell liquor, under *Yeager's* case, 11 Grat., 655, and *French vs. Noel*, *supra*, no appeal allowed either applicant or contestant. Those acts give to the applicant an appeal to the circuit court only. The failure to give the appeal to others must be construed as conclusive evidence of a purpose to withhold the right of appeal from all but the applicant, and the contestant has no appeal whatever. So far as this court in *Leighton's* case reached a different conclusion on the question of the right of appeal from judgments of county courts on applications for license to sell liquor, its decision is overruled.

A. applied to a county court of R. for license to sell, by retail, liquor at G. P. opposed. By the evidence the court was fully satisfied that A. brought this case within the requirements of the law, and granted the license. P. excepted. The court certified the evidence. P. obtained from the circuit judge a writ of error and *supersedeas*. On petition of A. to this court for a writ of prohibition to the circuit court, held: The circuit court has no jurisdiction to award a writ of error and *supersedeas* in this case. The writ of prohibition must be awarded so that the judgment of the county court will remain as if no writ of error and *supersedeas* had been awarded.

Ex parte Lester, 77 Va., 663, decided September 20, 1883. Act of March 6, 1882, amending act of March 3, 1880, and substituting "may" for "shall," was not designed to remit applications to sell liquor to the court's arbitrary discretion. The words "may grant the license" mean the court must grant it in a proper case.

Where statute declares a court may do a judicial act, the word "may" must be construed as mandatory when a proper occasion for doing the act arises. To applicant denied liquor license by the act of March 6, 1882, there is given an appeal of right to the circuit court. Under Code 1873, Chapter 178, Section 2, he may, upon the bill of exceptions taken at the trial, apply to the circuit court for a writ of error and *supersedeas*. Of his two remedies he may resort to either, and if the circuit court also erroneously refuse the license, its decision is reviewable by the court upon appeal or writ of error and *supersedeas* as in other cases. The applicant is a party directly interested in the decision refusing the license, and comes within the letter of Code 1873, Chapter 178, Section 2. Not so with contestant.

Ex parte Yeager, 11 Grat., 655, was founded on the law of 1849, which gave county courts arbitrary discretion as to liquor licenses; *French vs. Noel*, 22 Grat., 454, on law of 1870, was based on the same ground; *Leighton vs. Maury*, 76 Va., 865, on the law of 1880, construing the law as giving those courts a legal discretion, reviewable upon appeal or error upon petition

of either applicant or contestant; *Ailstock vs. Page*, ante, p. 386, on law of 1880, amended by act of March 6, 1882, overrules *Leighton vs. Maury*, so far as latter allows right of appeal or error to the contestant, but decides nothing concerning the applicant.

L. applied to county court of M. for license to sell liquor. The court certified that the applicant proved that he was a fit person, and that his place of business was suitable. L. applied to the circuit court for a writ of error. He denied the writ of error, and endorsed the petition as follows: "The words of the statute (1882) only apply to an applicant, and only allow him right of appeal during the term at which the refusal to allow his application is entered. I therefore decline to grant as asked for in the petition." Held (by a majority of the court):

1. The applicant brought himself within the requirements of the law, and was entitled to the license applied for.

2. The right of appeal upon errors to the circuit court was not taken away by the statute, and the applicant was entitled, upon the facts manifested by the record, to have the judgment refusing him the license reviewed and reversed by the circuit court. Held (by Lewis, P., and Hinton, J): From the judgment of the county court refusing license under the act of March 3, 1880, amended by the act of March 6, 1882, the applicant is entitled, during the term at which the refusal is entered, to take an appeal of right to the circuit court, and no further, and such appeal is his only remedy.

In *Haddox vs. County of Clarke*, 79 Va., 677, the above cases were affirmed and approved.

SECTION 3454.

In the case of *Lomax vs. Picot*, 2 Rand., 247, decided February 7, 1824, it was held: An appeal will lie from an order of the chancellor overruling a motion to dissolve an injunction, when the motion has been overruled, on the ground that the plaintiff in equity is entitled to relief on the merits, and fixing the principle on which the cause depends, or where it is necessary to avoid expense or delay.

In the case of *Talley vs. Tyree*, 2 Rob., 500, decided November, 1843, it was held: An appeal lies to the court of appeals from an order of a circuit court overruling a motion to dissolve an injunction which was improvidently granted.

In the case of *Reed vs. Cline's Heirs*, 9 Grat., 136, decided August 2, 1852, it was held: There may be an appeal from a decree directing an issue, when the decree impliedly involves a settlement of the principles of the cause.

In the case of *Baltimore & Ohio Railroad Company vs. City of Wheeling*, 13 Grat., 40, decided November 23, 1855, it was held: A proceeding for a contempt in disobeying an injunction

is not an order in the cause, but is in the nature of a criminal proceeding, and the judgment in such a proceeding can only be reviewed by a superior tribunal by writ of error, and not always in that way.

An order overruling a motion to dissolve an injunction may be appealed from if the principles of the cause are thereby adjudicated, and this though such an order is made in vacation.

The court, for good cause shown, may overrule a motion to dissolve an injunction and continue it to the hearing, without adjudicating the principles of the cause; in which case no appeal will lie from the order. When the principles of the cause are adjudicated by such order, an appeal may be refused if the court or judge to whom the petition of appeal is presented deems it most proper that the cause should be proceeded in farther in the court below before an appeal is allowed therein; and if, in such case, an appeal is allowed, it may be dismissed as prematurely allowed.

In a case which is purely an injunction cause, the parties having had time to prepare the case, and having taken testimony to support their respective pretensions, and it not being probable that any other facts can be brought into the cause which will affect its principles, a motion was made in vacation to dissolve the injunction, on the ground that it was improvidently awarded, and upon the cause as it then stood. The hearing of the motion was objected to,

1. Because a foreign corporation, which was a party, had not answered.

2. Because exceptions had been filed to the sufficiency of the answer of the defendants which were still pending and undetermined.

3. Because the answer of the defendant, a corporation, was not verified by affidavit.

The judge heard the motion, but refused to dissolve the injunction, and continued it until further order or decree. Held: The refusal of the judge to dissolve the injunction adjudicated the principles of the cause to the extent that the injunction had not been improvidently awarded, and that the cause as it then stood ought to be continued. It is, therefore, such an order as may be appealed from, and it is a proper case for appeal at once.

In the case of *Richmond & York River Railroad Company vs. Wicker*, 13 Grat., 375, decided May 24, 1856, it was held: An appeal may be taken from an order made in vacation, overruling a motion to dissolve an injunction, when the principles of the cause are thereby adjudicated.

In the case of *Gooet's Administratrix vs. Bradford*, 28 Grat., 609, decided May 1, 1877, it was held: A decree which over-

rules certain exceptions to a commissioner's report, and confirms the report as to the questions involved in these exceptions, is a decree settling the principles of the cause as to these questions, from which the party excepting may appeal, although the report is recommitted to the commissioner as to other matters involved in other exceptions.

In the case of *Elder's Executors et als. vs. Harris et als.*, 75 Va., 68, decided December 2, 1880. The court of appeals has no jurisdiction to entertain an appeal from an interlocutory decree, except as it is given by the statute.

In a pending cause a commissioner is directed to take an account of certain personal property and rents of lands, the report is returned and excepted to, and the court without deciding upon any question upon the report directs a jury to try an issue of fact as to what was the value of the personal property. Held: The decree decides no principle in the cause, and an appeal allowed from it will be dismissed as improvidently awarded.

In the case of *Kahn vs. Kerngood*, 80 Va., 342, decided March 19, 1885, it was held: From an order overruling an injunction and adjudicating the principles of the cause, an appeal lies.

Where a deed conveys property alleged therein to be worth over five hundred dollars, and is assailed as fraudulent by a creditor whose debt is less than five hundred dollars as between the grantee and the assailing creditor, the matter in controversy is the value of the property, and not the amount of the debt; and in the absence of proof to the contrary the alleged must be deemed the actual value of the property.

When on bill and answer denying all equity in the bill there is a motion to dissolve an injunction, it is customary to dissolve, but for good cause the motion may be overruled and the injunction continued until the hearing, without any adjudication of the principles of the cause.

In the case of *Wells vs. Jackson*, 3 Munf., 458, decided March 26, 1814, it was held: The plaintiff cannot appeal from a judgment in favor of all the defendants except one in a joint action of trespass, until the suit has been abated, dismissed, or decided as to that one.

In the case of *Cowling vs. The Justices of Nansemond County*, 6 Rand., 349, decided May, 1828, it was held: Though a judgment of a superior court of law, reversing a judgment of a county court, and directing other pleadings in the cause, be interlocutory in its character, yet the finality of the judgment in the county court imparts its character to the judgment of the superior court, so as to authorize an appeal to the court of appeals.

In the case of *Juney vs. Blake's Administrator*, 8 Leigh, 88, decided February, 1837. On a *supersedeas* to a judgment of a

county court, the circuit court reverses the judgment with costs, but omits to give such judgment as the county court ought to have given, and retains the cause. Held: This judgment of the circuit court is to be regarded as its final judgment in its appellate character, and a *supersedeas* will lie thereto from the court of appeals.

In the case of *Priddy & Taylor vs. Hartsook*, 81 Va., 67, decided October 8, 1885, it was held: A rule in action at law requiring plaintiff to elect by the next term whether he will proceed at law or in chancery is not a final judgment, and this court has not jurisdiction to review it.

In the case of *Tucker et als. vs. Sandidge (Curator)*, 82 Va., 532, decided November 11, 1886. In a proceeding at law to contest writing propounded by the executor, S., for probate, a jury was impaneled to ascertain whether the paper-writing was the last will and testament of T. The verdict was that it was not. On motion of the propounder, the verdict was set aside and a new trial awarded. Contestants appealed. Held: The appeal was improvidently awarded and must be dismissed, and the case remanded for trial and final order.

This is the case cited from 11 Va. Law Journal, 107.

In the case of *Cocke's Administrator vs. Gilpin*, 1 Rob., 20 (2d edition, p. 22.)

Question whether a decree was final or interlocutory. Per Baldwin, J. Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded not as final, but interlocutory.

The opinion of the Supreme Court of the United States in *Ray vs. Law*, 3 Cranch, 179, that a decree for a sale under a mortgage is a final decree, disapproved.

In the case of *Furneyhough vs. Dickerson*, 2 Rob., 582, decided December, 1843. An executorial account being settled by commissioners under an order of the court of probate, some of the legatees file exceptions to the account, and the court overrules the same, orders the account to be recorded, and adjudges the exceptors to pay the executor's costs. Held: This is a final proceeding or order within the meaning of the statute, to which, on the petition of the exceptors, a *supersedeas* may be awarded.

In the case of *Ambrouse's Heirs vs. Keller*, 22 Grat., 769, decided October 28, 1769, it was held, p. 774: An appeal from a decree of the court refusing to allow the bill of review to be filed, if the decree was final, brings up for consideration the correctness of the first decree, and if the first decree was interlocutory, brings up the whole case.

If the petition for an appeal is presented within the period for the limitations of appeals, it is sufficient.

In the case of *Ryan's Administrators vs. McLeod et als.*, 32 Grat., 367, decided November 20, 1879, it was held, pp. 376-381: A decree cannot be in part final, and in part interlocutory, in the same cause, for and against the same parties who remain in court.

Whenever a partial relief is contemplated, if anything remains to be done by the court to make the relief effectual, the decree is interlocutory. When no further action is required the decree is final.

In the case of *Rawling's Executors et als. vs. Rawling et als.*, 75 Va., 76, decided December 9, 1880, it was held, pp. 87-88: In a suit for the administration of an estate, a decree which settles the principles of the case and distributes the whole property to the parties entitled, and directs the payment of the costs, leaving nothing to be done in the cause, is a final decree, though it may possibly become necessary to resort to measures to enforce it.

On a bill to review a decree on the ground of error in law, the errors must be such as appear on the face of the decrees, orders, and proceedings in the cause, arising on facts either admitted by the pleadings or stated as facts in the decrees. But if the errors be errors of judgment in the determination of facts, such errors can be corrected only by appeal.

In this case, held: The decree was a final decree, and the errors sought to be corrected were not errors of law apparent in the decree, but errors, if errors, of judgment on the determination of fact on which the decrees complained of are based. If the decree in this case was interlocutory, and the bill treated as a petition for a rehearing, after the long acquiescence by the parties in the decrees settling the questions in the cause, and all the circumstances of the case, the rehearing should not be granted.

In the case of *Jones vs. Turner*, 81 Va., 709, decided February 14, 1886. A decree in these words: "The plaintiff failing to prosecute his suit, it is ordered that the same be dismissed," is a final decree. It can only be set aside by appeal, or by bill of review, within the periods limited by statute.

In the case of *Bransford (Treasurer) vs. Karn & Hickson*, 87 Va., 242, decided December 11, 1890, it was held: No writ of error lies where judgment is entered upon agreement that judgment be entered in accordance with the result of another case.

In the case of *Ludlow vs. City of Norfolk*, 87 Va., 319, decided January 16, 1891, it was held: There must be a degree of finality about every judgment taken up to be reviewed by appellate courts. A judgment appointing commissioners to fix a just compensation for land proposed to be taken in condemnation proceedings is not final and appealable.

In the case of *Shannon vs. Hanks*, 88 Va., 338, decided July 23, 1891, it was held: Under this section an appeal lies to a decree appointing a receiver, whereby a change in possession or control of the property is acquired, though made in vacation.

In the case of *Norris vs. Lake et als.*, 89 Va., 513, decided January 5, 1893, it was held: Where a decree decides that the deed attacked by the bill as fraudulent *per se* is not so, thus overruling one of the grounds on which relief is prayed for in the bill, it adjudicates, to a certain extent, the principles of the cause, and is, therefore, an appealable order.

SECTION 3455.

In the case of *The Commonwealth vs. Moore's Administrators*, 1 Grat., 294, decided December, 1844, it was held: The statute which limits the right of appeal to the court of appeals to five years applies to the Commonwealth.

In the case of *McIntosh (Treasurer) vs. Braden et als.*, 80 Va., 217, decided February 5, 1885, it was held, p. 222: Act of March 12, 1884, is unconstitutional as far as it confers upon this court jurisdiction in all cases of coupons arising under act of January 14, 1882, without regard to the amount in controversy, being in conflict with Article 6 of State constitution, fixing minimum jurisdictional amount in cases purely pecuniary at five hundred dollars.

See the references to Section 2720.

In the case of *Carter's Administrators vs. Kelly (Judge)*, 28 Grat., 787, decided August 2, 1877, it was held: Where a warrant is brought before a justice upon a claim exceeding twenty dollars, and upon the application of the defendant before trial it is removed to the county court, an appeal lies to the circuit court from the judgment of the county court in the case.

In the case of *Clark vs. Brown*, 8 Grat., 549, decided April, 1852, it was held: In an action on a case for an injury done to the plaintiff's land by the mill-dam of the defendant, though the freehold or franchise was drawn in question, yet if the damages found by the jury are under two hundred dollars, the court of appeals has no jurisdiction of the case.

In the case of *Snoddy vs. Haskins*, 12 Grat., 363, decided May 14, 1855, it was held: The execution is for less than five hundred dollars, but the slave is allotted to the widow at a valuation above that sum, she having obtained an injunction to the sale under the execution, which is afterwards dissolved. *Quere*: If the supreme court of appeals has jurisdiction in the case?

In the case of *Umbarger and Wife et als. vs. Watts et als.*, 25 Grat., 167, decided June, 1874, it was held: A judgment-creditor brings a suit in equity to subject his debtor's land to satisfy his judgment, and other judgment-creditors of the same debtor

come into the cause by their petitions to subject the same land. None of these judgments amount to five hundred dollars. Upon a decree against them, dismissing the bill, the court of appeals has no jurisdiction to allow or hear an appeal from the decree, either on the ground that the united judgments amount to more than five hundred dollars, or that the suit concerns the titles or bounds of land. In such a case the decree is to be considered as several as to each creditor.

The matter in controversy in reference to the appellate jurisdiction of the court of appeals, is that which is the essence and substance of the judgment, and by which the party may discharge himself.

In the case of *Gage vs. Crockett*, 27 Grat., 735, decided September 21, 1876, it was held: To give the court of appeals jurisdiction of a cause, except in certain cases specified, the judgment or decree must amount to five hundred dollars, principal and interest, at the date of the judgment or decree, except where the claim of the plaintiff is more than that amount and he applies for the appeal.

In the case of *Stuart vs. Valley R. R. Co.*, 32 Grat., 146, decided September, 1879. S. denies that he was a stockholder in the company, and the controversy involved the validity of his subscription for the whole of said five shares, which was five hundred dollars. Held: That though the judgment against S. for the three hundred dollars and interest was less than five hundred dollars, yet the subject in controversy was the validity of the subscription for the five shares, and the court of appeals has jurisdiction to hear the case upon appeal.

In the case of *Campbell vs. Smith*, 32 Grat., 288, decided September, 1879. S. moved the court below to quash an execution issued against his effects on a judgment recovered against him by C., on the ground that he had paid it. The court allowed a credit on the execution to the amount of four hundred and twenty dollars, and from this judgment C. obtained an appeal to this court. On the motion of S. to dismiss the appeal on the ground that the matter in controversy was not as much as five hundred dollars. Held: That the appeal being by C., it is not the amount of the execution, but the amount of the credit which is the matter in controversy, and this court does not have jurisdiction of the case, and the appeal is dismissed.

In the case of *Harman vs. City of Lynchburg*, 33 Grat., 37, decided March, 1880, it was held: The term "matter in controversy" as used in reference to the jurisdiction of the court of appeals, in Section 2, Article 6, of the Virginia Constitution, means the "subject of litigation, the matter for which suit is brought and upon which issue is joined."

When a plaintiff seeks a revision of the judgment below, if

he claims in his declaration money or property of the value of not less than five hundred dollars, the court of appeals has jurisdiction, although the judgment may be for less, or for the defendant. But where the revision is sought by the defendant, the amount of value of the judgment at its date determines the jurisdiction. The *onus* is upon the party seeking the revision to establish the jurisdiction of the appellate court.

In the case of *Fink, Brother & Co. vs. Denny et als.*, 75 Va., 663, decided September, 1881, it was held: Every *post-nuptial* settlement, when the settler is indebted, is, against his creditors, fraudulent and void; and every settlement will be taken to be voluntary, unless those claiming under it can show that it was made for valuable consideration.

In such a case when a bill charges that a deed was voluntary and fraudulent, the answer of husband and wife denying the fraud and setting up the defence of valuable consideration, is not evidence for the respondents, but the defence must be established by proof.

In the case of *Batchelder & Collins vs. Richardson*, 75 Va., 835, decided November, 1881, it was held: Where on a money demand the difference between the amount decreed to the appellant in the court below and the amount of the claim asserted by him in that court is not sufficient to give this court jurisdiction, his appeal will be dismissed. And if the actual amount in dispute does not otherwise appear, the court will look to the whole record for the purpose of determining the jurisdiction.

In the case of *Southern Fertilizing Co. vs. Nelson*, 6 Va. Law Journal, 162, decided March, 1882, it was held: The *onus* of showing that the appellate court has jurisdiction of a case is always on the appellant or plaintiff in error.

Several creditors were seeking to enforce their executions against property which was adjudged in the circuit court not to belong to the judgment-debtor. One of these creditors obtained a writ of error to this judgment, but the record, although showing that the aggregate amount of the several executions levied on the property and held by different plaintiffs were more in amount, exclusive of costs, than five hundred dollars, and also that the property levied on and claimed to be liable to the levy, was of greater value than five hundred dollars, yet it did not show that the amount of the execution of the plaintiff in error was five hundred dollars exclusive of costs. Held: The court has no jurisdiction, and the writ of error must be dismissed as having been improvidently awarded.

The property levied on does not constitute the "matter in controversy" so as to give the court jurisdiction in the case.

In the case of *Atkinson (Trustee) vs. McCormick (Trustee) et als.*, 76 Va., 791.

1. Appeals.—If a bill be erroneously dismissed as insufficient in law, a party aggrieved thereby may, though a defendant in form, appeal from the decree of dismissal.

2. *Idem*.—A trustee in an assignment for the benefit of creditors, as a representative of the whole fund, may appeal if aggrieved thereby, though none of the debts secured separately amount to five hundred dollars.

In the case of *Buckner vs. Metz et als.*, 77 Va., 107, decided February 1, 1883. B. has judgment against M. for \$1,689.99. M. has only one tract of land, containing eighteen and a quarter acres, and worth \$91.25. After the judgment M. makes his deed, setting apart his land as his homestead. The bond whereon the judgment was founded, contained no waiver of the homestead, and was not for the price of this land. Court below dismissed this bill. On appeal, held:

1. To give this court jurisdiction of the case under Constitution, Article 6, Section 2, "the matter in controversy—that for which the suit is brought"—the subject of the litigation, and upon which the issue is joined, must either be of the value of five hundred dollars, exclusive of costs, or concerning the title of boundaries of land.

2. Here the suit was brought to enforce the lien of the judgment upon the eighteen and a quarter acres owned by M. at the recovery of the judgment, but subsequently conveyed to P. The whole aim, object, and scope of the suit is the value of the land, by payment whereof P. may discharge the land from the judgment. Its value ascertained by the proceedings in the cause is less than five hundred dollars.

3. The matter in controversy, as concerns the appellate jurisdiction of this court, is the value of the land, and that being less than five hundred dollars, this court has no jurisdiction.

4. This is not a suit for the land, and no such controversy "concerning the title or boundaries of land" as would give this court jurisdiction can arise.

In the case of *Breeding vs. Davis et als.*, 77 Va., 639 and 651, decided July 26, 1883. On the 11th of April, 1877, there descended on E., wife of C., real estate in fee. Issue had been born alive of their marriage. D., a creditor of C., who was a non-resident, levied an attachment on C.'s interest in that real estate, and sale thereof was decreed to pay a debt of less than five hundred dollars in amount. Before sale, C. and wife conveyed the real estate to B., who conveyed same with general warranty and covenant to quiet title, purchase-money withheld until its performance, to M.; B. obtained an injunction to the sale. Held: The controversy is not concerning the debt of C. to D. The question is, "Where is the title to E.'s land vested?" The title to her land is the issue. The jurisdiction to this court is undoubted.

In the case of *Updike's Administrator vs. Lane*, 78 Va., 132, decided December 6, 1883, it was held: Where for debt of decedent there is no decree *in solido* against his personal representatives, but severally against each distributee for his proportion of the debt which exceeds five hundred dollars, substantially it is a decree against the decedent's estate, and as it exceeds in the aggregate the minimum jurisdictional sum, an appeal lies from the decree in behalf of the distributees.

In the case of *Peters & Reed vs. Mc Williams et als.*, 78 Va., 567, decided February 7, 1884, it was held: Where the amount in controversy exceeds the minimum jurisdictional sum, this court has jurisdiction, though the judgment complained of be not in form *in solido* for that amount, but be divided into lesser sums payable to the persons respectively entitled thereto. In form the judgment is several. In substance it is *in solido*.

In the case of *Cox vs. Carr et als.*, 79 Va., 28, decided April 3, 1884, it was held, p. 54: When jurisdiction depends upon the amount in controversy, if plaintiff in his declaration or bill claims money or property of greater value than five hundred dollars, he is entitled to his appeal or writ of error, though judgment be for less.

Yet if the claim is merely colorable in order to give the court jurisdiction, and that was made to appear, jurisdiction would be declined, for jurisdiction can no more be conferred than it can be taken away by improper devices of parties.

Sum claimed in bill, with interest at date of final decree, excluding costs, exceeds five hundred dollars, and nothing appears to show that the sum claimed was fixed with the view of acquiring jurisdiction in this court. Held: The court has jurisdiction of the appeal.

In the case of *McCrowell vs. Burson*, 79 Va., 290, decided August 7, 1884, it was held: To give this court jurisdiction, save in certain cases, the judgment must amount to five hundred dollars, principal and interest, at its date, except when plaintiff's demand exceeds that sum, and he applies for the appeal.

Though plaintiff's claim, except a sum less than five hundred dollars, be admitted by defendant in an agreed statement of facts, and the sum so admitted may determine the jurisdiction of this court, yet such is not the case where a special verdict finds plaintiff's claim to be less than five hundred dollars, whether court below renders judgment for plaintiff for the sum found by the verdict, or for the defendant.

In the case of *Smith et ux. vs. Rosenheim*, 79 Va., 540, decided October 7, 1884, it was held: The test of jurisdiction in this court to entertain an appeal from a decree of the court below enforcing on land the lien of a judgment, is the amount or value of the judgments. If such amount or value fall below five hun-

dred dollars this court has no jurisdiction to review such decree.

As respects jurisdiction, the case is not altered by the fact that in the progress of the cause in the court below a claim of homestead in the land was asserted by the defendant.

For 80 Va., 217, see *supra*, this Section.

For 80 Va., 342, see *ante*, Section 3454.

In the case of *Duffy & Bolton vs. Figgat*, 80 Va., 664, decided September 17, 1885, it was held: If plaintiff's claim exceed five hundred dollars, and he apply for appeal, this court hath jurisdiction, though the judgment or decree be less. But if the judgment or decree be for less than five hundred dollars, principal and interest, at the date of the decree, and the defendant apply for appeal, this court hath not jurisdiction.

Where purchasers at judicial sale are compelled to pay a second time a part of purchase-money by means of the special commissioner's failure to give required bond, and his default in paying over money collected of them, the jurisdiction of this court to hear their appeal depends on the amount of the defalcation, and not on the amount of his official bond.

In the case of *Whitmer's Heirs vs. Spitzer et als.*, 81 Va., 64, decided October 8, 1885. A decree requiring S. to pay nine hundred and seventy-five dollars to equalize the four other heirs with his wife, he paid the money. Later, an inquiry resulted in a decree that the wife of S. was entitled to an equal share of that sum, and that the four other heirs refund to S. one-fifth thereof. Held: This is a decree for payment of a less sum of money than constitutes the minimum jurisdictional amount, and the appeal must be dismissed.

In the case of *Cralle vs. Cralle*, 81 Va., 773, decided April 25, 1886. Pending an appeal from decree to which a *supersedeas* has been issued, and perfected by bond, the only orders the court below can make in the suit are such as are needed to preserve the *rem* in litigation.

Code 1873, Chapter 105, Section 10, authorizes trial court pending the suit to compel the man to pay the sum necessary to maintain the woman and enable her to carry on the suit; yet it does not justify it to make any order for such purpose, pending appeal here from decree rendered in same suit for alimony.

Pending a divorce suit, trial court decreed alimony to the woman. From the decree appeal was taken and a *supersedeas* awarded. Pending the appeal trial court decreed to the woman an allowance of one hundred and fifty dollars to enable her to defend the suit in this court, and twenty-five dollars a month for her maintenance during the pendency of the suit. On appeal from last decree. Held:

1. The court below was authorized to make the decree last appealed from.

2. The amount decreed, however, being less than the minimum jurisdictional sum, the appeal must be dismissed.

3. The appellant's remedy is by writ of prohibition from this court to the execution of the decree.

In the case of *McCarthy & Hurlburt vs. Hamaker et als.*, 82 Va., 471, decided October 7, 1886, it was held: Where appellant's debt, as claimed in his bill and as allowed by the master and confirmed by the court, is less than the minimum of appellate jurisdiction, that debt cannot be supplemented so as to give this court jurisdiction by the appellant's taking an assignment of another debt, unless the assignment was recognized by the master in his report, and by the court in its decree confirming the same.

In the case of *Thompson vs. Adams*, 82 Va., 672, decided December 9, 1886, it was held: Where several judgment-creditors with judgments each below five hundred dollars unite in one suit to enforce their liens on the judgment-debtor's lands, and their bill is dismissed by the court below, this court has no jurisdiction to entertain their appeal. That the land has been conveyed away by a deed alleged to be fraudulent makes no difference as to the appellate jurisdiction.

This is the case cited from 11 Virginia Law Journal, 217.

In the case of *Witz vs. Osburn and Wife*, 83 Va., 227, decided April, 1887, it was held: Where the claims of all the appellants but one are below the appellate jurisdiction, but the questions as to all are identical and their interests inseverable, this court will retain the appeal for all.

This is the case cited from 11 Virginia Law Journal, 585.

In the case of *Cabell & McGuire vs. Southern Mutual Insurance Company*, 10 Va. Law Journal, 729, decided May 6, 1886. The Southern Mutual Insurance Company conveyed to C. & McG. all its assets in trust for its creditors, and the trustees brought suit against the company and its mutual policy-holders, asking that assessments be made upon the "deposit notes" of the policy-holders to pay the creditors; the several claims against the numerous defendants were less than five hundred dollars, but the aggregate of the claims of the plaintiffs exceeded that sum. Held: The aggregate of all the claims is the plaintiffs' demand against all the defendants; it is the matter in controversy, and this court has jurisdiction upon appeal by the plaintiffs. The trustee represents the insured creditors, whose debt exceeds the jurisdictional sum, and upon this ground also the court has jurisdiction.

In the case of *Acker vs. A. & F. R. R. Co.*, 84 Va., 648, decided March 22, 1888, it was held: Excluding the three days the court held the petition and record before granting the writ of error, a *supersedeas* bond given within one year from the date of the judgment is in time.

In the case of *Walters Sons vs. Chichester*, 84 Va., 723, decided April 12, 1888. A creditor, whose claim was less than five hundred dollars, filed bill to annul trust deed. Other creditors whose separate claims exceeded that sum, subsequently filed in the clerk's office petitions, without leave of court and notice to grantor, asking to be made parties. Decree dismissed the bill without noticing petitions. Held: The petitioners were not parties below, and cannot be so regarded here, and the appeal must be dismissed for want of jurisdiction.

In the case of *Barker vs. Jenkins*, 84 Va., 895, decided May 10, 1888, it was held: An appeal lies to a decree allowing a widow a homestead for her lifetime in the realty of her deceased husband, though the appellant's interest therein be less than the minimum jurisdictional amount, as the controversy concerns the title to land.

In the case of *Hawkins vs. Gresham*, 85 Va., 34, decided May 10, 1888, it was held: Jurisdiction as to appeals in matters merely pecuniary being constitutionally limited to five hundred dollars, the amount is determined by the amount of the plaintiff's claim, or by the amount to be paid by the defendant to discharge himself, as the one or the other may be the appellant.

In suits to set aside fraudulent deeds and to subject the property therein to satisfy a debt, it is the amount of the debt, and not the value of the property which determines the appellate jurisdiction.

Where, in original suit against decedent's estate, creditor's claim exceeded five hundred dollars, but, when amount in administrator's hands was ascertained, creditor's share thereof fell below that sum, administrator defaulted, and creditor filed an amended bill against administrator's sureties, seeking to recover of them his said share; upon plea of statute of limitations the amended bill was dismissed. Held: No appeal to this court lies to said decree.

In the case of *Cook vs. Bondurant*, 85 Va., 47, decided May 17, 1888, it was held: Where the decree is for less than five hundred dollars, including interest, the appeal must be dismissed for want of jurisdiction, though the decree provides that certain lands be sold unless the debt be paid within a named period.

In the case of *Jordan vs. Cunningham*, 85 Va., 418, decided September 20, 1888, it was held: By this section it matters not whether decree of refusal is to filing or to granting prayer of a bill of review to final decree rendered more than twelve months before, petitions from such decree of refusal must be presented within six months from date of refusal.

In the case of *Board of Supervisors vs. Catlett's Executors*, 86 Va., 158, decided June 13, 1889, it was held: A suit as to the right of a board of supervisors to levy a tax to pay a claim concerns a franchise, and this court has jurisdiction.

In the case of *Lancaster vs. Lancaster*, 86 Va., 201, decided June 20, 1889, it was held: An order adjudicating the principles of a cause is one which so far determines the rules or methods by which the rights of the parties are to be finally worked out; that is only necessary to apply these rules to the facts of the case in order to ascertain the relative rights of the parties with regard to the subject-matter of the suit.

In the case of *Turner's Administrator vs. Staples et als.*, 86 Va., 300, decided September 12, 1889, it was held: Decree of this court upon a question decided by the court below is final and irreversible; and upon second appeal in the cause a question decided upon first appeal cannot be reversed, being *res judicata*.

In the case of *Yates's Administrator et als. vs. Wilson*, 86 Va., 625, decided March 6, 1890, it was held: When a decree makes an end of a case and decides the whole matter in contest, and leaves nothing to be done by the court in the case, it is final.

In the case of *Richmond, Fredericksburg & Potomac Railroad Company vs. Knopffs*, 86 Va., 981, decided June 19, 1890, it was held: Where the amount allowed for compensation for land taken is less than five hundred dollars, this court hath not jurisdiction to review the judgment of the court below.

In the case of *Bransford (Treasurer) vs. Karn & Hickson*, 87 Va., 242, decided December 11, 1890, it was held: Where the constitutionality of no statute is called in question, the judgment of the corporation court upon an appeal from the decision of a justice is final in a case to recover back money paid for taxes under protest after tender and refusal of coupons.

In the case of *Prince George County vs. A., M. & O. R. R. Co.*, 87 Va., 283, decided January 8, 1891, it was held: Where right of county to levy taxes is involved, this court hath, under Virginia Constitution, Article 6, this section, jurisdiction of an appeal in an action to recover a tax of less than five hundred dollars illegally collected.

In the case of *Harper vs. Vaughan*, 87 Va., 426, decided February 5, 1891, it was held: Appeal lies from interlocutory decree adjudicating the principle of the case, but the final decree may be waited and the appeal is in time.

In the case of *Sellers (Executor) vs. Reed*, 88 Va., 377, decided November 5, 1891, it was held: A trust deed to secure a debt less than five hundred dollars having been executed on an interest under a will by a legatee, who dies before the youngest child reached seventeen (the period of partial distribution), the question in the court below was, whether his interest was a vested interest going to his administrator, or a contingent interest lapsing at his death. The court of appeals has jurisdiction.

tion of the appeal, as the controversy concerns the title to land.

In the case of *Pannill vs. Coles*, 81 Va., 380, decided January 21, 1886, it was held: State Constitution, Article 6, Section 2, gives this court appellate jurisdiction in controversies concerning the title of boundaries of land, whatever the amount and whatever the element of title involved in the controversy, and, consequently, such jurisdiction extends to cases of unlawful entry and detainer.

SECTION 3457.

In the case of *Effinger vs. Kenney (Trustee)*, 24 Grat., 116, decided November 26, 1873, it was held, pp. 119-'20: The transcript of the record of the county court, certified by the clerk of that court, was filed with the petition to the circuit court, and that transcript, together with a transcript of the judgment of the circuit court thereon, is certified to this court by the clerk of the circuit court, and is a substantial compliance with the requirements of the statute.

In the case of *Mandeville vs. Perry*, 6 Call, 78 and 83, decided May, 1806, it was held: The record in common law suits consists of: The writ for the purpose of amending by if necessary. The whole pleadings between the parties. Papers of which proffert is made or oyer demanded, and such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at rules or in court until the rendition of judgment, are to be noticed by the court and no others.

In the case of *White vs. Toncray*, 9 Leigh, 347, decided April, 1838, it was held, p. 351: Pleas tendered by a defendant in an action at law, and rejected by the court, are not part of the record, unless made so by bill of exceptions to the rejection of them, or by order of the court that they shall be made so; and a mere memorandum, that when the pleas were rejected, the court declared that the matter thereof might be given in evidence without the pleas being filed, and that this was done at the trial, does not make the rejected pleas part of the record.

If pleas be tendered by a defendant and rejected by the court, and he takes no exception to the rejection of them, he shall be presumed in the appellate court to have acquiesced.

In the case of *Roanoke Land and Improvement Company vs. Karn & Hickson; Same vs. Snead & Winston*, 80 Va., 589, decided June 25, 1885, it was held, p. 591: Nothing not made part of the record by bill of exceptions or by order of the court, can be regarded as such by the appellate court. The clerk can add nothing to the record, and his certificate that a deposition,

or other paper copied by him, was the evidence whereon the judgment was founded, is no part of the record.

In the case of *Blanton vs. Carroll*, 86 Va., 539, decided December 5, 1889, it was held: To appeals from decrees rendered before this section, Code 1887, took effect, requiring notice of intention to appeal to be given opposite party, the section has no application.

In the case of *Mears & Lewis vs. Dexter*, 86 Va., 828, decided April 17, 1890, it was held: This section providing that notice of intention to apply for transcript of record, with a view of applying for an appeal or writ of error. Held: Merely directory, and not a limitation upon the jurisdiction of this court.

SECTION 3458.

In the case of *Poindexter's Executors vs. Green's Executors*, 6 Leigh, 504, decided December, 1835. Report of an account in chancery not excepted to by either party; decree according to the report; on appeal taken, the report is omitted from the record according to the statute of 1825-'26. Held: Either party may call for the report in this court and have it brought up; but if neither party does so, no objections can be considered which the report would be necessary to explain or support.

SECTION 3459.

In the case of *Barksdale vs. Parker's Administrators*, 87 Va., 141, decided December 4, 1890, it was held: This section authorizes selections from the completed record, and not additions after final decision. And deed placed among the papers, without being filed or referred to in the proceeding, becomes no part of the record on appeal by being copied into the transcript by order of the judge under said section.

SECTION 3463.

For the reference to 6 Leigh, 504, see *ante*, Section 3458.

SECTION 3467.

For the reference to 81 Va., 773, see *ante*, Section 3455.

SECTION 3469.

In the case of *Rhea et als. vs. Preston*, 75 Va., 757, decided July 21, 1881, it was held, p. 778: Judgments for money, whether docketed or not, bind the unaliened lands of the debtor; certainly those owned by him at the date of the judgments, and, it may be, those subsequently acquired, in the order in which the judgments are recovered; and the same is true of decrees for money; and so, though not docketed, they bind the debtor's lands subsequently aliened to a purchaser with notice, even though he be a purchaser for value; but unless docketed they

are not liens on lands subsequently aliened to *bona fide* purchasers for value without notice, and a trustee in a deed of trust given to secure a debt, and the creditor secured, are purchasers for value within the meaning of the registration laws.

SECTION 3470.

In the case of *Nelson vs. Anderson*, 2 Call, 286 (2d edition, 242), decided April 16, 1800. M. appealed from a judgment obtained against him by A. in the county court. N. joins M. in the appeal bond; then M. dies, and the appeal abates and is not revived. Held: N. is exonerated.

In the case of *Wilson vs. Wilson's Administrators*, 1 H. & M., 16, decided September 30, 1806, it was held: Executors and administrators having given security for their administration are not to be required to give security on obtaining injunctions, appeals, writs of error, or *supersedeas*.

In the case of *Sadler's Executor and Legatees vs. Green*, 1 H. & M., 26, decided October 13, 1806, it was held: Where executors and legatees jointly appear, the legatees (being in possession of the property in dispute) may be ruled to give security for the prosecution of the appeal.

In the case of *Dunton vs. Robins*, 2 Munf., 341, decided September 30, 1811, it was held: Where a decree is rendered on a matter in which the party appellant is interested in his own right and also as executor, he must give bond and security, before prosecuting the appeal, in a penalty equal to double the amount of such part of the decree as was against him in his own right.

In the case of *Shearman (Administrator, etc.) vs. Christian et als.*, 1 Rand., 393, decided March, 1823, it was held: Where an executor is sued in chancery for a subject which is in part personal to himself and in part touching his executorial character, he ought not to be compelled to give an appeal bond for the latter, as the subject is covered by his official bond.

In the case of *Brown vs. Matthews*, 1 Rand., 462, decided May, 1823, it was held: An appeal is taken from the county court sitting in chancery, and a bond is given, which is, in fact, a *certiorari*, and not an appeal bond. No objection is made to the regularity of the bond in the court of chancery. An appeal is taken to the court of appeals. In that court an objection is made, for the first time, to the bond. The objection comes too late; but if it had been made in the court of chancery, that court could only have dismissed the appeal *nisi*, or have laid the party under a rule to give a proper bond within a reasonable time.

In the case of *Linney's Executor vs. Holliday*, 3 Rand., 1, de-

ecided November, 1824, it was held: An executor can appeal without giving bond and security.

In the case of *Porter's Executor vs. Arnold*, 3 Rand., 479, decided October, 1825, it was held: On an appeal by executors from a decree in favor of distributees or legatees for their proportions of the estate, the executors ought to give bond and security.

In the case of *Epps vs. Thurman*, 4 Rand., 384, decided June, 1826, it was held: When a party has obtained an injunction from the court of chancery to a judgment at law which is afterwards dissolved, and he appeals to the court of appeals, he cannot be required to give security for the amount of the judgment enjoined, but only for such costs as may be awarded against him by the court of appeals.

In the case of *McKay vs. Hite's Executors*, 4 Rand., 564, decided November, 1826, it was held: A party appealing from an order dissolving an injunction can only be required to give security to perform the decree of the inferior court, and to pay the costs and damages awarded in the appellate court if the decree shall be affirmed.

In the case of *Turner vs. Scott*, 5 Rand., 332, decided June, 1827, it was held: A dissolved injunction is revived by an appeal taken by the plaintiff in the court of chancery, and it is improper in the appellee to take out an execution so long as the appeal is depending.

In the case of *Jackson (Administrator) vs. Henderson, etc.*, 3 Leigh, 196, decided November, 1831, it was held: The condition of an appeal bond misrecites the judgment appealed from as being for three thousand nine hundred dollars, when in truth it was for three thousand nine hundred and fifty-seven dollars, but recites the judgment correctly in all other respects. *Quere*: Whether such misrecital renders the appeal bond naught?

In the case of *Pugh's Executor vs. Jones*, 6 Leigh, 299, decided April, 1835, it was held: In an action against an executor, judgment is entered against him personally instead of *de bonis propriis*; though the judgment be plainly erroneous, yet if the executor pray an appeal or *supersedeas*, it can only be allowed him upon his giving an appeal bond with surety.

A *supersedeas* is allowed by this court without requiring a *supersedeas* bond, when one ought to have been required, and the cause is docketed without objection. This is not good cause to dismiss the *supersedeas*, on motion made after a lapse of six years from the time of awarding it.

In the case of *Erskin vs. Henry and Wife et als.*, 6 Leigh, 378, decided April, 1835, it was held: Suit in equity against defendant as executor and in his own right as legatee, and de-

cree against him personally, on appeal allowed him from the decree, an appeal bond with surety shall be required of him. Interlocutory decree directs defendant to deliver up slaves to be divided among plaintiffs, and then final decree against him for the profits; defendant appeals from both decrees. Held: If defendant has complied with the interlocutory decree by delivering the property, he shall not be required to give an appeal bond with surety for delivery thereof in case of affirmance; if he has not so complied with it, such appeal bond shall be required. And upon the question whether defendant has so complied or not, parol evidence, by affidavits, will be received in the appellate court.

In the case of *Amis vs. Koger*, 7 Leigh, 221, decided February, 1836. The judge of a circuit court, in vacation, allows a writ of error to a judgment of a county court; but the writ of error is dismissed at the next term of the circuit court as improvidently allowed, since the judge in vacation had no authority to allow it; then a writ of error is prayed in term time and denied. Held: The writ of error allowed by the judge in vacation was properly dismissed, but as the judgment of the county court was erroneous, it was error in the circuit court not to allow the writ prayed in term time.

In the case of *McClung vs. Beirne*, 10 Leigh, 394 (2d edition, 410), decided July, 1839. A judgment was rendered May 8, 1828, for \$148.63 damages, with interest and costs; on the same day an appeal was allowed. The judgment being affirmed, damages were recovered against the appellant for retarding the execution, and also costs in the appellate court. A *fiery facias* being then issued and returned *nulla bona*, the surety in the appeal bond paid \$362.64 in satisfaction of the judgment, and within a year after the affirmance filed a bill to pay real estate aliened by the debtor between the date of the original judgment or affirmance. Held:

1. The surety is to be substituted in the place of the judgment-creditor, and to have the benefit of his lien.

2. The real estate aliened by the debtor between the date of the original judgment and the date of the judgment and affirmance, whether owned by him at the date of the original judgment or acquired afterwards, is subject to the lien.

3. The lien is not only for the damages, interest and cost recovered by the original judgment, but also for the damages and costs to which the creditor became entitled by the judgment of affirmance.

In the case of *Brown vs. Glascock's Administrator*, 1 Rob., 461 (2d edition, 486). A personal decree against an administrator being recovered by a creditor of the decedent, the administrator appeals, giving an appeal bond with surety; the

decree being affirmed, an arrangement is made between the creditor and the surety in the appeal bond, by which the decree is transferred to the surety, who makes a part of the amount due thereon by execution against the administrator, and then brings an action on the administration bond in the name of the creditor as relator, against the surety therein bound, in which action a judgment is recovered for the balance due on the affirmed decree, being less than the amount of damages incurred by the appeal. Held: The surety in the administration bond has no claim to be substituted to the remedy of the creditor on the appeal bond, and equity will not interfere in his favor by enjoining the judgment.

In the case of *Mulliday vs. Machir's Administrators*, 4 Grat., 1, decided April, 1846, it was held: This court, upon affirming the decree of the court below, which does not bear interest, will give damages at the rate of six per cent. per annum upon the amount of the decree, exclusive of costs, from the time the appeal takes effect until paid.

In the case of *Magill vs. Sauer*, 20 Grat., 540, decided March, 1871, it was held: Upon a decree in favor of an attaching creditor, and an appeal therefrom, the appellant gives an appeal bond. The giving of this bond does not release the attachment.

The act, Code of 1860, Chapter 151, Section 31, has no application to the attachment lien upon the estate of the debtor, whether it be real or personal property, or choses in action. To relieve the property attached, bond is to be given, as required in Section 13 of the act.

In the case of *Cardwell vs. Allen (Trustee)*, 28 Grat., 184, decided March, 1877, it was held: That portion of Section 13, Chapter 178, of the Code of 1873, prescribing the penalty of an appeal and *supersedeas* bond, refers only to the damages mentioned in Section 24 of the same chapter, and was not intended to cover the rents and profits of real estate in possession of the appellant, who had given a deed of trust thereon to secure a debt fully its value, he having obtained an injunction to prevent the sale of such real estate, which injunction was dissolved, and the bill was dismissed; and the penalty of the appeal and *supersedeas* bond will not be fixed with reference to such rents and profits.

The word "awarded" in said Section 13 refers to the words "damages and costs," and the word "incurred" to the word "fees" therein, so as make the meaning the same as if the sentence had been written: "and also to pay all damages and costs which may be awarded against, and all fees which may be incurred by, the appellants or petitioners."

The penalty of the appeal and *supersedeas* bond should be sufficient to indemnify and save harmless the surety in the injunction bond.

In the case of *Harnsberger et als. vs. Yancey et als.*, 33 Grat., 527, decided September, 1880. A decree was rendered against Y., a principal debtor, and M., his surety on one bond; against T., a principal, and W., his surety on another bond; and against said T., principal, and H., his surety on another bond—all given for deferred payments for purchases of land, part by Y. and part by T. An appeal was taken by both principals and sureties from said decree, but the *supersedeas* bonds were executed only by T., one of the principals, and H., one of the sureties. The condition of the bond, as prescribed by the judge awarding the *supersedeas*, was, to pay all “costs and damages according to law, and also any deficiency in the funds arising from the land sales decreed, in meeting and discharging the sums decreed against the parties, respectively, in case the decree complained of be affirmed, or the appeal or *supersedeas* be dismissed.” The condition inserted in the bond by the clerk was, to “pay the judgment,” in addition to that prescribed by the judge. On a suit on the appeal bond, held: The stipulations in the bond to “pay the judgment,” and “also the deficiency” on the resale of the lands, should be regarded as an alternative provision, intended to accomplish one, but the same object, namely, the satisfaction of the decree and the payment of costs and damages according to law. The proceeds of these bonds, when collected, are applicable to the satisfaction of the decree appealed from, as reduced by the resales of the lands apportioned amongst all of the parties against whom the decree was rendered; and H., a surety for T., a principal, now a bankrupt, who joined in the appeal bond, is not only entitled to his proportion of the fund arising from the judgment on the appeal bond, to be credited on the decree against him as such surety, but he and his co-obligors in the bond, who have satisfied the penalty, are entitled to indemnity from Y., one of the principals, for the portion credited to him as derived from said bond, and are also entitled to contributions from W. as co-surety on the original contract to T. for the amount paid by them on said appeal bond.

In the case of *Pace (Assignee) vs. Ficklin's Executrix et als.*, 76 Va., 292.

1. Limitation.—Appeal.—An appeal from a final decree of June 2, 1877, was allowed May 8, 1879, but the bond was not given until June 9, 1879. Held: Under Code 1873, Chapter 178, Section 17, the appeal must be dismissed.

2. Appeal.—Bond —Assignee in bankruptcy filed a bill in the State court which was dismissed with costs; that assignee dying, his successor presented petition for appeal. It was insisted that no bond was required, as the appeal was partly to protect decedent's estate. Held: Bond was necessary, as the sec-

ond assignee had nothing as such to do with his predecessor's estate.

3. Chancery Practice.—Final Decree.—It was insisted that the decree was not final, because rendered in vacation, and the judge afterwards gave written instructions to the clerk how to tax the costs. Held: Decree dismissing the bill with costs must be final; rendered in vacation it takes effect from time it is entered of record, and the judge cannot afterwards impart to it a different character.

In the case of *Acker vs. A. & F. R. R. Co.*, 84 Va., 648, decided March 22, 1888, it was held: *Supersedeas* bond made payable to the Commonwealth is sufficient.

Bond reciting the judgment as that of "the Circuit Court of Alexandria," omitting the words "the city of," is not vitiated by such omission.

A bond containing not "a waiver of homestead" may be insufficient, and may be made sufficient at any time on motion of the defendant in error, but it is not a void bond.

SECTION 3474.

In the case of *Yarborough et ux. vs. Deshazo*, 7 Grat., 374, decided May 5, 1871, it was held: Upon an appeal to the court of appeals from a final judgment, decree, or order, if the appeal bond is not given within five years from the date of said judgment, decree, or order, the appeal will be dismissed.

In the case of *Callaway vs. Harding*, 23 Grat., 542, decided June, 1873, it was held: The longest period of limitation within which a petition for an appeal, writ of error, and *supersedeas* can be presented is two years, nine months, and ten days; as to final judgments, decrees, and orders rendered before the passage of the act of November 5, 1870, and as to those since rendered, such period of limitation is two years.

In the case of *Otterback vs. Alexandria & Fredericksburg Railroad Company*, 26 Grat., 940, decided December 16, 1875, it was held: A judgment is rendered May 13, 1872, and one of the parties obtains an award of *supersedeas* to the judgment on the 9th of November, 1872, but the *supersedeas* bond is not given until April 15, 1875, though counsel had marked his name on the docket as counsel for the appellee. The bond not having been given within the time prescribed by the statute, the appeal must be dismissed, and the counsel marking his name on the docket, though it may be a waiver of process, is not a waiver of the bond.

In the case of *Puce (Assignee) vs. Ficklin's Executrix et als.*, 76 Va., 292.

Cimitation.—The period between death of first and appointment of second assignee will be included in the two years allowed for appeal. The statute does not begin to run until some person

exists capable of suing; but having once begun, is not stopped by death or other disability.

In the case of *Frazier vs. Frazier et als.*, 77 Va., 775, decided October 11, 1883. Final decree rendered November 30, 1880. Record for appeal presented November 28, 1881, to a judge of this court. The judge endorsed that fact on the same day on the record, and April 24, 1882, he also endorsed thereon that he declined to act, because record was unaccompanied by a petition. His official term expiring December 31, 1882, record went into the hands of his successors. Record was endorsed, appeal allowed by one of those successors on January 8, 1883, and was delivered to the clerk the next day, and the bond was given on the 30th. It appears not when the petition was put in the record. Held: The time during which the first judge held the record must be excluded from the computation of the two years of limitation for appeals under Code 1873, Chapter 178, Section 17, as amended by Chapter 42, p. 30, Acts 1876-'77. The statute ceases to run on the endorsement by the first judge of his receipt of the record. This court hath jurisdiction of the appeal.

SECTION 3475.

In the case of *Barksdale & Terry vs. Fitzgerald*, 76 Va., 892, 895-'96.

1. Subrogation.—Principal and Surety.—Evidence.—Case here.—Judgment against T. and another docketed April, 1872. *Fi. fa.* levied and forthcoming bond taken with E. as surety. Bond forfeited and returned May, 1873, but not docketed. Judgment on the bond against all the obligors January 19, 1874, and docketed. E. claims that he paid judgment as surety and asks to be substituted to the lien of the judgment on the land of T. conveyed by trust deed to secure F., recorded January 4, 1874. *Fi. fa.* on last judgment levied on principal obligor's property, but, with consent of surety, held up by plaintiffs' order. The debt was then paid without sale. On the last *fi. fa.* is an endorsement purporting to be signed by W. and S., the judgment-creditor's attorneys, to the effect that the *fi. fa.* was satisfied by E.; and one of the attorneys deposed that he was induced to hold up the *fi. fa.* by the promise of one of the principals or the surety E., or both, to see the money paid at an early day, whilst the testimony of the sheriff tends to show that if payment was made by either, that principal or E., it was probably by the former. Held:

(1.) The endorsement on the *fi. fa.* is not evidence against any other than the judgment-creditor.

(2.) The *onus* of proving the payment by himself, so as to entitle him to the relief he asks, rests on E., and as it is insufficient, the other questions involved are left undecided.

2. *Quære*: Whether the original judgment was merged in the forfeited forthcoming bond, or in the subsequent judgment on the bond, it never having been quashed, or liable to be quashed, so far as it appears? See *Rea vs. Preston*, 75 Va., 757; *Bank of Old Dominion vs. Allen*, 75 Va., 200.

3. *Quære*: Whether the payment (if made) by the surety, and the release thereby effected of the principal's property, render the surety's right of substitution (if it exists) to the lien of the first judgment subordinate to the trust deed, which is junior to that judgment? See *Clevenger vs. Miller*, 27 Grat., 740; *Sherman's Administrator vs. Shaver, etc.*, 1 Matthews, 1.

4. Judicial Sales.—Interest.—Former Judgment.—Case at Bar.—A cause being remanded for further proceedings, with a view to a sale of the land in parcels, if more advantageous, commissioners divide the land into parcels according to the directions of the debtor, T. Their report, unexcepted to, is confirmed. The court then directed the sole commissioner to offer the land in parcels, and accept the bids, if sufficient to pay the liens; but if not, to offer it undivided. The bids for the land in parcels aggregated \$1,066.40—a sum less than one-fifth of the liens. The bid for it undivided was \$4,977, which was reported, and the court confirmed the sale. Account of liens having been taken, only two debts were reported—those of F. and of H. T. excepted to both as usurious. The debt of H. bore interest at 12½ per centum per annum, that being the rate allowed by law when the debt was contracted. That of F. had been finally adjudicated in a former suit between T. and F. The exceptions were overruled. On appeal. Held:

(1.) There was no error in the sale.

(2.) The exceptions were properly overruled.

5. Appeals.—In a cause several decrees are pronounced, from three whereof successive appeals are allowed, first, to T.; second, to E.; third, to T. and E. jointly. The first two were dismissed for failure respectively to give bond, and to print the record. The third, which relates only to the last decree pronounced, remained. Held: The spirit, if not the letter, of Code 1873, Chapter 178, Section 18, would seem to preclude inquiry into the matters involved in the former appeals; but the conclusions arrived at are unaffected by waiving the bar of the statute in the present case.

In the case of *Cobb's Assignee vs. Gilchrist's Administrator et als.*, 80 Va., 503, decided June 11, 1885, it was held: Order dismissing appeal or writ of error effects same purpose as affirmance.

SECTION 3482.

In the case of *Lee vs. Turberville*, 2 Wash., 209 (1st edition, 162), decided at October term, 1795, it was held: If a *superse-*

deas be granted to an order of an inferior court giving leave to build a mill, the superior court is not confined to errors apparent on the face of the record.

In the case of *Bohn vs. Sheppard*, 4 Munf., 403, decided January 26, 1815, it was held: The court to which an appeal is taken from an order granting letters of administration ought not to take into consideration, in deciding upon such appeal, the comparative merits of the grantee and of the party who oppose him as candidates for the office, unless it appear, by some evidence from the record, that a motion for the appointment of such opposing party was substantially made in the court below.

In the case of *Reid's Administrators vs. Strider's Administrators*, 7 Grat., 76, decided May 14, 1850, it was held: A writ of error *coram vobis* does not lie to the supreme court of appeals.

In the case of *Jeter vs. Board et als.*, 27 Grat., 910, decided December 7, 1876, it was held: There may be an appeal as of right from an interlocutory order of a county court in a controversy concerning the establishment of a road.

SECTION 3484.

In the case of *Dudleys vs. Dudleys*, 3 Leigh, 436, decided February, 1832. Upon a question of probate of a will, the testimony of one of the attesting witnesses is directly contradicted by that of another; the county and circuit courts both give credit to the witness for the will; on appeal from the sentence of probate, held: That the court of appeals, on a mere question of credibility of witnesses, will always presume that the inferior courts, which saw and heard the witnesses examined, decided correctly.

In the case of *Brooks vs. Calloway*, 12 Leigh, 466, decided December, 1841, it was held: Where the evidence, on the trial of an issue, is conflicting, and the court is satisfied with the verdict, and a new trial is asked and refused, the court is right not to certify the facts proved.

In the case of *Taliaferro vs. Franklin*, 1 Grat., 332, decided January, 1845, it was held: The judge below is not bound to certify the facts proved on the trial at law, on refusing to grant a new trial, where the case depends upon the credibility of the witnesses, or the evidence is conflicting.

In the case of *Grayson vs. The Commonwealth*, 6 Grat., 712, decided December, 1849, it was held: Where the evidence is contradictory, and the verdict is against the weight of evidence, a new trial may be granted by the court which presides at the trial; but its decision is not the subject of a writ of error or *supersedeas*, or examinable by any appellate court.

Where the evidence is contradictory, the court which tries the

case cannot be required to state, in a bill of exceptions, either the evidence, or the facts proved by the witnesses, respectively; it is enough to state that the evidence was contradictory.

This last clause since overruled by *Powell vs. Larry*, *post*.

In the case of *Pryor vs. Kuhn*, 12 Grat., 615, decided September 11, 1855, it was held: In an action at law the parties waive a trial by jury, and submit the whole matter of law and fact to the judgment of the court. An exception taken to the judgment of the court must state the facts proved, not the evidence; and it will be treated as governed by the principles applicable to exceptions taken to the opinion of a court, overruling a motion for a new trial, on the ground that the verdict is contrary to the evidence.

In the case of *Wickham & Goshorn vs. Lewis Martin & Co.*, 13 Grat., 427, decided August 25, 1856, it was questioned: What should be the form of a bill of exceptions to the refusal of the court to grant a new trial when the whole case has been submitted to the court?

In the case of *Mitchell vs. Barrata et als.*, 17 Grat., 445, decided May 14, 1867. Parties agree to dispense with a trial by jury and refer the whole matter of law and fact to the judgment of the court under the statute, and all the evidence is stated on the record, though no exception is taken to the judgment of the court. Held: It sufficiently appearing that the evidence was intended to be a part of the record, it will be so considered, though there was no exception. In such a case the evidence, and not the facts proved, should be stated. The opinion of the judge who decided the case should not be reversed unless it is plainly erroneous, especially if the evidence, or a part of it, be oral; and more especially if it be conflicting.

In the case of *Hodges (Executor) vs. First National Bank, Richmond*, 22 Grat., 51, decided April 3, 1872, it was held: In a case in which a jury is dispensed with and the case is submitted for trial to the court, upon a bill of exceptions to the judgment, all the evidence is to be inserted in the bill, and in the appellate court it will be considered as on a demurrer to the evidence. In such a case, where the judgment is for the plaintiff, and the defendant excepts, if it appears that a witness for the defendant, on his examination-in-chief, makes a statement of a fact in one way and upon his cross-examination makes it in a materially different way, the first statement is to be rejected and the last taken as correct.

In the case of *Read vs. The Commonwealth*, 22 Grat., 924, decided December 11, 1872, it was held: Though the bill of exceptions taken to the refusal of the court to grant a new trial purports to certify the facts, yet it may appear from the bill of exceptions itself that the evidence is certified; and this is shown

where the facts certified are contradictory. In such case, where the evidence is certified, the appellate court will not reverse the judgment unless, after rejecting all the parol evidence of the exceptor, and giving full faith and credence to that of the adverse party, the decision of the court below shall appear to be wrong.

The reference to 23 Grat., 352, is an error.

In the case of *Backhouse (Executor) vs. Selder*, 29 Grat., 581, decided December 19, 1877, it was held: Where neither party requires a jury, and the whole matter of law and fact is heard and determined, and judgment given by the court, and the whole evidence is certified by the court in the bill of exceptions, the bill must be regarded as a demurrer to evidence by the plaintiff in error.

In the case of *Danville Bank vs. Waddill*, 31 Grat., 469, decided February 6, 1879, it was held, p. 475: On an exception to the refusal of the court to set aside the verdict and grant a new trial on the ground that the verdict is contrary to the evidence, if the evidence and not the facts is certified, the appellate court will not reverse the judgment unless, after rejecting all the parol evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the court still appears to be wrong.

The reference to 31 Grat., 664, is to a case which merely cites, *obiter dictum*, conflicting authorities upon the rule of decision where the trial court proceeds without a jury, and upon error to an order of the court overruling a motion for a new trial on the ground that the judgment was contrary to the law and the facts, the court sets out the evidence but decides nothing.

In the case of *Dean vs. The Commonwealth*, 32 Grat., 912, decided July, 1879, it was held: Where, in a criminal case, a bill of exception taken to the refusal of the court to set aside the verdict on the ground that it is not warranted by the evidence, sets out the evidence and not the facts proved, the appellate court can only consider the evidence introduced by the Commonwealth, and will not reverse the judgment unless upon that evidence taken to be true the decision of the court below appears to be erroneous.

In the case of *Baccigalupo vs. The Commonwealth*, 33 Grat., 807, decided January, 1880, it was held: When the defence of insanity is relied on by the prisoner, the burden of proof is on him; and it is not sufficient to raise a rational doubt on the subject; but he must satisfy the jury that he was insane at the time the act was committed for which he is prosecuted. Mere cumulative evidence is not sufficient to authorize the granting a new trial to the prisoner; and in this case the new evidence offered is merely cumulative.

In the case of *Creekmur vs. Creekmur et als.*, 75 Va., 430, de-

cided April 14, 1881, it was held: The difference between the effect of a demurrer to evidence and a motion for a new trial founded upon a certificate of the evidence is, that in the former case the demurrant is considered as admitting the truth of his adversary's evidence, and all inferences to be drawn therefrom by a jury, and as waiving all his evidence which conflicts with that of his adversary, and all inferences from his evidence which do not necessarily result therefrom; whilst in the latter case, the exceptor waives all of his oral evidence, and must succeed, if at all, by showing that the verdict of the jury is erroneous, upon the testimony of the successful party.

In the case of *Powell, who sues for, etc. vs. Tarry's Administrator*, 77 Va., 250, decided March 15, 1883, it was held: Unless by record it appears that points decided by court below were saved before jury retired, they cannot be reviewed by appellate court. But bill of exceptions may be prepared and signed at any time during the term.

When evidence conflicts, court may refuse to certify the facts proved; but must certify the evidence on motion of any suitor.

Unless the evidence is before appellate court, it cannot pass on instructions given or refused.

Lack of time or lapse of memory is no excuse for a judge's refusal to certify the evidence on the trial of a cause before him, or to perform any other duty imposed on him by law.

To compel judge to certify evidence *mandamus* lies, but his refusal is error reviewable in the appellate court on complaint of jury injured. To deny certificate of evidence is to deny suitor his right of appeal.

Grayson's Case, 6 Grat., 712, wherein the court said: "Where the evidence is contradictory, the court which tries the case cannot be required to state in a bill of exceptions either the evidence or the facts proved by the witnesses respectively. It is enough to state that the evidence was contradictory; the opinion was mere *obiter dictum*, and is not sound in principle."

Written or oral declarations of a party to a suit relevant to the issue, and against his interest, are admissible as evidence against him.

In the case of *Taylor vs. The Commonwealth*, 77 Va., 692, decided September 13, 1883, it was held: Where the evidence, and not the facts, is certified, the verdict will not be disturbed unless it appears wrong, after rejecting all the parol evidence of the exceptor, and giving full faith and credit to the Commonwealth's evidence.

In the case of *Proctor vs. Spratley*, 78 Va., 254, decided January 10, 1884, it was held: When court below certifies the evidence, not the facts, the judgment will not be reversed, unless, after rejecting all the exceptor's evidence and giving

full faith to the adverse party, the judgment shall appear wrong. When the case before the jury depends on the credibility of witnesses, and new trial is denied by court below, this court will not reverse the judgment.

In the case of *Farley et als. vs. Tillar*, 81 Va., 275, decided January 7, 1886, it was held: Where bill of exceptions to opinion of court below refusing new trial sets out the evidence, and not the facts, this court will not reverse the judgment, unless after rejecting all the exceptor's parol evidence, and giving full faith to that of the adverse party, the said judgment still appears to be wrong.

In the case of *Hollingsworth vs. Sherman et als.*, 81 Va., 668, decided December 17, 1885, it was held: Where neither party requires a jury, and the whole matter of law and fact are heard and determined, and judgment given by the court, and the whole evidence is certified by the court in the bill of exceptions, the bill must be regarded as a demurrer to evidence by the plaintiff in error.

In the case of *Moses vs. Old Dominion Iron and Nail Works Company*, 82 Va., 19, decided February 25, 1885, it was held: Where, under the rule of this court, to reject all the parol evidence of the exceptor to the refusal of the court below to award a new trial, and to give full weight and credit to the exceptee's evidence, this court is left without means to determine whether the court below erred or not, the judgment of the court below must be affirmed.

In the case of *Muse vs. Stern*, 82 Va., 33, decided January 21, 1886. At first trial the verdict was for plaintiff, and was set aside, and he excepted; at second trial verdict was for defendant. Held: If the first verdict was erroneously set aside, this court will enter judgment on that verdict, and will set aside all subsequent proceedings.

Where evidence is conflicting, and involves credibility, and the verdict is set aside, and the evidence is certified, this court will look at the whole evidence, and sustain the verdict, unless it be against the law or the evidence, or without evidence.

In the case of *Weaver vs. Bliven*, 82 Va., 53, decided May 6, 1886, it was held: Where the verdict is not against the evidence, and is not without evidence to sustain it, and the trial court refused to set it aside, this court cannot be called on to pass on the credibility of witnesses, or the weight of the testimony.

In the case of *Pruner & Clark vs. The Commonwealth*, 82 Va., 115, decided June 24, 1886, it was held: Where, though the bill of exceptions claims to set forth the facts proved upon the trial, it is apparent that the evidence is certified and not the facts, this court must look only to the evidence of the exceptee.

In the case of *Hartman vs. Strickler*, 82 Va., 225, decided July 8, 1886, it was held: On motion for new trial of issue *devisavit vel non*, when the certificate is of the evidence and not of the facts, the verdict must stand, unless, after rejecting all the exceptor's parol evidence, and giving full force and credit to the adverse party's, the decision of the court below shall appear to be wrong.

In the case of *The Virginia Mining and Iron Company vs. Hoover*, 82 Va., 449, decided October 7, 1886, it was held: Where neither party requires a jury, and the whole matter of law and fact is heard and determined, and judgment is given, by the court, and the entire evidence is certified by the court in the bill of exceptions, the bill must be regarded as a demurrer to evidence by the plaintiff in error. In such a case the demurrant admits the truth of all demurree's evidence and all reasonable and proper inference therefrom, and waives all his own evidence which conflicts with, or tends to make a case different from, the case made by the demurree's evidence.

In the case of *Magarity vs. Shipman*, 82 Va., 806, decided January 27, 1887, it was held: In the case here there is no bill of exceptions and no motion for a new trial. But the case having been referred to a referee, the proofs were taken in the form of depositions and a report was made by him, and no exception taken thereto by either party. Such a case cannot be reviewed by this court, and will be dismissed.

In the case of *McArter vs. Grigsby*, 84 Va., 159, decided December 1, 1887, it was held: Upon an appeal from refusal of trial court to set aside the verdict and grant a new trial, the facts proved must be presented to this court by a bill of exceptions which states that those facts are all the facts; and when the evidence, and not the facts, is certified, it must appear from the bill of exceptions, either by direct statement or clear inference, that the evidence presented is all the evidence, else this court cannot know upon what the lower court based its decision, and the judgment appealed from must be presumed to be right.

When the circuit court, on appeal from the judgment of the county court, reverses it, but files no opinion, and when, on appeal from the judgment of the circuit court to this court, there is no argument here for the defendant in error, the case must be considered here upon the record as made in the county court, and the judgment of that court must be presumed to be right unless error be apparent on the face of the record, or appear from a bill of exceptions properly taken.

In the case of *Southwest Improvement Company vs. Smith's Administrator*, 85 Va., 306, decided August 23, 1888, it was held: Where motion to set aside verdict as contrary to evi-

dence is overruled, the mover excepts and evidence is certified, this court will consider the case as if it were a demurrer to evidence by the exceptor under this section, though lower court rendered its judgment before this code took effect, because this section takes away no vested right, but merely prescribes a rule of practice.

In the case of *Tucker vs. Sandidge (Curator)*, 85 Va., 546, decided December 13, 1888. When at trial jury finds against the will, verdict is set aside on motion of plaintiff; at second trial jury finds for the will. Motion for defendants to set aside the verdict is overruled, and the defendants having excepted, and the evidence (not the facts) certified on appeal. Held: Under this section plaintiff in error's exception must, in considering the decision of the court below setting aside the first verdict, be treated as a demurrer to evidence, and all his oral evidence treated as waived, and all his adversary's evidence, and all fair inferences therefrom, be treated as true, instead of considering the whole evidence at the first trial as under the rule before this section was enacted.

In the case of *Adams et als. vs. Hays et als.*, 86 Va., 153, decided June 13, 1889, it was held: Plaintiff sold the defendant's bricks at an agreed price per one thousand, "kiln count." For the former it was testified that "kiln count" meant an estimated count of the brick while in the kiln; for the latter, that an actual count of the brick from the kiln was meant. Held: Under this section, prescribing as the rule of decision the rule as upon demurrer to evidence, "kiln count" must be construed to mean a count by estimation while the bricks were in the kiln.

In the case of *Mears & Lewis vs. Dexter*, 86 Va., 828, decided April 17, 1890, it was held: This section requires the appellate court to look first to the proceedings and the whole evidence on the first trial, and, if there be error in setting aside the verdict on that trial, to set aside and annul all proceedings subsequent to said verdict, and to enter judgment thereon. Held: The rule of this act, which operates retrospectively, applies to all cases which, though decided by the court below before, yet come before this court on error since, the passage of said act.

In the case of *Woods vs. The Commonwealth*, 86 Va., 929, decided June 19, 1890, it was held: Where the evidence, not the facts, is certified, the appellate court must dispose of the case as on a demurrer to evidence.

In the case of *Vawter vs. The Commonwealth*, 87 Va., 245, decided December 11, 1890, it was held: This court cannot review a refusal of the court below to give an instruction, when the evidence or the facts are not certified.

In the case of *Tucker vs. The Commonwealth*, 88 Va., 20, de-

cided June 18, 1891, it was held: Where exceptor's evidence does not conflict with exceptee's, or with any inference which the jury might have reasonably drawn therefrom, such evidence is not waived by the rule under this section.

In the case of *N. & W. Railroad Co. vs. Groseclose's Administrators*, 88 Va., 267, decided July 16, 1891, it was held: Where the evidence, and not the facts, is certified, and the defendant in such action is the exceptor, any evidence that it may have adduced tending to show contributory negligence on the part of the exceptee, and contrary to the exceptee's evidence, must be rejected.

In the case of *Lyles vs. The Commonwealth*, 88 Va., 396, decided November 12, 1891, it was held: Where the evidence, and not the facts, is certified, the accused must be considered here, on review of the refusal of the court below to grant a new trial, as admitting the truth of all the Commonwealth's evidence, and as waiving all his own which conflicts therewith, even where one of the Commonwealth's witnesses admitted at the trial that she had made different statements.

In the case of *Blakeley et als. vs. Morris*, 89 Va., 717, decided March 9, 1893. As the plaintiff must recover, if at all, upon the strength and sufficiency of his own title, and not upon the insufficiency of the defendant's title, and the evidence adduced in the cause being contradictory, the jury found for the defendant. Held: That under the rule, Section 3484, this court will not disturb the verdict, there having been no correct instructions on the law given to the jury.

SECTION 3485.

In the case of *Moss and Wife et als. vs. Moorman's Administrator et als.*, 24 Grat., 97, decided November, 1873, it was held: There is a decree against an administrator and his sureties; and on appeal by plaintiffs decree is reversed, and the administrator is held liable for a larger amount than was decreed against him; though the decree is also reversed in favor of a purchaser of land from an administrator. Whilst the appellate court reverses the decree so far as it is erroneous, it will affirm it so as to continue the lien of the decree for the security of the *pro tanto* of the amounts which may be found due by the parties respectively against whom the said decree was rendered.

In the case of *Thompson vs. Chapman*, 11 Va. Law Journal, 667, decided April 21, 1887, it was held: Where a decree is reversed in part and affirmed as to the residue, the reversal in part does not destroy the lien of so much of the decree as is unreversed or affirmed. But this principle does not apply to a judgment at law which has been reversed and a new trial awarded.

SECTION 3486.

For the reference to 10 Leigh, 394 and 400, see *ante*, Section 3470.

In the case of *Jeter vs. Langhorn*, 5 Grat., 193, decided July, 1848, it was held: An injunction is dissolved, and on appeal the decree is affirmed. Ten per cent. damages is to be computed from the time when the injunction was granted to the date of the dissolution thereof in the court below; but not for the time it was pending in the appellate court.

SECTION 3487.

In the case of *Smith vs. Hutchinson et als.*, 78 Va., 683, decided March 13, 1884, it was held: On reversal or affirmance of judgment of county court, the cause must be retained by circuit court, and not remanded except by consent or for cause.

In the case of *Pettit vs. Cowherd*, 83 Va., 20, decided March 10, 1887, it was held: On reversal or affirmance of judgment of county court the cause must be retained in circuit court, and not remanded except by consent or for cause, which consent, or cause, must be stated in remanding order.

SECTION 3488.

In the case of *Hudson vs. Ross & Co.*, 1 Wash., 74, decided at the spring term, 1792. A motion was made that the clerk might be permitted to give a certificate of the judgment to be entered in the district court then sitting. Held: This is a motion which is never granted without strong reasons. In general it is not permitted, as we may change our opinions during the term. It is often granted if the delay would endanger the debt.

In the case of *The Bank of Virginia vs. Craig*, 6 Leigh, 399, decided May, 1835, it was held: The court cannot examine the propriety of a decree made at a former term *inter partes*, nor set aside such decree of a former term, on the ground that it decided matters *coram non judice* at the time.

In the case of *Wynn vs. Wyatt's Administrators*, 11 Leigh, 584, decided February, 1841, it was held: After this court had reversed a judgment and remanded a case to the court below for further proceedings there, and certificate of that judgment had been sent by the clerk to the court below, a rehearing was, on motion of defendant in error, directed here, whereupon this court revoked the certificate of its former judgment, and directed the court below to surcease proceedings till further order; and plaintiff in error, being now a non-resident, ordered that service of this order on the counsel who appeared for him on the former argument should be as sufficient service.

SECTION 3490.

In the case of *White vs. Atkinson*, 2 Call, 376 (2d edition, 316), decided November 15, 1800, it was held: The court of chancery cannot make any alterations in the terms of a decree of this court certified therein, in order that a final decree may be made in the cause.

In the case of *Price vs. Campbell*, 5 Call, 115, decided April, 1804, it was held: The court of chancery cannot, upon the same facts, alter a decree of the court of appeals.

In the case of *Murdock vs. Hendron's Executors*, 4 H. & M., 200, decided October, 1809, it was held: If a cause be remanded to an inferior court, and a new trial be directed, the superior court must be presumed to have thought the declaration sufficient; consequently, on the new trial, or on a second appeal, no exception can be taken to the appeal.

In the case of *Campbell vs. Price et als.*, 3 Munf., 227, decided April 1, 1812, it was held: The court of chancery cannot correct, on motion or by bill of review, any error apparent on the face of the proceedings in a decree which has been affirmed by the court of appeals.

In the case of *Lanier, Shelton & Cocke vs. Cocke, Crawford & Company*, 6 Munf., 580, decided March 30, 1820, it was held: After the court of appeals has passed upon a case and remanded the cause for a new trial upon the general issue, a demurrer to the declaration, or a plea in abatement, upon the ground that the Christian names of the respective parties are not mentioned therein, ought not to be received.

In the case of *Epes's Administrator vs. Dudley*, 4 Leigh, 145, decided January, 1833, it was held: If proceedings on a judgment at law be enjoined by a court of chancery, and the injunction be afterwards dissolved, and on appeal taken to the court of appeals, the order of dissolution is affirmed *in omnibus*; an execution may be sued out on the judgment at law, before the decree of affirmation is entered up in the court of chancery.

In the case of *Towner vs. Lane's Administrator*, 9 Leigh, 262, decided February, 1838, which is here quoted as an authority, the judges were equally divided, so the case is valueless.

In the case of *Deneufville's Administrator vs. Travis (Administrator)*, 5 Grat., 28, decided April, 1848. Upon an appeal from a final decree made upon the report of a commissioner to which there were various exceptions by the appellant to the report; and the decree is reversed and the cause remanded for the necessary inquiries to be made in relation to the subject of that exception. Held: The decree concluded all other questions.

In the case of *Burton vs. Brown's Executors*, 22 Grat., 1, decided March 20, 1872, it was held: An appeal by one party

from a decree overruling some exceptions to a commissioner's report, and sustaining others, and recommitting the report, brings up the whole cause; and the decree of the court of appeals, affirming the decree of the court below, concludes all questions previously decided, whether in favor of the appellants or appellees.

In the case of *Campbell's Executors vs. Campbell's Executor*, 22 Grat., 649, decided September 25, 1872, it was held: The decree of the court of appeals upon a question decided by the court below is final and irresistible; and upon a second appeal in the cause, the question decided upon the first appeal cannot be reversed. In such a case the conclusiveness of the decree of the court of appeals is the same, whether the first appeal was from a final or interlocutory decree of the court below. All the decrees of the appellate court are in their nature final, except, possibly, where that court disposes only of part of the case at one term and reserves it for further and final action at another.

In the case of *Bank of Old Dominion vs. McVeigh*, 29 Grat., 546, decided December 13, 1877, it was held, p. 554-'55. It is settled that whatever is decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration the proceedings of the court below after the mandate of this court.

The reference to 32 Grat., 657-'61, is an error.

For the reference to 76 Va., 892 and 894, see *ante*, Section 3475.

In the case of *New York Life Insurance Company vs. C. W. Clemmit et ux.*, 77 Va., 366, decided April 5, 1883, it was held, p. 373-'74: It is a settled rule that decrees of the court of appeals on questions decided by the court below are conclusive, and on second appeal those questions cannot again be raised.

In the case of *Frazier vs. Frazier et als.*, 77 Va., 775, decided October 11, 1883, it was held, p. 784: Decree of appellate court upon questions raised by court below is final and irrevocable. Upon second appeal, questions decided by the first cannot be reversed. Its decision is not only final as to the decree appealed from, but also as to all prior orders and decrees in the cause between the appellants and appellees. But this rule has, of course, no application where a different question arises, or the same question arises between different parties.

In the case of *McCormick's Executor vs. Wright's Executor*, 79 Va., 524, decided October 7, 1884, it was held, p. 533: It is a settled rule that decrees of the court of appeals on questions decided by the court below are conclusive, and on second appeal those questions cannot again be raised.

In the case of *Effinger vs. Kenney (Trustee)*, 79 Va., 551, de-

cided November 20, 1884, it was held, p. 553: Where objection for want of liens was not raised in court below when decree of sale was entered, and on appeal that decree has been affirmed, such affirmance is a final determination between the parties of all questions which were or might have been raised on that appeal.

In the case of *Cobbs (Assignee) vs. Gilchrist's Administrator et als.*, 80 Va., 503 and 507, decided June 11, 1885: By decree H.'s land was subject to certain liabilities. H. devised his lands to L. and to J. Between them partition was made. L. was adjudicated a bankrupt. C., her assignee, became a party to the suit. In 1876 a decree apportioned the liabilities between the lands of L. and J., and directed sale. Sale was made and proceeds collected. Then a personal fund amenable to same liabilities turned up and was applied, causing a surplus. J. and one S. had a contest for said surplus, which, in 1882, was adjudged to J. During this contest C. was neutral, but more than two years after the accrual of his right of action, he, as L.'s assignee, claimed said surplus as part of L.'s assets, because L.'s lands had contributed more than their proportion to satisfy said liabilities. Court below, in 1883, decreed against C. On appeal, held: Decree of 1883 could not be reversed without disturbing decree of 1876, affirmed by dismissal of appeal. Suit by assignee for said surplus was barred by lapse of two years before the suit was brought.

In the case of *Stuart & Palmer vs. Preston et als.*, 80 Va., 625, decided June 18, 1885, it was held: It is the well-settled rule of this court, that a question which has been decided upon the first appeal in any cause cannot be reviewed or reversed upon any subsequent appeal in the same cause.

In the case of *Smith vs. Snyder*, 82 Va., 614, decided December 2, 1886, it was held: Where instructions given, or verdict rendered, at trial in the court below, are, on appeal, pronounced erroneous, it is improper, at a subsequent trial, the evidence being the same, to give the same instructions, or to enter up judgment on the same verdict.

In the case of *Diehl vs. Marchant*, 87 Va., 447, decided February 12, 1891, it was held: When matter alleged in the second suit between the same parties was either actually litigated, or might have been, under the issues, in the first suit, the judgment in the first may be set up as a bar to the second suit.

In the case of *Foster vs. The City of Manchester*, 89 Va., 92, decided June 16, 1892, it was held: A judgment of a court of competent jurisdiction upon a question directly involved is conclusive of that question in another suit between the same parties.

In the case of *Lore et als. vs. Hash et als.*, 89 Va., 277, decided July 6, 1892, it was held: Where a decree has been affirmed

by this court on appeal, it becomes *res adjudicata*, and no error in it can be corrected by a rehearing in the court below.

In the case of *Carter vs. Hough & Co. et als.*, 89 Va., 503, decided December 15, 1892, it was held: Matters once determined on appeal in this court cannot be reopened; and this is true, whether those matters were actually adjudicated or not; if they could have been adjudicated in that suit, they are equally settled.

SECTION 3492.

In the case of *Armistead vs. Bailey et als.*, 83 Va., 242, decided April, 1887, it was held: Neither bills of review nor petitions for rehearing lie for assignees.

CHAPTER CLXXI.

SECTION 3493.

In the case of *Jones's Executors vs. Clarke et als.*, 25 Grat., 642, decided January 7, 1875, it was held, p. 675: A demurrer to a bill in equity, in the form given in the statute, is sufficient.

SECTION 3494.

In the case of *Newel vs. Wood (Governor)*, 1 Munf., 555, decided May 9, 1810, it was held: The court of appeals has jurisdiction to revise any judgment on a bond, provided the penalty amount to the sum limited by law. The statute was passed to change this.

In the case of *Heathe (Executor) vs. Blaker & Kimbler*, 2 Va. Cases, 215, decided by the General Court, June, 1820, it was held: Debt on a penal bill for one hundred dollars conditioned to pay forty-seven dollars. The defendant moved the court to stay proceedings, because the penalty was inserted for the purpose of giving the court a jurisdiction which the law withheld. Decided that the superior court ought not to sustain the motion, but declined deciding whether the fact alleged would avail if pleaded.

In the case of *Fleming vs. Toler*, 7 Grat., 310, decided April 21, 1851, it was held: The penalty and condition of a bond for the payment of money is in the same sum. It is proper to treat it as a single bill, and to give judgment for the amount of the bond with interest from the time of payment.

SECTION 3495.

See the references to Section 2990.

TITLE XLIX.

CHAPTER CLXXII.

SECTION 3520.

In the case of *Craigien's Executor vs. Lobb*, 12 Leigh, 627, decided August, 1841, it was held: Though no action lies for clerk's fees, till they shall be put into an officer's hands for collection, and he has returned that they cannot be levied by distress, yet the clerk may set them off against an action on his bond to the party from whom they are due. And if the clerk's fees were never put into an officer's hands for collection, there was not until the statute of 1839 any limitation to the clerk's claim for them.

CHAPTER CLXXIII.

SECTION 3539.

In the case of *Vance vs. Bird et als.*, 4 Munf., 364, decided February 1, 1815, it was held: Upon a rule requiring security for costs, if sufficient security be tendered in court, at the first calling, after the expiration of the sixty days, it ought to be received, and the suit ought not to be dismissed.

In the case of *Jacobs vs. Sale*, 1 Va. (Gilmer), 123, decided October 19, 1820, it was held: Error to rule a defendant to trial on a motion for continuance, when the plaintiff has failed until the term at which the motion is made to give security for costs, after a rule to do so.

In the case of *Reed's Lessee vs. See*, 1 Va. Cases, 123, decided by the General Court, it was held: Where plaintiffs ordered by court to give security for costs within sixty days, but failed to do so, but before the court dismissed the suit offered the requisite security, it should have been accepted and the suit retained.

In the case of *Evans vs. Bradshaw et als.*, 10 Grat., 207, decided July, 1853, it was held: Upon a motion against a plaintiff in equity for security for costs, a bill of exceptions is taken to the opinion of the court, which states the evidence introduced on the motion. There is no objection to this mode of putting the evidence upon the record.

In the case of *Anderson vs. Johnson et als.*, 32 Grat., 558, decided November, 1879, it was held, p. 573: Where, on the motion of the defendant in an attachment case, the plaintiff, who is a non-resident of the State, is ordered to give security for the costs of the suit within sixty days, and fails to do so, his bill should be dismissed, and it is error to hear and decide the case.

On reversing the decree and remanding the cause, the appellate court will not direct the suit to be dismissed at once for the

failure of the plaintiff to give security for costs, but will direct that he be allowed a reasonable time to comply with the order.

SECTION 3543.

In the case of *Bills vs. Harris*, 2 Va. Cases, 26, decided by the General Court, November, 1815, it was held: In assault and battery, the jury found for the plaintiff six cents and the costs. They had no right, under our statute, to find the costs.

SECTION 3544.

In the case of *Maitland vs. McDearman*, 1 Va. Cases, 131, decided by the General Court, it was held: Where the amount sued for was over one hundred dollars and verdict was for less the court held: Verdict should be arrested because the verdict did not show that the account was reduced by set-off.

In the case of *Neff vs. Talbot*, 1 Va. Cases, 140, decided by the General Court, it was held: Where the arbitrators found an award of one hundred dollars, the award was confirmed and made the judgment of the court.

In the case of *Pendred's Administrators vs. Pendred*, 2 Va. Cases, 93, decided by the General Court, November, 1817, it was held: Where damages for breach of contract are uncertain, and therefore unknown, till ascertained by verdict, the superior court has jurisdiction, although the verdict is for less than one hundred dollars.

In the case of *Larowe vs. Harding's Administrators*, 2 Va. Cases, 203, decided June, 1820, by the General Court, it was held: Where a debt is reduced by payment below one hundred dollars, the superior court has not jurisdiction to render judgment on the verdict.

In the case of *Acker's Assignee vs. Highley*, 2 Va. Cases, 255, decided by the General Court, June, 1821, it was held: Debt for a sum more than one hundred dollars, reduced to a sum below it by a set-off, the superior court has jurisdiction to render judgment on the verdict.

SECTION 3545.

In the case of *Middleton vs. Johns*, 4 Grat., 129, decided July, 1847, it was held: A general judgment for costs against two defendants in ejectment is proper, though one of them did not enter himself a defendant until there had been one trial of the cause, and a large portion of the costs had been incurred.

SECTION 3546.

In the case of *Pates vs. St. Clair*, 11 Grat., 22, decided April, 1854, it was held: It was not improper, even before the act of 1849, Code, p. 706, Section 9, to render judgment for costs in

favor of the defendant against a person for whose benefit a suit was brought, when the defendant succeeded in the case.

In a suit brought in the name of one person for the benefit of another, a judgment stating that the parties appeared by their attorneys, and that, by consent, the suit was dismissed, and judgment was rendered for defendant's costs against the person for whose benefit the suit was brought, it must be held that the consent is the consent of the latter, and that the judgment is proper.

SECTION 3552.

In the case of *Thon vs. The Commonwealth*, 77 Va., 289, decided March 15, 1883, it was held: Act approved March 12, 1878, Acts 1877-'78, Chapter 183, Section 2, page 174, providing that the attorney-general shall receive a salary of \$2,500 annually for his services, and shall not be entitled to any further compensation therefor, refers to salaries payable out of the State treasury, and not to fees taxed in the costs as fees of attorneys on the winning side in any case, under Code, Chapter 181, Section 13. The laws requiring such fees to be taxed for the benefit of the Commonwealth have never been repealed nor amended, and the losing suitor has them to pay, whether they go into the State treasury or to the attorney-general. But the laws requiring such fees to be taxed in the costs and to be paid to said attorney-general are also unrepealed.

SECTION 3554.

In the case of *Mahone vs. Long*, 3 Rand., 557, decided December, 1825, it was held: Where the appellant fails to bring up a copy of the record within the time limited by law, and it is filed by the appellee, who obtains a dismissal of the appeal, the fee of the clerk of the chancery court for the copy of the record so filed may be taxed in the bill of costs as a part of the cost of defending the appeal; and the same rule exists where the record is brought up by the appellant.

In the case of *Leachman vs. The Overseers of the Poor of Prince William County*, 2 Va. Cases, 399, decided by the General Court, June, 1824, it was held: If, on a motion in a county court, on the common law side thereof, it becomes proper to refer to a commissioner long-standing and perplexed accounts, for the purpose of facilitating the investigation of the cause to the parties and to the court, and such reference is made by order of the court, and with the assent of the parties, the fee of the commissioner for stating and reporting the accounts ought to be taxed in the bill of costs, and a judgment for those costs ought to be rendered against the party who had to pay the general costs. If such taxation is made, and noted by the clerk of the county court at the foot of the record, it will be

presumed by the appellate court that the order for such taxation was made by the court itself (it not being a matter of course with the clerk to include such fee in his taxation of costs), though it does not appear on the minutes of the court.

TITLE L.

CHAPTER CLXXIV.

SECTION 3557.

The case referred to as 2 Leigh, 84 and 101, follows the statute, not construes it.

In the case of *Windrum vs. Parker & Goodwyn*, 2 Leigh, 361, decided October, 1830, it was held: The statute giving common law executions on decrees in chancery gives the courts of chancery the superintendence and control of all such process, and power to correct irregularities and abuses in it.

The courts of chancery may quash executions irregularly sued out on their decrees, and forthcoming bonds taken under them, on motion made on notice, in a summary way.

For the references to 75 Va., 116 and 126-'27, and 76 Va., 173 and 176, see *ante*, Section 3397.

In the case of *Hutcheson vs. Grubbs*, 80 Va., 251, decided February 10, 1885, it was held: A decree for specific property, or requiring payment of money, has the effect of a judgment, and persons entitled thereto are judgment-creditors.

In the case of *Cheatham vs. Cheatham's Executor*, 81 Va., 395, decided January 28, 1886, it was held: If husband and wife agree to sell and convey wife's lands, the agreement cannot be specifically enforced in a court of equity: not against wife, because she is incapable of binding herself by an executory contract; not against husband, because coercion against him would be moral coercion against her; and not against the other party, because then the obligation of the contract would not be mutual and the remedies equal.

Fiduciary cannot be compelled, by summary process of rule, to show cause why he shall not be fined and imprisoned to pay a decree against him as such, especially where his accounts have not been settled in the suit, and it has not been shown that he has assets in his hands.

SECTION 3561.

In the case of *Old Dominion Granite Company et als. vs. Clarke et als.*, 28 Grat., 617, decided March, 1877. C. obtained a judgment against B. & P., as partners, trading under the firm of B. & Co. He delivered an abstract of his judgment to the clerk of the county court of the county wherein there was a

tract of land belonging to P., and the same was properly entered by the clerk in the body of the judgment docket, but was not indexed in the name of P., but merely in the name of B. & Co. Subsequently P. sold and conveyed his land to O., who had no knowledge of C.'s judgment. Upon a bill filed by C. to subject the lands in the hands of O. to the lien of his judgment. Held: That indexing was not a necessary part of the docketing, and that the land was therefore subject to the lien of C.'s judgment.

SECTION 3566.

In the case of *Newman vs. Chapman*, 2 Rand., 93, decided December 6, 1823, it was held: The doctrine of *lis pendens* does not rest upon the presumption of notice, but upon reasons of public policy; and in cases in which it operates, applies where there is no possibility that the party should have notice of the pendency of the suit.

In the case of *French vs. The Successors of the Loyal Company*, 5 Leigh, 627, decided July, 1834, it was held: A *lis pendens* can only affect a purchaser of the subject in controversy from a party to the suit.

In the case of *Smith vs. Brown's Administrators*, 9 Leigh, 293, decided March, 1838, it was held: If, pending a suit in chancery for recovery of slaves and their profits, one of the slaves is sold by the defendant, and the plaintiffs ask and obtain a decree against the defendant for the value of the slave sold, they thereby waive the claim against the purchaser *pendente lite* for the specific property.

In the case of *Page et als. vs. Booth et als.*, 1 Rob., 169 (2d edition, 170). Upon a bill in equity to charge property which has passed into the hands of third persons without notice of the complainant's claim, the court being called upon to investigate transactions which occurred thirty years before the institution of the suit, and, from the lapse of time and the obscurity of the transactions, it being impossible to arrive at the truth of the case. Held: The bill ought to be dismissed.

A person entitled to have an assignment of a title bond and the possession of the property upon paying a certain sum, transfers his right, and his assignee pays that sum, and assigns his right to another, who obtains title to the property according to the bond; after which the person first mentioned files a bill, alleging that his transfer was in consideration of money which has never been paid him, and claiming that the lien of a vendor for purchase-money exists in his favor, upon the property in the hands of the subsequent holders, who purchased, as he alleges, with notice. Held: No such lien exists.

In the case of *Philips et als. vs. Williams, etc.*, 5 Grat., 259, decided October, 1848, it was held: Land on which the annuity

is a charge, having been sold during the pendency of the suit, it will be directed to be sold to satisfy the arrears of the annuity, without noticing the *pendente lite* purchaser.

In the case of *Carrington et als. vs. Dieder, Norvell & Co.*, 8 Grat., 260, decided October, 1851, it was held: Creditor of a deceased debtor may proceed by foreign attachment against the heirs residing abroad, to subject land or its proceeds in the State descended to them from the debtor.

So he may proceed against them as absent defendants in equity to marshal the assets, and thus subject the land descended to them.

Heirs residing out of the State having instituted a suit for a sale of land descended to them, and the same having been sold and the proceeds being in the hands of a commissioner directed by the court to collect them; a creditor of the ancestor seeking to subject these proceeds to the payment of his debt should apply by petition to the court to be made a party in the cause, and to have the fund applied by proceedings in that cause to the payment of his debt; or if he proceeds by foreign attachment the commissioner should be a party, and be restrained by the endorsement on the process from disposing of the proceeds; or if the creditor proceeds against the heirs to marshal the assets, there should be an injunction to restrain the commissioner from paying away the money in his hands. And the commissioner, though a party, as administrator of the debtor, to the creditor's suit, but having in fact no knowledge of the object of it, paying over the money to the heirs under the order of the court, whose commissioner he was, will not be affected by the *lis pendens* of the creditor's suit so as to be held liable to pay it over again to the collector.

In the case of *Cirode vs. Buchanan's Administrators*, 22 Grat., 205, decided June 12, 1872, it was held, p. 220: After *lis pendens* filed, all rights from or under the defendant to the subject in controversy, pending the suit, are subject to any decree which may be made in the suit, except so far as a purchaser without actual notice is protected by the statute.

In the case of *Briscoe vs. Ashby*, 24 Grat., 454, decided March, 1874, it was held: Mrs. A. and her children claiming under the decree of the Circuit Court of Fauquier, the case does not come within the operation of the registry act, Code of 1860, Chapter 119, Sections 4 and 5, and the decree is not necessary to be recorded in Culpeper to protect them against the claim of T. and B., claiming to be purchasers for value without notice. Nor is the decree of the Fauquier court such a decree as is required to be recorded by the first and eighth sections of Chapter 186, Code of 1860. Nor does the fifth section of said Chapter 186, which requires a *lis pendens* to be recorded, apply to the decree in the Fauquier suit.

In the case of *Cammack vs. Soran et al.*, 30 Grat., 292, decided March, 1878, it was held: The consideration for the sale and conveyance of land is a debt due at the time by the vendor to the purchaser; the purchaser is a purchaser for valuable consideration within the meaning of the recording acts; and such a purchaser, having purchased and received a conveyance of the land, without notice of an attachment which had been previously levied upon it, but which had not been docketed, is entitled to hold the land free from the lien of attachment.

In the case of *Easley et als. vs. Barksdale et al.*, 75 Va., 274, decided February 10, 1881, it was held: Lands sold and conveyed by an heir and devisee after such report filed will be held liable in the hands of a purchaser for the debts of the decedent, while lands sold and conveyed to a *pendente lite* purchaser without actual notice of the *lis pendens* will not be bound by such *lis pendens*, unless the provisions of the statute, Chapter 182, are complied with.

In the case of *Hurn vs. Keller*, 79 Va., 415, decided September 25, 1884, it was held: Independent of statute, a purchaser *pendente lite* from a party to a suit of the subject thereof takes it bound in his hands by any decree rendered against his vendor in that suit touching said subject. By statute such purchaser is not bound by such decree until the *lis pendens* is recorded, as thereby directed, provided he purchased without actual notice of the pending suit.

In the case of *Davis et al. vs. Bonney et al.*, 89 Va., 755, decided March 16, 1893, it was held: A creditor at large, successfully suing to set aside a deed conveying property in fraud of creditors, has a lien on the property from the time of suit brought, and a creditor who comes into this suit shall have a like lien from the filing of his petition, but, as against creditors, with or without notice, and purchasers for value without notice, from the time of his filing his memorandum of *lis pendens*. Such lien is a lien only upon the property conveyed, and not, like the lien of a judgment, on all of the debtor's estate.

SECTION 3567.

In the case of *Mutual Assurance Society vs. Stannard et als.*, 4 Munf., 539, decided January 21, 1815, it was held: The lien of a judgment upon the lands of the party relates back to the commencement of the term at which it was obtained.

If a judgment-creditor (without suing out execution) file a bill in chancery to get satisfaction out of the real and personal property of the debtor, the whole being conveyed by a deed of trust executed during the term in which the judgment was obtained, and providing that the property conveyed may be sold by the trustees to answer the purposes of the trust, the court

ought to dismiss the bill as to the personal property, without prejudice to the plaintiff's right, if any, to the residuary money resulting to the debtor from the sale of that property, after satisfying the deed; but should direct the trustees to sell the lands, and out of the proceeds thereof to satisfy the judgment in the first place, and afterwards to perform the trusts reposed in them by the deed.

In the case of *Coutts vs. Walker*, 2 Leigh, 268, decided June, 1830. Real estate is vested in a trustee by deed of marriage settlement, in trust to pay the wife an annuity out of the profits, and, subject to the annuity, in trust for the son of the grantor; while the annuitant is yet living a creditor of the son recovers a judgment against him, and exhibits his bill in chancery, to subject the son's equity in the estate to the debt. Held:

1. That such an equitable interest cannot be taken in execution at law.

2. That it is bound by the judgment in equity, which will apply it to the satisfaction of the debt; but,

3. As the annuitant is yet living, and is not compellable to take a gross sum in satisfaction of the annuity, and as the trustee is to hold the subject and pay the annuity out of the profits, the court of chancery ought not to direct the sales out and out of the debtor's equitable interest subject to the annuity, but ought to only direct the application of the surplus of profits as they accrue, after paying the annuity, to the debt.

In the case of *Skipwith's Executor vs. Cunningham, etc.*, 8 Leigh, 271, decided April, 1837, it was held: It is well settled as general rule, that the lien of a judgment upon the land of the debtor relates back to the commencement of the term at which the judgment was obtained, and overreaches a deed of trust on the land executed by the debtor on or after the first day of the term; but the term is not considered as necessarily commencing on the day appointed by law for its commencement. A deed admitted to record on the day appointed for commencing the term, but before the day on which the court actually commences its session, will be unaffected by the lien of the judgment.

In the case of *Taylor's Administrator vs. Spindle*, 2 Grat., 44, decided April, 1845, it was held: Where a *fiери facias* has been issued upon a judgment within the year and a day, the judgment is a lien upon a moiety of all the lands owned by the debtor at the date of the judgment, or which were afterwards acquired, in the hands of *bona fide* purchasers for value, without notice.

So long as a judgment may be revived, it is a lien upon a moiety of all the lands owned by the debtor at the date of the judgment, or which are afterwards acquired, into whosoever hands they may have come.

It is the settled practice in Virginia to entertain the suit of the judgment-creditor for relief in equity, when the debtor has, subsequent to the judgment, conveyed his lands in trust for the payment of debts, or on other trusts authorizing the sale of the land. And in such case the court will decree a sale to satisfy the judgment.

It is not necessary that a judgment-creditor should have issued an *elegit* on his judgment before coming into equity for relief.

In the case of *Leuke vs. Ferguson*, 2 Grat., 419, decided January, 1846, it was held: The lien of a judgment is a legal lien, and a purchaser of the legal title from the debtor takes it subject to the lien, though he had no notice of it.

On a joint judgment against several, the service of a *ca. sa.* upon one does not extinguish the lien of the judgment upon the land of the others.

On a joint judgment against several, the service of a *ca. sa.* on one, and the execution and forfeiture of a forthcoming bond by him, does not extinguish the lien of the judgment upon the land of the others.

In such a case, the party upon whom a *ca. sa.* was served, and who executed the forthcoming bond, having been a surety of the principal debtor in the judgment, his surety in the forthcoming bond having paid the debt, is entitled to be substituted to the creditor's remedies against the land of the principal debtor; and this though the land was sold by the principal debtor, and had come into the hands of a *bona fide* purchaser for value without notice before the service of the *ca. sa.*

Prior to the act of 1822, a judgment in favor of the Commonwealth against general debtors only bound one-half the land of the debtor.

A party coming into equity to enforce the lien of a judgment is not entitled to an account for rents accrued before the decree.

In the case of *Rodgers vs. McClure's Administrator et als.*, 4 Grat., 81, decided July, 1847, it was held: A judgment is a lien upon the lands owned by the debtor at the date of the judgment in the hands of *bona fide* alienees for value.

The land last sold by the debtor is to be first applied to the satisfaction of the judgment, and this though the last purchaser obtained a conveyance before the first; the first having previously had a good equitable title.

In the case of *Withers vs. Carter*, 4 Grat., 407, decided January, 1848, it was held: A creditor by judgment or decree may in equity subject the debtor's equitable interest in land sold by him for the purchase-money unpaid; and such creditor will be preferred to an assignee of the purchase-money claiming under an assignment made subsequent to the judgment or decree.

The fiction of law which gives the judgment relation to the

first day of the term, applies to all cases in which the judgment might have been rendered on that day; but not to a case in which it could not have been then rendered.

There is a creditor by judgment prior to a sale of land by his debtor, and there is purchase-money unpaid sufficient to satisfy the judgment, when another creditor recovers judgment against the same debtor. This last cannot insist that the first shall go against the land, and leave the purchase-money unpaid for him, but the purchaser of the land is entitled to have the purchase-money applied to relieve his land.

In the case of *Burbridge vs. Higgins (Administrator)*, 6 Grat., 119, decided July, 1849. In a suit in the nature of a foreign attachment the *subpœna* is served upon the absent defendant, and there is a personal decree against him in favor of the plaintiff for the amount of the debt. In another suit brought by the plaintiff to obtain satisfaction of this decree, the validity of the decree in the first suit cannot be questioned.

A person largely indebted purchases land and pays part of the purchase-money, and has the land conveyed to his son; and the son conveys it in trust to secure the balance of the purchase-money. The son then sells the land to a third person at an advance price given by the father. A decree-creditor of the father files a bill to set aside the conveyance as fraudulent as to creditors, and pending this suit the balance of the original purchase-money is paid by the last purchaser out of the money due him from his son. The plaintiff being willing that the last sale shall stand, and to look to the purchase-money for satisfaction. Held: That the deed of trust given to secure the balance of purchase-money on the first sale being still outstanding, though satisfied since the commencement of this suit, the plaintiff is entitled to have the whole of the purchase-money, after satisfying said trust, and not a moiety only, applied to the discharge of the debt. A decree is a lien on the debtor's land, and the creditor may come into equity to subject the land though the decree has not been revived against the administrator of the debtor, and no execution has ever been issued upon it.

In the case of *Jones, etc. vs. Myricks's Executors*, 8 Grat., 179, decided October, 1851. Lands subject to a judgment lien which have been sold or encumbered by the debtor are to be subjected to the satisfaction of the judgment in the inverse order in point of time of the alienations and encumbrances. The land last sold or encumbered being first subjected.

A judgment-creditor having by his conduct waived or lost his right to subject the land first liable to satisfy his judgment, is not entitled to subject the lands next liable to the whole amount of his judgment, but only for the balance after crediting thereon the value of the land first liable.

A judgment-creditor having the prior lien on the lands of his debtor files a bill against the debtor and other creditors having encumbrances on his debtor's lands. Pending this suit another creditor of the same debtor files a bill against him and his creditors, and among them the judgment-creditor, seeking to subject the lands under his lien, and in this suit the proceeds of the whole lands which were sold by the sheriff under the insolvent laws, or by the trustees in the deeds, are distributed by the decree of the court to other creditors. The judgment-creditor afterwards matures his suit and brings it on for hearing. Held: That the decree in the other cause concludes him, so that he is not entitled to recover from the creditors who received them the proceeds of the land sold by the sheriff, nor is he entitled to have the land sold, as against the purchaser thereof.

In the case of *Craig vs. Sebrell*, 9 Grat., 131, decided August 2, 1852, it was held: A judgment is a lien upon the lands in the hands of a purchaser, though at the time of the conveyance execution upon the judgment was suspended by an injunction, and the lien exists though the judgment was not docketed, the purchaser having had notice thereof.

In the case of *Michaux's Administrator vs. Brown et als.*, 10 Grat., 612, decided January, 1854, it was held: A judgment is a lien upon an equity of redemption in land, and will be referred to a subsequent purchaser of the equity of redemption not having the legal title. And the lien of the judgment extends to the whole equity of redemption.

Though the judgment was enjoined at the time of the purchase, yet upon the dissolution of the injunction the lien relates back to the date of the judgment, and so has priority over the equity of the purchaser. The damages on the dissolution of an injunction to a judgment becomes, as to the party obtaining it, a part of the judgment, and are embraced in the lien of the judgment upon the equity of redemption.

A judgment being rendered for the penalty of a bond to be discharged by the payment of the principal sum due and interest, and the payment of the money having been delayed by an injunction until the principal due and the interest exceed the penalty, the lien of the judgment only extends to the penalty, the damages upon the dissolution of the injunction, and the costs at law, without continuing interest.

The reference to 16 Grat., 265, is an error.

In the case of *Gatewood's Administrator vs. Goode et als.*, 23 Grat., 880, decided September, 1875. At the March term, 1861, of the County Court of Monroe, a judgment was rendered at the suit of the Bank of V., plaintiff, against W. S. and G., the latter living in the county of Bath. Execution of *fi. fu.* was issued on this judgment, and was levied on the property of W. S.; and

the sheriff returned, after June, 1861, a levy upon the personal property of W., that the property was appraised and offered for sale, and, not bringing its valuation, it was returned. G. died during the war, leaving real estate in Bath county, and also in West Virginia; and after his death some of his creditors filed their bill in the Circuit Court of Bath to subject his real estate to the payment of his debts. The commissioner reported the above judgment as a debt by judgment having priority. A copy of the judgment was certified by the "clerk of Monroe Circuit Court, and, as such, keeper of the records of Monroe County Court, and which by law are a part of the records of my office." The Circuit Court of Bath confirmed the report. Held: The judgment, as constituted between the parties thereto, was a lien on the real estate in Virginia belonging to the judgment-debtors, or any of them, whether the said judgment was docketed in the counties in which the real estate might be or not. That the lien was not discharged by the levy of the execution upon the property of W., one of the debtors, by the sheriff of Monroe county; nor was the execution satisfied by the act of the sheriff returning the property so levied on to W., in obedience to the ordinance of the Virginia Convention of 1861, whether such ordinance was valid or not, said act of the sheriff being entirely his own act, neither prompted nor assisted by the plaintiff in the judgment. That the lien of said judgments on the lands of G. in Bath county was neither lost nor impaired by reason of the division of the State of Virginia into two States, and the falling of the county of Monroe into the State of West Virginia. That the certificate of the clerk of the Circuit Court of Monroe county in West Virginia, of the records of which court the records of the former County Court of Monroe form a part, was proper evidence of such judgment; and, there appearing no other judgment binding said lands, nor any debt of G. of superior dignity, there was no error in the decree.

In the case of *Floyd (Trustee) vs. Harding et als.*, 28 Grat., 401, decided March, 1877. In 1856 L. sells land to T. by parol contract, receives all the purchase-money, and puts T. into possession. In January, 1857, L. executes a deed to T., by which he releases all the land to T. and warrants the title. T. then sells the land to W., and W. conveys it to F. In March, 1866, B. recovers a judgment against L., which is docketed within the year. In a suit against F. to subject the land to satisfy the judgment against L., held: That the registry acts do not apply to a parol contract for land; and T. having paid all the purchase-money, and having been put into possession, so that he had a valuable equitable title to the land, it is not subject to the lien of the judgments against L. The valid equitable title of T. is not so merged in the legal title acquired by the deed of

L. to him as to subject the land to the lien of the judgment against L.

In the case of *Lavell and Jordan vs. McCurdy's Executors*, 77 Va., 763, decided October 4, 1883, it was held: The utmost extent of the jurisdiction in the court upon a writ of *scire facias* reciting a judgment for money, and notifying the defendants to appear and show why the plaintiffs should not have an execution against them for the debt, interest, and cost of said judgment, is to render judgment that the plaintiffs in the writ of *scire facias* have execution of the judgment in the writ set forth. Such judgment for the award of execution does not constitute a lien on real estate.

In the case of *Sinclair vs. Sinclair*, 79 Va., 40, decided April 3, 1884, it was held: A judgment-creditor can acquire no better right to his debtor's estate than the latter himself has, and applies it to satisfy his lien, subject to all equities existing at the time in favor of third persons.

When one, with another's money, buys an estate, and takes the conveyance in his own name, by presumption of law a trust results in favor of him whose money is thus used. Such trust may be established by parol proof, but the proof must be clear. If part only of the purchase-money has been paid of another's funds, the land will be charged proportionately, and judgment-creditors of the grantee can subject only his portion or interest therein.

In the case of *Yates & Ayres vs. Robertson & Berkley*, 80 Va., 475, decided May 7, 1885, it was held: As a general rule a judgment rendered at any time during a term relates back to the first day of the term, as if rendered then. This, however, is not always so. This rule does not apply to a judgment rendered during a term in a case which was in such a condition that the judgment could not have been rendered on the first day of the term.

SECTION 3569.

In the case of *McCance vs. Taylor*, 10 Grat., 580, decided January, 1854, it was held: The act of March 3, 1843, Session Acts 1842-'43, p. 51, does not apply to purchasers before the passage of the act. As to such the lien of a prior judgment is valid though not recorded.

SECTION 3570.

For the reference to 28 Grat., 401, see *ante*, Section 3567.

In the case of *Borst vs. Nulle et als.*, 28 Grat., 423, decided March, 1877. The docketing of a judgment is an act to be done to preserve or prevent the loss of a civil right or remedy within the meaning of the acts of March 4, 1862, Acts of 1861-'62, Chapter 81, and of March 2, 1866, Code of 1873, Chapter 146, Sections 6 and 7, pp. 998-'99. And, therefore, in computing the time

within which a judgment is required by Section 8, Chapter 186, Code of 1860, to be docketed, in order to preserve the lien of such judgment against purchasers, the period between the 17th of April, 1861, and the 2d of March, 1866, is not to be computed as a part of such time.

For the reference to 28 Grat., 617, see *ante*, Section 3561.

In the case of *Edison vs. Huff et als.*, 29 Grat., 338, decided November, 1877. At the February term, 1857, of the court a judgment was recovered against S., and H. as his surety on a forthcoming bond, and it was docketed on the 1st of April, 1857. An execution was issued on this judgment, and it was paid by H. On the 8th of October, 1856, S. by written agreement under seal sold to E. a house and lot, and delivered possession, and on the 18th of the same month S. conveyed the same to E. This deed was acknowledged on the same day, H. being one of the justices who took the acknowledgment, but it was not presented in the clerk's office for record until March 9, 1857. Upon a bill by H. against E. and S. to be substituted by the lien of the judgment against S., held: H. is entitled to be substituted to the lien of the judgment.

The judgment having been docketed within twelve months from the date of its being rendered, and the deed not having been docketed within sixty days from its acknowledgment, the judgment is a lien upon the house and lot against the deed.

The agreement not having been docketed, it is void as to the creditor and as to H. claiming under him, though H. had notice of the deed, and E. had possession of the house and lot.

Notice of deed or written agreement for sale of land does not affect a creditor of the grantor.

In the case of *March, Price & Co. vs. Chambers et als.*, 30 Grat., 299, decided March, 1878. In January, 1866, C. by an agreement in writing sold to W. a lot in Danville, and in the same month conveyed it to him. The agreement was never recorded, and the deed was not recorded until September 18, 1873. W. having paid all the purchase-money to C., conveyed the lot to R. to secure him a debt of four thousand dollars. This deed was recorded on the 24th of August, 1866. In April, 1868, W. was declared a bankrupt, giving in the lot as a part of his estate. In May, 1868, on the joint application of the assignee and R. as a lien creditor of the bankrupt, the court in bankruptcy ordered a sale of the lot, and the sale was made to R., and on the 18th of November confirmed, and the assignee directed to convey the lot to R. which was done on the same day, and R. took possession. In July, 1872, M. recovered a judgment against C. in the Corporation Court of Danville, which was docketed on the 11th of March, 1873. Held: Though M. had notice of the sale by C. to W., the lot is liable to satisfy this

judgment notwithstanding all the subsequent conveyances and proceedings in relation to said lot.

In the case of *Redd vs. Ramey*, 31 Grat., 265, decided January 9, 1879, it was held: R. obtains a decree against his guardian and his sureties for a certain sum of money, and sues out an execution, which is levied, and a forthcoming bond taken and forfeited. The court on its chancery side, on notice to the obligors in the forthcoming bond, renders a judgment in favor of R. against them, and this judgment is docketed. Held: The judgment is a valid judgment, and having been docketed, it is notice which will affect all subsequent purchasers of land from any of the defendants in the judgment.

In the case of *Young et als. vs. Devries et als.*, 31 Grat., 304, decided January 23, 1879, it was held: Land sold and purchased under a written contract which has not been recorded, though the purchasers have paid all the purchase-money and have been for years in possession under the contract before a judgment has been recovered against their vendor, is liable to satisfy the judgment.

Land sold and purchased under a parol contract, the purchasers having paid the purchase-money, and having been put in possession, and holding the possession under the contract before a judgment has been recovered against their vendor, is not liable to satisfy the judgment.

For the reference to 75 Va., 757, see *ante*, Section 3469.

For the reference to 76 Va., 173, see *ante*, Section 3397.

In the case of *Gordon (Assignee) vs. Rixey (Assignee) et als.*, 76 Va., 694.

Liens.—Judgment.—Vendors.—Priorities.—Case at Bar.—In 1867, on bond of M. and B. to P., assigned by P. to R., the latter obtained judgment, which was docketed in 1869. In 1866 M. granted his land to B., reserving lien for purchase-money, and in 1870 assigned the purchase-money bonds to G. for value without notice of the judgment. In contest for priority between R., as judgment-creditor, and G., as assignee of the vendor's lien and of the bonds thereby secured. Held: The lien of the judgment hath priority.

In the case of *Gurnee vs. Johnson's Executor et als.*, 77 Va., 712, decided September 27, 1883, it was held: Code 1873, Chapter 182, Section 6, makes every judgment rendered in this State a lien on all the debtor's real estate, and the prior judgment hath priority as between the judgments, whether docketed or undocketed. But no judgment is a lien on real estate as against purchasers thereof for a valuable consideration without notice, unless it be docketed in the mode and within the time prescribed. If docketed, the judgment, if prior in time, hath priority over such purchaser. To docket his judgment is the

creditor's privilege, not his duty. If he fails to docket it he may lose his lien on the real estate aliened to a purchaser without notice.

In the case of *McCormick (Trustee) vs. Atkinson (Trustee)*, 78 Va., 8, decided November 15, 1883, it was held: Where conveyance is made of the stock and fixtures of a store, in trust to secure debt payable *in futuro*, without right to trustee to possess or control the property, except in event of default of payment, then, on request of *cestui que trust* to sell the same, such conveyance impliedly reserves to grantor the power to possess and sell the property; and if he sells, then, as to the purchaser, and creditors of that purchaser, that conveyance is void, although it may have been recorded, its recordation being only notice of a void thing.

As between an unrecorded deed of trust and a subsequent but recorded conveyance of the equity of redemption without notice of the former deed, the latter hath priority.

SECTION 3571.

In the case of *Cronie vs. Hart et als.*, 18 Grat., 739, it was held: It must appear that the rents and profits will not discharge the judgment, even against fraudulent alienees.

In the case of *Horton vs. Bond*, 28 Grat., 815, decided August 9, 1877, it was held, p. 820: The decree of sale, though a sale was ascertained to be necessary, was premature if entered before the priority of the liens was determined, affirming *Coles's Administrator vs. McRae*, 6 Rand., 644; *Smith et als. vs. Flint et. als.*, 6 Grat., 40; *Buchanan vs. Clark et als.*, 10 Grat., 164; *Large vs. Boisseux*, 15 Grat., 83; *Lipscomb vs. Rogers et als.*, 20 Grat., 658; *White vs. Mechanics Building Fund Association*, 22 Grat., 233; *Moran vs. Brent et als.*, 25 Grat., 104.

In the case of *Price vs. Thrash*, 30 Grat., 515 and 524-'28, decided July, 1878. There being no averment in the bill or admission or proof that the rents and profits of the land retained by P. will not pay the debt in five years, it was error to decree a sale of the land before having this inquiry made. But the decree appealed from being interlocutory, this court will amend the decree in this respect, and as amended affirm it, with costs to the appellee.

In the case of *Compton vs. Tabor*, 32 Grat., 121, decided July, 1879, it was held: Upon a bill filed by a judgment-creditor to subject the land of his debtor to satisfy his debt, the court, in order to ascertain whether the rents of the land will pay the debt in five years, should generally direct the commissioner to offer it first for one year, and, if that will not pay the debt, then for two, and so on, if necessary, for five years, closing the contract whenever the rent will pay the debt, the terms of payment

of the rent to be fixed by the court, looking to the kind of property and the usage of the country. If it will not rent for enough in five years, the commissioner should report the fact to the court.

The reference to 33 Grat., 576-'77, is an error. This case is, however, cited to Section 2442.

For the reference to 75 Va., 825 and 833-'34, see *ante*, Section 2475.

In the case of *Muse vs. Friedenwald*, 77 Va., 57, decided January 25, 1883, it was held: Before sale of realty can be decreed to pay judgment liens, the court must, in some way, be convinced that the rents and profits will not in five years satisfy those liens. When the insufficiency is alleged and not denied, there need be no inquiry; but where not alleged, or, if alleged, the allegation is denied, there must be inquiry before a sale is decreed.

In the case of *Brengle et als. vs. Richardson's Administrators et als.*, 78 Va., 406, decided January 31, 1884, it was held: Judgment-creditor brings suit to enforce his lien. After account ordered and taken, and other liens proved, the other lienors become parties to the suit, and are entitled to have the lands sold for their relief in the order of their respective priorities, and aliened lands of the debtor must be sold in the inverse order of the alienation.

The acts of courts of competent jurisdiction, having cognizance of the parties and of the subject-matter, cannot be questioned elsewhere. If a bankrupt court wrongfully allows the bankrupt the exemption claimed by him, the remedy is not in the State courts.

Where the bill does not allege the insufficiency of the rents and profits to satisfy the liens within the period of five years, and where there has been no inquiry, but the decree of the court below sets forth that it appears that the lands without the improvements, when sold, would not more than pay the liens, the party entitled to the inquiry may be presumed to have waived it, and the decree of sale will not be set aside on account of the omission of such inquiry; but it will be amended, and that party be allowed to have the inquiry if he chooses; and, so amended, the decree will be affirmed.

In the case of *Daingerfield vs. Smith*, 83 Va., 81, decided March 31, 1887, it was held: It is improper to decree sale and renting of lands before taking an account of liens and priorities. It is also improper to decree renting and sale simultaneously, if the rents prove insufficient. The renting should be first decreed, and, if report shows it to be insufficient, sale may be decreed.

This is the case cited from 11 Virginia Law Journal, 588.

In the case of *Neff vs. Wooding and Wife*, 83 Va., 432, decided June, 1887, it was held: In suit to enforce liens reserved in favor of grantor in his conveyance of land, as provided by Section 2473, the court may decree sale of the land to satisfy the lien, without any previous account of rents and profits; Section 3571 applies only to suits for the enforcement of judgment liens.

This is the case cited from 11 Virginia Law Journal, 634.

In the case of *Eggleston vs. Whittle*, 84 Va., 163, decided December 1, 1887. A commissioner sold land and received the money without giving bond or accounting. Purchaser was required to pay it again; receiver got judgment against him and surety; execution was returned no effects. Before the return, commissioner executed trust deed to secure the purchaser. Receiver filed in pending creditor's suit against commissioner his petition to enforce his execution lien against fund secured to purchaser. Latter resisted on the ground, *first*, that he claimed the fund as his homestead, and *second*, that he had assigned it. Receiver then brought suit to enforce his judgment lien against the lands of the purchaser and surety. Held: Receiver was entitled to maintain his suit to enforce said judgment lien against lands of surety and purchaser.

In the case of *Moore vs. Bruce*, 85 Va., 139, decided July 19, 1888, it was held: The lien of a judgment may always be enforced in equity without a *fi. fa.* thereon.

In the case of *Thomas vs. Sellman*, 87 Va., 683, decided April 23, 1891, it was held: It is not multifarious for a bill to seek to subject judgment-debtor's alleged interest in lands, chattels, etc., to the payment of plaintiff's debt.

In the case of *Kyger vs. Sipe (Trustee)*, 89 Va., 507, decided December 15, 1892, it was held: In suit to enforce trust deed, the value of the rents and profits of the lands is immaterial, as the deed is not a judgment within the meaning of the Code, Section 3571.

SECTION 3573.

In the case of *Hutcheson vs. Grubbs*, 80 Va., 251, decided February 19, 1885, it was held: Courts of equity follow the law as respects the statutes of limitations. If a legal claim barred at law be asserted in equity, it is equally barred there.

Lien of judgment is a creature of statute, and cannot be enforced in equity after it ceases to be enforceable at law.

The language of the statute, Code 1873, Chapter 182, Section 9, "The lien of a judgment may always be enforced in a court of equity," implies only a purpose to confer jurisdiction on courts of equity to enforce the lien, whether the remedies at law are adequate or not.

In the case of *Sutton et als. vs. McKenny (Trustee)*, 82 Va.,

46, decided April 22, 1886, it was held: The lien of a judgment is not enforceable in equity after it ceases to be enforceable at law.

SECTION 3574.

For the reference to 76 Va., 895-'96, see *ante*, Section 3475.

SECTION 3575.

In the case of *Alley et als. vs. Rogers*, 19 Grat., 366, 388-'89, decided March 12, 1869. On the 24th of May, 1859, G. conveyed real estate in Henrico to W. to secure four negotiable notes of that date, payable in six, twelve, eighteen, and twenty-four months to R. who lived in Kentucky. The notes were endorsed by R. and deposited by him in the F. bank for collection.

On the 21st of February, 1861, G. conveyed to A. this real estate with much more, in trust for the payment of his debts; debts being a lien upon any of the property to be paid first.

On the 17th of April, 1863, A. sold the greater part of the real estate conveyed to W., and conveyed the same by deeds of different dates to the purchasers, and some of these purchasers conveyed subsequently to others. The last two of the notes aforesaid were protested for non-payment and remained in the bank until the 14th of September, 1863, when A. paid them to the bank in Confederate currency, and took them up, Confederate notes being then the only currency, and being generally received by the banks in payment of notes either owned by the bank or deposited for collection, and being then depreciated to about twelve for one in gold. But the deed of trust to W. was not released. After the war R. filed his bill claiming that the two notes were still due, and seeking to enforce the trust for their payment, and he made G., the bank, A., and the purchasers from A., and the present holders parties. Held: If it is not necessary to sell the whole of the real estate conveyed to W. to pay said notes, the part not sold by A. is first to be sold, and after applying the proceeds of said sale to the payment *pro tanto* of said notes, the balance due upon them should be raised ratably out of the lots now held by the purchasers respectively in proportion to the amounts of the purchase-money for which they were respectively sold by A. on the 17th of April, 1863, without regard to the dates of the deeds from A. to the purchasers.

In the case of *Harman et als. vs. Oberdorfer et als.* 33 Grat., 497, p. 503-'7, decided September, 1880. A deed takes effect from its delivery, and such delivery, like any other fact, may be established either by direct proof or by circumstances.

Without evidence of any preceding executory agreements between the parties, or any evidence of the time of the delivery of the deeds, except what may be inferred from their dates, P., a

judgment-debtor, by one deed (dated January 1, 1860, acknowledged February 1, 1860, and recorded April 13, 1860) conveyed one tract of land to H., and by another deed (dated February 1, 1860, acknowledged February 1, 1860, and recorded February 24, 1860) conveyed another tract to B. In proceedings to subject both tracts to the payment of judgments obtained against P. prior to either deed, held: The tract to B. was the last aliened, and therefore first liable to satisfy the judgments.

If a deed has a date, the law intends it to have been delivered at the date; and when it is proved by witnesses, who say nothing as to the time of delivery, and is recorded, it stands recorded as a deed proved to have been delivered at its date. There is no distinction in principle between the presumption of delivery arising from the proof by witnesses and the acknowledgment before a justice or notary.

The provision that every deed, etc., shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time it is duly admitted to record, etc., does not apply to purchasers of different tracts of land from the same vendor, but refers only to subsequent purchasers of the same subject as that embraced in the instrument declared to be void.

Where several lots of land are sold on the same day, on the same terms, to several parties, all of whom are immediately put into possession under the same agreement as to the deeds conveying the same land and the trust deeds to secure the purchase-money, although the deeds conveying them are really delivered and recorded at different times, they will all be regarded as alienations within the meaning of the statute as of the same day (day of sale), and in subjecting them to the payment of a judgment docketed against a vendor at the time of the sale, each lot must bear its proportion according to their relative values on the day of sale, and subjected in accordance with the principles of *Horton vs. Bond*, 28 Grat., 815.

In the case of *Whitten, etc., vs. Saunders, etc.*, 75 Va., 563, decided August 11, 1881. A debtor possessed of a large tract of land conveys a part of the same by deed of gift to one of the sons, who thereafter sells it to another person for valuable consideration. The father-debtor then, by subsequent deeds for value, executed at different times, conveys nearly the whole of his said land to different purchasers. On proceedings to subject said land to the payment of a portion of the purchase-money, for which the vendor to the debtor had retained his vendor's lien, held: The lands will be held in the inverse order of the alienations from the debtor, and this, too, although one of the alienees is a purchaser from the son of the debtor, who held under a voluntary conveyance from the debtor.

In the case of *Dickinson vs. Clement*, 87 Va., 41, decided November 6, 1890, it was held: Where decree to sell debtor's land in judgment-creditor's suit, and the creditors garnishee bonds of previous purchasers of land from debtor, but realize nothing. Held: Debtor is not entitled to credit on the judgments for amount of said bonds, and in fact has no right to go on the lands sold until the lands retained by him have been exhausted.

SECTION 3576.

See references to Sections 3567 and 3568.

In the case of *Rhea et als. vs. Preston*, 75 Va., 757 and 767-768, decided July 21, 1881. K. sold and conveyed to T. a tract of land, reserving a lien for the payment of the purchase-money. Afterwards, and on the same day, T. executed two deeds of trust to secure the payment of two certain debts to D., in one of which deeds the tract purchased from K. is conveyed to secure one debt, K. uniting in this deed; and in the other deed a tract called the "Mill tract" and other tracts of land. Held: That K. had the right to require that the debt to D. shall be paid by the "Mill tract," on which D., as between himself and K., has the exclusive lien, and leave the other tract to be applied to K.'s lien; and K.'s equity in this respect is prior and paramount to that of P. to have the "Mill tract," on which his lien rested, exonerated from the D. debt for his benefit.

SECTION 3577.

In the case of *Yates's Executor vs. Pickett*, 4 Munf., 104, decided March 9, 1813, it was held: A plea of the act of limitations in bar of *scire facias* to revive a judgment cannot be repelled by a replication that the defendant, within five years next before the suing out of the *scire facias*, promised to pay the judgment.

If a replication be insufficient, and be demurred to as such, yet, if the plea be also insufficient, the court will go up to the first fault and give judgment for the plaintiff.

In the case of *Gee vs. Hamilton et ux.*, 6 Munf., 32, decided December 4, 1817, it was held: The right to issue a *scire facias* upon a judgment is not barred by the act of limitations in a case where execution was issued in due time, and returned "no effects," though more than ten years elapsed between the return of the execution and the date of the *scire facias*.

Issue being joined on the plea of "no such record" and on the act of limitations, if the jury find for the plaintiff on the second plea, and the court, without taking any notice of the first plea, enter judgment, such judgment ought to be reversed, notwithstanding on previous pleadings, which, by consent, were

set aside, the court had pronounced that, in fact, there was such a record.

In the case of *Peyton's Administrator vs. Carr's Executor*, 1 Rand., 436, decided May, 1823, it was held: A judgment obtained against a testator in his lifetime, and not revived against his personal representative after his death, within five years from the time of his qualification, is barred by the statute of limitations. The operation of the statute will not be prevented by a *scire facias* sued out within the five years, on which the plaintiff suffered a non-suit.

In the case of *Randolph's Administratrix vs. Randolph*, 3 Rand., 490, decided October, 1825, it was held: There is no limitation by statute to an action of debt, or *sci. fa.* on a judgment, except only in the case of a judgment on which no execution has been taken out, and except in cases of executors and administrators, on a judgment against their testator or intestate.

In the case of *Lipscomb's Administrator vs. Davis's Administrator*, 4 Leigh, 303, decided February, 1833, it was held: The statute of limitations, whereby the remedy on a judgment by debt or *scire facias* is limited to ten years, is no bar to a motion on a forthcoming bond of more than ten years' standing.

In the case of *Fleming's Executor vs. Dunlop & Buchanan, etc.*, 4 Leigh, 338, decided March, 1833, judgment recovered by D. P. & Co. against F. in September, 1810, and execution sued out in the same month, and another in October, 1815, but neither returned; to a *scire facias* to revive the judgment against F.'s executor sued out in July, 1826, defendant pleads in bar the statute of limitations; plaintiffs reply to the two executions sued out in September, 1810, and October, 1815, on demurrer to this replication. Held: The statute is a bar to the *scire facias*.

But it seems, by the opinion of Tucker, P., that debt would lie on the judgment, and the statute would not be a bar to that action.

In the case of *Manns vs. Flinn's Administrator*, 10 Leigh, 93 (2d edition, 97), decided February, 1839. Judgment is recovered against A. in his lifetime; A. dies, and upon the supposition of his intestancy, administration of his estate is granted to B.; a will of A.'s being afterwards found and proved, the former grant of administration is revoked, and administration, with the will annexed, granted to C., and suit is brought on the judgment, after five years had elapsed from the grant of administration to the rightful administrator, C. Held: The five years limitation prescribed by the statute began to run, not from the void grant of administration to B., but from the qualification of C., the rightful administrator, and so the statute was not a bar to the suit.

In the case of *Hill's Executor vs. Fox's Administrator*, 10 Leigh, 587 (2d edition, 615), decided February, 1840. A decree for a sum of money provides that if no property of the debtor can be found, other than that conveyed by him by a deed of trust and mortgage, then he shall deliver up the trust and mortgage property to the marshal, to be sold to satisfy the money secured by the trust and mortgage, and then to satisfy the decree. The debtor dying, a bill of revivor and supplement is filed against his administrator, to obtain payment of the decree out of the assets in his hands. And the administrator by his answer relies upon the statute of limitations. Held: The decree in this case is not a final decree, and, if it were, is not such a one as the statutes can apply to.

For the reference to 11 Leigh, 2, see *ante*, Section 2921.

In the case of *Herrington vs. Harkins's Administrators*, 1 Rob., 591 (2d edition, 624). Where an action of debt is brought on a judgment after ten years from the date thereof, and the defendant wishes to avail himself of the statute of limitations, it is necessary that he should do so by plea. A demurrer to the declaration is not the proper mode to take advantage of the statute.

The statute 1 Rev. Code 1819, Chapter 128, Section 5, p. 489, declaring that where execution hath issued and no return is made thereon, the party in whose favor the same was issued may obtain other executions for ten years from the date of the judgment, and not after, does not bar such party from maintaining an action of debt on the judgment after ten years.

In the case of *Braxton vs. Wood's Administrators*, 4 Grat., 25, decided April, 1847, it was held: A suit brought by the judgment-creditor to enforce satisfaction of his judgment suspends the operation of the statute of limitations during its pendency. But if it is dismissed without satisfaction of the judgment, it will not prevent the bar of the statute to another suit brought after its dismissal.

In the case of *Smith's Executor vs. Charlton's Administrators*, 7 Grat., 425, decided May 11, 1851, it was held: A judgment *quando accidevint* does not come within the operation of the statute of limitations in relation to judgments.

In the case of *Beal's Administrator vs. Botetourt Justices, for, etc.*, 10 Grat., 278, decided July, 1853, it was held: In such an action a plea that the execution issued irregularly and unlawfully after the expiration of more than a year and a day from the time of the decree, without any previous proceeding by way of *scire facias* or otherwise to authorize the same, presents an immaterial issue, such an irregularity would not render the execution void, but only voidable, and it cannot be avoided by pleading or proof in this collateral suit.

In the case of *Richardson (Administrator) vs. Prince George Justices*, 11 Grat., 190, decided April, 1854, it was held: The *scire facias* stated that the judgment had been suspended by injunction. This was an unnecessary allegation, and may be treated as surplusage, and a plea that the judgment had not been suspended by injunction offered no bar to the *scire facias*.

The *scire facias* further stated that the injunction had been dissolved is bad, and an issue made up upon it is immaterial. Therefore, though the court admits improper evidence upon it, offered by the plaintiff, it is not cause for reversing the judgment.

The pendency of an injunction to a judgment at law will not prevent the revival of the judgment upon the death of either the plaintiff or defendant, and the injunction operates upon the judgment on the *scire facias* to restrain and prohibit the issue of execution thereon.

In the case of *Hutsonspiller's Administrators vs. Stover's Administrators*, 12 Grat., 579, decided September 7, 1855, it was held: Upon the dissolution of an injunction to a judgment, execution may issue thereon within a year and a day from the dissolution of the injunction without a *scire facias*, though the injunction was in force for more than ten years. The statute of limitations to judgments does not run whilst an injunction to the judgment is in force.

If a defendant in a judgment dies whilst an injunction to the judgment is pending, though the injunction may not be dissolved for more than five years after his death, the statute requiring judgments to be revived within five years does not run during the pending of the injunction; and the judgment may be revived after the five years from the death of the defendant; and this though the judgment might have been revived while the injunction was in force.

Upon a *scire facias* to revive a judgment which had been suspended by an injunction for forty-six years, issue was made upon the plea of payment; and upon the trial the court instructed the jury that the pending of said injunction cause repelled the legal presumption of payment which would have arisen from lapse of time if said injunction had not been pending. Held: This instruction was proper, and it is not necessary to distinguish to the jury between the legal presumption and the natural presumption arising from lapse of time.

In the case of *Shannon vs. McMullen*, 25 Grat., 211, decided July 1, 1874, it was held: When process is returnable process, if the officer make return of the performance of acts beyond his duty under such process, such return will be invalid as to such parts, and will not be evidence, though the addition of such parts will not render the whole return void, but it will be good to the extent he was authorized to make such return.

In the case of *Brown (Administrator) vs. Campbell et als.*, 33 Grat., 402, decided July, 1880, it was held, pp. 404-'5: Under the circumstances of this case held, the proof is sufficient to establish the payment of a debt on which judgment had been rendered and execution issued twenty-three years before the filing of a bill to enforce the payment of the judgment.

Where three executions have been issued upon a judgment and two of them returned by the officer, the statute of limitations is twenty years from the return-day of the execution on which a return was made.

In the case of *Mc Veigh vs. Bank of Old Dominion*, 76 Va., 267.

Scire Facias.—Neither declaration nor rule is necessary upon a *scire facias* to revive a judgment. If *scire facias* is returnable to rules, and defendant makes default, there should then be an award of execution, which, if not set aside at the next term, becomes a final judgment as of the last day of the term. No order of the court is necessary in such case, but could prejudice no one.

In the case of *Sutton et als. vs. Marye (Auditor)*, 81 Va., 329, decided January 14, 1886. The Commonwealth got judgment against the sheriff of W. county and his sureties, and had *fi. fa.* issued and levied. Upon return thereof it had a *venditioni exponas* issued. Instead of this writ going to the sheriff, it was taken in charge by the auditor of public accounts. Nothing was done and no process issued for over sixteen years, when in December, 1884, an *alias fi. fa.* was issued, levied, and returned, and thereupon a writ of *venditioni exponas* was issued. The sureties moved the court below to quash the *alias* writ of *venditioni exponas*, which motion was denied. On error, held: The writ of *venditioni exponas*, as well as the *alias fi. fa.*, was issued without authority of law, and should be quashed.

In the case of *Hamilton vs. McConkey*, 83 Va., 533, decided June 23, 1887, it was held: Under the Code of 1860, Chapter 186, Section 15, it is required that the officer shall return upon a writ of *fi. fa.* "whether the money is, or cannot be, made." A return of "not levied by reason of the stay law" is a return, substantially, that the money cannot be made.

The limitation within which an *alias* execution may be issued is twenty years where there is a return of an officer; and whether such return be true or false, sufficient or insufficient, is not a question which can arise.

In the case of *McCarthy vs. Ball*, 82 Va., 872, decided February 10, 1887, it was held: Courts of equity follow courts of law as respects this statute. If a legal claim, barred at law, is asserted in equity, it is equally barred there. Thus, liens are creatures of statutes, and cannot be enforced in equity after they have ceased to be enforceable at law.

* This is the case cited from 11 Va. Law Journal, 697.

In the case of *Kennerly vs. Schwartz*, 11 Va. Law Journal, 605, decided September 22, 1887, it was held: Where a judgment has been obtained against one who is not a householder or head of a family, and has become a lien upon his land, and he subsequently becomes a householder or head of a family, the judgment has priority over his claim to a homestead exemption in the land; but he may claim such exemption in the land after satisfying the judgment.

In the case of *Straus vs. Bodeker's Executrix et als.*, 86 Va., 543, decided December 5, 1889, it was held: Where non-resident judgment-creditors are summoned by order of publication, and no order is made to suspend the issuing of executions, a suit to enforce a contract for the sale of the judgment-debtor's land is no such "legal process" as suspends judgment-creditors' right to sue out execution, and stops the running of the statute of limitations against such judgments.

In the case of *Brown vs. Butler*, 87 Va., 621, decided April, 9, 1891, it was held: In April, 1887, suit was brought to enforce the liens of two judgments, one dated February 23, 1866, the other dated November 2, 1866, both duly docketed, but execution had been issued on neither. Held: Right to enforce had ceased by limitation.

CHAPTER CLXXV.

SECTION 3583.

In the case of *Tolson vs. Elwes*, 1 Leigh, 436, decided October, 1829, it was held: Execution sued out in the name of W., endorsed for the benefit of E., held that E. cannot maintain a motion in his own name against the sheriff for the amount levied on the execution, or for his default in service and return of the writ.

In the case of *Meze vs. Howver*, 1 Leigh, 442, decided October, 1829, it was held: A *fi. fa.* is sued out by M. and M. on judgment recovered by them; they endorse on the writ that it is for the benefit of H. The sheriff levies it and takes forthcoming bond payable to H. Held: The bond is naught.

In the case of *Fletcher vs. Chapman*, 2 Leigh, 560, decided March, 1831. Judgment is rendered against a sheriff for a fine for the alleged default of his deputy, the sheriff making no defence, nor giving any notice to the deputy of the proceeding; this judgment is erroneous in point of law, and unjust upon the merits. Held: In such case, the sheriff is not entitled to recover the amount of the fine from the deputy.

In the case of *Burnett et als. vs. Harwell et als.*, 3 Leigh, 89, decided October, 1831, it was held: Under the provisions of

the statute, an action cannot be maintained on an executor's bond at the relation of an assignee of a legatee of a decree for legacy; such action can only be maintained at the relation of the person who has the legal right to the debt.

In the case of *Governor for Leighton vs. Hinchman et als.*, 1 Grat., 156, decided September, 1844, it was held: The action against a high sheriff and his sureties upon his official bond for the misconduct of his deputy in his proceedings on an execution in his hands must be at the relation of the plaintiff in the execution, and cannot be sustained at the relation of the parties for whose benefit the execution issued.

In the case of *Wallop's Administrator vs. Scarborough et als.*, 5 Grat., 1, decided April, 1848, it was held: A motion to quash a writ and inquisition founded on a judgment may be in the name of the party on the record, and must be against such a party.

A stranger having acquired an equitable right to the benefit of an execution, or to the property to which it is levied, will generally have authority to sue out and conduct the process, or to object to its regularity or validity; but he must do it in the name of a legal party to the process, or one who can be made to do so. And his authority to use the name of the party to the process of a court of law will be so far recognized by such court as to preclude the intervention of such party for the purpose of defeating it.

In the case of *Pates vs. St. Clair*, 11 Grat., 22, decided April, 1854, it was held: It was not improper, even before the statute, to render judgment for costs in favor of the defendant against a person for whose benefit a suit was brought when the defendant succeeded in the case.

In a suit brought in the name of one person for the benefit of another, a judgment stating that the parties appeared by their attorneys, and by consent the suit was dismissed, and judgment for defendant's costs against the person for whose benefit the suit was brought, it must be held that the consent is the consent of the latter, and that the judgment is proper.

SECTION 3585.

In the case of *Garland vs. Bugg*, 5 Munf., 166, decided October, 1816, it was held: After a *distringas* upon a judgment in detinue has been returned executed, but without satisfaction, if the court, on the plaintiff's motion, direct the *distringas* to be superseded so far as it relates to the specific property, and to be executed as to the alternative value, such order is not erroneous; but it seems the plaintiff may have a new *distringas*, to be executed as to such value.

After the *distringas* upon a judgment in detinue has been exe-

cuted without satisfaction, or superseded as to the specific property, and directed to be executed as to the alternative value, if it appear to the court that, in consequence of the defendant's persisting in withholding the specific property, the plaintiff cannot get it by the *distringas*, a *ca. sa.* or *fi. fa.* may be directed to be issued for the alternative value.

Notice of a motion to supersede *distringas*, or for a *ca. sa.* or a *fi. fa.*, in lieu thereof, need not be given by the plaintiff to the defendant.

In the case of *Jordan (Administrator) vs. Williams*, 3 Rand., 501, decided October, 1825, it was held: On a *distringas fi. fa.* the sheriff cannot distrain the very property for which the execution issued, nor can he seize and sell it to pay the damages mentioned in the execution.

SECTION 3586.

See the case of *Garland vs. Bugg*, 5 Munf., 166, quoted *supra*, Section 3585.

SECTION 3587.

In the case of *Price vs. Crump*, 2 H. & M., 89, decided March 11, 1808, it was held: Money lent *bona fide* to a sheriff, and applied by him to his own use prior to receiving a writ of *fi. fa.* against the lender, is not liable to satisfy such execution, either in law or equity, notwithstanding the same money was originally deposited in his hands as a pledge for certain purposes.

In the case of *Bullitt's Executors vs. Winstons*, 1 Munf., 269, decided March 22, 1810, it was held: A writ of *fi. fa.* may be levied without touching or removing the property, provided it be in the immediate power of the sheriff, and admitted by him to have been taken to satisfy the debt. The sheriff's permitting the property to remain in the possession of a third person or of the defendant, under a verbal engagement to produce it on the day of sale, does not prevent the *fi. fa.* from having been levied in contemplation of law, the sheriff being responsible to the plaintiff if the property be not produced.

Parol evidence is admissible to prove that a *fi. fa.* was levied, though no return was made upon it.

A sheriff may be permitted, by order of court, to make a return upon an execution, or to amend it according to the truth of the case, at any time after the return-day.

A plaintiff, by directing the sheriff to put off the sale of property taken in execution to a day after the return-day, and to suffer it to remain in the possession of the principal defendant or his securities, releases the securities altogether from that or any subsequent execution, such direction being given without their concurrence. In such a case the plaintiff's adding to the

direction the words "holding the property subject to the said execution" cannot prevent the release from operating.

An appeal from, or *supersedeas* to, an order quashing an execution against two defendants need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only.

In the case of *Dix vs. Evans*, 3 Munf., 308, decided November 20, 1812, it was held: The sheriff's failing to mention in his return of an execution one of the negroes on whom it was levied is no ground for reversing a judgment on a forfeited forthcoming bond in which that negro is mentioned as one of those on whom such execution was levied.

It seems that where a *capias ad satisfaciendum* is executed at any time before the return-day thereof, the sheriff may receive property tendered by the debtor in discharge of his body out of custody, and may appoint a day of sale posterior to the return-day; and that a bond for the forthcoming of such property is good in law, though dated after such return-day.

In the case of *Lusk vs. Ramsay*, 3 Munf., 417, decided November 9, 1811, it was held: The lien by virtue of the writ of *fi. fa.* upon the property of the debtor is not released by his giving a forthcoming bond, but continues until such bond is forfeited.

In the case of *Steele vs. Brown et als.*, 2 Va. Cases, 246, decided by the General Court, June, 1821, it was held: A writ of *fi. fa.* may be levied on ready money in the possession of the defendant.

For the reference to 2 Leigh, 268 and 280, see case of *Coutts vs. Walker*, *ante*, Section 3567.

In the case of *Turnbull (Executor, etc.) vs. Claibornes*, 3 Leigh, 392, decided December, 1831. Robertson, executor of Cole, recovers judgment against Claibornes, and sues out execution thereon; before the execution is delivered to the sheriff, Robertson dies; the execution being then delivered to the sheriff, he levies it on property of defendant, and takes a forthcoming bond payable to Robertson, executor of Cole. Held: The execution was properly levied, though Robertson was dead before it was delivered, and the forthcoming bond was rightly taken to Robertson, as executor, and was good.

In the case of *Governor for Fisher vs. Van Meter*, 9 Leigh, 18, decided November, 1837. A sheriff having levied a *fi. fa.* on goods of the debtor, receives an order to postpone the sale from an unauthorized person, and postpones the sale accordingly, and the sheriff relies on the acquiescence of the plaintiff in the order to discharge him from liability for conforming with it. Held: It is incumbent on him to prove such acquiescence, and the time of it, for if it occurred after the sale day of the

execution, it would be of little weight, since then all the mischief had been done.

When goods have been taken in execution under a *fi. fa.*, a direction given by the creditor to the sheriff to restore the goods to the possession of the debtor is fraudulent and destroys the lien of the execution on the goods; but a mere order to postpone the sale without collusion does not affect the lien of the execution.

A deputy sheriff having levied a *fi. fa.* on the goods of the debtor, receives an order from the creditor to postpone the sale for two months, holding the property subject to the sheriff's control to satisfy the debt, and the deputy sheriff postpones the sale, but instead of holding the property, restores it to the debtor, whereby the lien of the execution is destroyed and the debt ultimately lost. Held: This is official misconduct in the deputy, for which the sheriff and his sureties are liable in an action on his official bond.

In the case of *Pegram vs. May*, 9 Leigh, 176, decided January, 1838. A creditor delivers a *fi. fa.* to a deputy sheriff acting in a different district of the county from that in which the debtor resides, in order by such delivery to bind the debtor's property, but with directions to the deputy to hold it till a future day, and then to transfer it to the deputy of the district in which the debtor resides, to be by him levied, unless the debt should be paid in the meantime, or unless the debtor should bring his property to the district of the first deputy to be sold, in which case the first deputy was to levy the execution upon it. Held: The execution binds the goods of the debtor from the date of its delivery to the first deputy.

In the case of *Carr's Administrators vs. Glasscock's Administrators*, 3 Grat., 343, decided October, 1846, it was held: The lien which a creditor acquires by a levy of his execution upon personal property, if not enforced by a sale thereof, is only temporary, and expires with the authority to sell under the execution. Therefore a surety of the debtor who afterwards pays the debt has no right to be subrogated to the lien of the execution upon this property.

In *Langster's Case et als.*, 17 Grat., 124, decided October 29, 1866, it was held, pp. 129-'32: A sheriff who takes the property of A. under an attachment against the property of B. thereby not only commits a trespass, but plainly violates the duty of his office, and breaks the condition of his official bond; and his sureties are liable for his act.

In the case of *Walker et als. vs. The Commonwealth*, 18 Grat., 13, decided October, 1867, it was held: The levy of an execution of *fi. fa.* does not divest the defendant in the execution of the property and transfer the title to the plaintiff or the sheriff.

Only a special interest is vested in the sheriff as a mere bailee, to enable him to keep the property safely, and defend it against wrong-doers. It is in the custody of the law, and the sheriff has a naked power to sell it and pass the title of the owner to the purchaser.

A plaintiff may always, with the consent of all the defendants, abandon a levy upon the property of all or any of them, and afterwards sue out a new execution.

If the defendants in an execution be a principal and his sureties, and the property levied on be that of the sureties, the plaintiff may, with the consent of the sureties only, abandon the levy and afterwards sue out an execution against all the defendants.

If the levy be abandoned by the sheriff, with the consent of the defendants, without the concurrence or authority of the plaintiff; or if the property be eligned or removed by the defendant out of the reach of the sheriff, without the consent of the sheriff or the plaintiff, the latter may sue out a new execution.

But if the property levied on be lost to the defendant by the misconduct or neglect of the sheriff, the execution is thereby satisfied, to the extent of the value of the property; and the plaintiff can only look to the sheriff for indemnity.

A mere suspension of proceedings on a levied execution does not authorize a restoration of the property to the possession of the defendant, or release the levy. And if by a misunderstanding of the directions of the plaintiff by the sheriff and the defendants the property is released by the sheriff to them, the plaintiff may have a new execution.

In a proceeding at law against several parties, judgments against one or more are entered at one time, and against others at another time, one execution may be issued against all.

Upon a motion to quash a second execution in vacation, the judge may, in vacation, allow the sheriff to amend his return on the first execution.

In the case of *O'Bannon et als. vs. Saunders*, 24 Grat., 138, decided November, 1873, it was held: When an execution is placed in the hands of a sheriff, the presumption of law is that he has levied it and made the money, and in the absence of evidence that he did not levy it, he and his sureties will be liable for the debt to the creditor.

If the sheriff fails to levy the execution, when he might do it, he and his sureties are liable for the debt.

Execution is issued in June, 1860, and the sheriff does not return it until 1868, after suit is brought against him and his sureties, when he returns that he had received the money in 1861 or 1862. A law to stay the levy of executions and directing

that when levied at the time the sheriff should restore the property to the debtor, was passed in July, 1861. The court will presume against the sheriff and his sureties that the money was received on the first of January, 1861.

In the case of *Paine (Survivor, etc.) vs. Tutwiler, et als.*, 27 Grat., 440, decided March, 1876. Execution on a forthcoming bond for \$318.53, in the name of K. against T., returnable December rules, 1860, went into the hands of J., deputy of S., sheriff of the county of F. On January 1, 1861, J. becomes sheriff of F. In May, 1861, J. receives from T. \$176.40 on this execution and signs his own name to the receipt with the addition of sheriff, but he does not return the execution. In February K. issues another execution on the judgment; then T. files his bill to enjoin it, on the ground that he had paid it, and he files J.'s receipt for \$176.40. Neither T. nor J. can say positively whether the execution was or was not levied, or whether J. received the money, as deputy of S., or as sheriff. Held: After the great lapse of time the court will presume that the execution was levied by J. before the return-day, and that he received the money as deputy of S., so as to entitle T. to a credit for the amount paid.

In the case of *Grandstaff (late Sheriff) et als. vs. Ridgley Hampton & Co.*, 30 Grat., 1, decided January, 1878. The act, though it gives to a *fiery facias* the effect of a continuing lien, after the return-day, upon all the personal estate of the execution debtor, except as therein stated, does not enlarge the powers of the sheriff with respect to executions, and was not so intended. It simply extends the lien for the benefit of the creditor.

The authority of an officer to collect money in discharge of an execution does not result from the lien, but is a consequence of the right to levy and sell the debtor's property under the execution. So long as the right to sell continues, the right to receive remains, but no longer.

If the officer levies before the return-day of the writ, he may sell after the return-day has passed; and, as a necessary consequence, he may receive payment without selling. But if he fails to levy before the return-day, his authority to sell afterwards ceases, and with it the right to receive payment in discharge of the writ. He may receive payment at any time before the return-day without a levy.

In the case of *Sage et als. vs. Dickinson et als.*, 33 Grat., 361, decided July, 1880. A judgment is obtained in 1870 on a contract entered into prior to the present Constitution of Virginia, and in the same year an execution issued thereon was placed in the hands of the deputy-sheriff, and was levied on property of the judgment debtor, who gives a forthcoming bond, and has

the property forthcoming on the day and place of the sale. The debtor then claims the property as exempt under the homestead provision of the Constitution and the statute of Virginia, and the deputy-sheriff releases the property to him without requiring an indemnifying bond of the creditor, or even notifying him of the claim of homestead set up by the debtor. In a suit by the creditor against the sheriff and his sureties to recover the value of the property lost by the conduct of the deputy, held: The sheriff and his sureties are liable.

When an officer surrenders property he has seized under an execution, he does it at his peril, and the burden of establishing that it is not liable to levy is on him.

In the case of *Rhea et als. vs. Preston*, 75 Va., 758 and 771-772, decided July 21, 1881. The mere levy of an execution is not a satisfaction. There must be a sale or some other act divesting the debtor of his title, or depriving him of his property. And where the property levied on is left with the debtor and the levy abandoned, other creditors may resort to it, if they see fit, in like manner as if no execution had issued.

SECTION 3591.

The case of *Bullitt's Executors vs. Winstons*, 1 Munf., 269-284, is quoted *ante*, Section 3587.

In the case of *Rucker vs. Harrison*, 6 Munf., 181, decided October 15, 1818, it was held: If a *supersedeas* to a judgment, execution being levied and a forthcoming bond taken, be issued before the day of sale, and thereupon the property be not forthcoming, the penalty of the bond is saved, and no motion lies upon it.

It seems, too, that if the property taken in execution be in the sheriff's hands at the time of his receiving the *supersedeas*, or if it be delivered to him on the day of sale after his receiving such writ, he ought to restore it to the owner.

An amended return by a sheriff upon an execution, stating that a writ of *supersedeas* was issued on a day specified, being a day previous to that appointed for the sale of the property taken in execution; that he thinks the said writ was delivered to him on the day of sale; and that the property, for which a forthcoming bond was given, was not delivered at the day and place of sale, is sufficiently precise and certain.

In this case the sheriff was permitted by the court to amend his return after a lapse of seven years from its date.

In the case of *Smith and Rickard vs. Triplett & Neal*, 4 Leigh, 590, decided November, 1833. Upon a bond, assigned for valuable consideration, the assignees bring suit against the obligors, recover judgment, and sue out a *fieri facias*, which is levied, and a forthcoming bond taken, and, that being returned

forfeited, execution is awarded thereon against principal and surety, and a *fi. fa.* is sued out on the forthcoming bond, and on this execution the sheriff returns "*nulla bona*" as to the surety, but not as to the principal; then the assignees bring suit against the assignors, and, after trial and verdict for the defendants, court allows the sheriff to amend his return, and to return "*nulla bona*" as to the principal in the forthcoming bond, and gives plaintiff leave to amend his declaration, and to count on the amended return. Held: It was right to permit the sheriff so to amend his return, and to permit the plaintiffs so to amend their declaration.

In the action between the assignees and assignors the sheriff's return of "*nulla bona*" on the execution against the obligors in the forthcoming bond, though amended after the assignees' action, and five years after the return, so as to show the insolvency of both, is conclusive evidence of such insolvency. In such case the insolvency of the debtors might be proved by other evidence, but the assignees have a right to the conclusive evidence of the sheriff's return.

In the case of *Wardsworth vs. Miller*, 4 Grat., 99, decided July, 1847, it was held: A sheriff will be permitted to amend his return on an execution after an action has been commenced by the plaintiff in the execution against the sheriff and his sureties on his official bond, founded on said return.

In the case of *Stone vs. Wilson*, 10 Grat., 529, decided October, 1853, it was held, pp. 533-'34: A sheriff may have leave to amend his return upon an execution, after notice of a motion against him founded on the original return; and the amended return may be made by a deputy who did not make the first return. A second notice to the sheriff is not necessary after the amended return; but the plaintiff may proceed upon the original notice.

Under the act an action of debt may be maintained against a sheriff for either a wilful or negligent escape. In order to maintain the action it is only necessary for the plaintiff to show the escape, which may be done by evidence *abunde* the return on the execution. And to defeat the action the sheriff must show that the escape was tortious, and that fresh pursuit was made.

For the reference to 25 Grat., 211, 217-'18, see *ante*, Section 3577.

In the case of *Hammen (Sheriff) et als. vs. Minnick*, 32 Grat., 249, decided September, 1879. A sheriff cannot amend his return upon an execution after it has been filed, except by motion to the court, upon notice to the creditor.

A deputy-sheriff returns upon an execution, "Levied upon a lot of wheat, &c.," setting out the several species of property. Upon debt by the creditor against the sheriff and his sureties

upon his official bond for failing to make the money on the execution, they plead, "Condition performed." Held: The defendants may prove by the deputy that he had at the time other executions of prior date, and taxes due the State and the county, all of which had been before levied on the same property, and the whole proceeds thereof were consumed in the payment of these executions and taxes; and that the debtor had no other property unencumbered out of which the plaintiff's execution could have been made.

In the case of *Curr et als. vs. Mead's Executrix et als.*, 77 Va., 142, decided February 8, 1883, it was held, p. 159-'60: Having made return on an execution, and on that return, in part, a decree having been entered, in subsequent proceedings against him and his sureties, the sheriff will not be permitted to amend his return so as to explain it away and enable his sureties to escape liability for his default.

The record in proceedings whereby a sheriff's liability (*e. g.*, on his return) has been adjudicated, is admissible as evidence against his sureties, and is *prima facie* proof of their liability, although those sureties were not parties to that record.

SECTION 3594.

In the case of *Harrison & Co. vs. Hickman's Executors*, 1 Call, 295 (2d edition, 257), decided May 15, 1798, it was held: No *distringas* lies against the executors of the old sheriff to oblige them to sell property taken by him in his lifetime under a writ of *fieri facias*.

SECTION 3596.

In the case of *Wilson vs. Stokes & Betts*, 4 Munf., 455, decided October, 1815, it was held: It seems that since the attorney-at-law who prosecutes a suit and obtains judgment has full power to receive the money recovered when levied by execution, a demand made by him of the sheriff by whom it is levied is sufficient to authorize a motion against such sheriff for non-payment.

In the case of *Chapman vs. Cheves*, 9 Leigh, 297, decided March, 1838, it was held: Where an execution is delivered to a sheriff of a county other than that in which the creditor resides, and the creditor employs an attorney-at-law practicing in the sheriff's county to collect the money, without, however, giving the attorney a written order, and then the attorney makes a demand of the money from the sheriff, such demand, if no objection be made at the time to the authority of the attorney to receive the money, is, notwithstanding the statute, a sufficient demand to justify a judgment against the sheriff.

In the case of *Ballard vs. Thomas & Ammon*, 19 Grat., 14, decided November 14, 1868, it was held, p. 25: A county credi-

tor provided for in the county levy is not bound to apply to the sheriff or his deputies for payment before he proceeds to enforce payment of his debt by the sheriff and his sureties. Page 25, the court said "this statute is confined to money made under execution."

In the case of *O'Bannon et als. vs. Saunders*, 24 Grat., 138, decided November, 1873, it was held, pp. 144-'45: Proof that money collected on an execution by counsel for plaintiff within the county is sufficient to repel an excuse based on the fact of the plaintiff's non-residence.

In the case of *Grandstaff (late Sheriff) et als. vs. Ridgley, Hampton & Co.*, 30 Grat., 1, decided January 1878, it was held, pp. 14, 15: In an action by an execution-creditor against the sheriff and his sureties upon his official bond for the failure to pay over the money he had collected on the execution which had gone into the hands of one of his deputies, the declaration not stating that the plaintiff did not reside in the county of the sheriff, it is not necessary to aver that a demand had been made upon the sheriff as prescribed by the statute before the action was instituted.

If it appears upon the trial that the plaintiff in the execution did not reside in the same county with the sheriff, then, unless the plaintiff proves that such demand was made on the sheriff, his action must fail.

SECTION 3597.

In the case of *Eckhols vs. Graham et als.*, 1 Call, 492 (2d edition, 428), decided April 30, 1799, it was held: If plaintiff sues a second execution before the property taken under the first is disposed of, he waives the first, and destroys the lien on the property taken under the first.

In the case of *Coleman vs. Cocke*, 6 Rand., 618, decided December, 1828, it was held: According to the equitable and correct construction of our statute concerning executions, if a creditor by judgment or decree sues out a *fi. fa.* which is levied and returned satisfied in part only, he may take out another kind of execution (as the *elegit*) without pursuing the *fi. fa.* to return of *nihil*.

In the case of *Windrum vs. Parker*, 2 Leigh, 361, decided October, 1830, it was held: The statute of executions authorizes a party who has sued out one execution to sue out other executions if the first be not returned and be not executed; if the first be executed though not returned, the party is not entitled to sue out any other execution.

For the reference to 81 Va., 329, see *Sutton vs. Mayre (Auditor)*, ante, Section 3577.

SECTION 3599.

In the case of *Hendricks et als. vs. Dundas*, 2 Wash., 63 (1st edition, 50), decided at April term, 1795, it was held: Every court has power to watch over the execution of its process, and when it has been irregularly or fraudulently executed, to quash it. If the commissioners who take a replevy bond act improperly, the court will, on motion, quash the bond.

In the case of *Ferguson et als. vs. Moore*, 2 Wash., 68 (1st edition, 54), decided at April term, 1795, it was held: A bond taken upon replevying property distrained for rent must be returned to the court to which the officer levying the distress belongs, or to the court of that county in which the land lies. Property distrained for rent can be sold only by an officer duly qualified as such as by a sheriff or constable.

In the case of *Burwell vs. Anderson*, 2 Wash., 249 (1st edition, 194), decided at April term, 1796, it was held: A *supersedeas* will not lie where an execution was improperly issued upon a twelve months replevin bond. The injured party may move to quash the execution, and the judgment on that motion, if erroneous, may be corrected on an appeal or *supersedeas*.

In the case of *The Commonwealth vs. Hewitt*, 2 H. & M., 181, decided March 24, 1808, it was held: A party may, without any previous notice, move the court to direct an execution to be issued (where the clerk refuses to issue one) or to quash an execution, and it will be so far considered a cause depending that either party may appeal from the decision of the court on such motion.

In the case of *Moss vs. Moss's Executors*, 4 H. & M., 293, decided October, 1809, it was held: If the clerk of an inferior court misconceive a judgment and issue execution against any persons not properly a party thereto, the remedy is not by *supersedeas* or writ of error, but by motion to quash the execution, and if such motion be overruled an appeal may be taken to the court of error, or an application may be made for a writ of error or *supersedeas* to the order overruling such motion.

The case of *Bullitt's Executors vs. Winston's*, 1 Munf., 269-'84, is quoted *ante*, Section 3587.

In the case of *Hamilton vs. Shrewsbury*, 4 Rand., 427, decided August, 1826, it was held, p. 431: If the execution is valid so far as to bind the property, but the sale under it is void, on account of the interest or improper conduct of the sheriff, the court from which the execution issued may correct the abuse of its own process by quashing the execution, etc., and there is no ground for equity to interfere.

In the case of *Smock vs. Dude*, 5 Rand., 639, decided by the General Court, November, 1826, it was held: If, on a motion (to quash an execution, or enter a judgment satisfied), the re-

lief of the party depends on matters of fact, the court has a discretion to direct a jury to try the facts.

In the case of *Crawford vs. Thurmond et als.*, 3 Leigh, 85, decided October, 1831. A. recovers a judgment against B., and C., who had prosecuted the suit to judgment as A.'s agent, sues out a *fi. fa.* upon it, and endorses on the execution that it is partly for his, C.'s, own benefit; before this execution is delivered to the sheriff, B., the debtor, makes a satisfaction to A. of the full amount of the debt, and A. gives him a receipt in full and discharge. Held: Though B., the debtor, might have made a motion to quash the execution, and thus had remedy at law, yet a court of equity has jurisdiction to give him relief by way of injunction to inhibit further proceedings on the execution.

In the case of *Shackleford vs. Apperson*, 6 Grat., 451, decided October, 1849. In a suit to subject land for the payment of the purchase-money there is a decree against the defendant for a sum certain; and if he shall fail to pay it within thirty days, a commissioner is directed to sell the land upon terms prescribed in the decree. Held: The clerk has no authority to issue an execution on this decree without an order of the court or of the judge in vacation.

Though circumstances may exist which will warrant the court, or a judge in vacation, to allow process of execution in such an interlocutory decree, these circumstances must be shown, and if not shown, it is improper to allow it.

If an execution is issued by the clerk without an order of the court, or the judge in vacation, the court may quash the execution in term, or the judge in vacation may restrain proceedings upon it by an injunction order.

In the case of *Shumaker vs. Nichols*, 6 Grat., 592, decided January, 1850, it was held: A tender of money in payment of a judgment will not authorize the quashing of an execution issued thereon, unless the tender is followed by the payment of the money into the court, and a motion to enter satisfaction on the record.

A tender of money in payment of a judgment will not authorize a court of equity to stop the execution, where there is neither allegation or proof that the defendant in execution kept the money on hand for the discharge of the judgment.

In the case of *Morrison vs. Speer*, 10 Grat., 228, decided July, 1853, it was held: A party claiming that he has not been credited for all the money paid by him to the sheriff on an execution, may have any injustice done to him in that respect corrected by the court from whence the execution issued; and it is not a case for an injunction and relief in equity.

In the case of *Beckley vs. Palmer et al.*, 11 Grat., 625, decided July, 1854, it was held: Where the debtor in an execution

objects that a previous execution has been levied by the sheriff upon sufficient property to satisfy the judgment, and that he has improperly misapplied the proceeds of the sale of the property, or if he insists that payment has been made to the sheriff which has not been credited on the execution, if he has an opportunity to apply to the court of law from which the execution issued for redress, he has no right to come into equity for relief.

In the case of *Coleman's Administrators vs. Anderson*, 29 Grat., 425, everything relating to this section is a mere *quære*, and is of no effect.

In the case of *Snaveley et als. vs. Harkrader et als.* 30 Grat., 487, decided July, 1878. In a suit by infants who have removed out of the State, by their next friend, against their Virginia guardian, they ask that their property may be transferred to their foreign guardian, and the court decrees that the amount ascertained to be due from the Virginia guardian to the several plaintiffs shall be paid to the foreign guardian, and that he may sue out execution upon the decree. Upon appeal, so much of the decree as directs the payment to the foreign guardian is reversed, and he is directed to proceed according to the statute to have the infants' estate removed; and when that is done, the circuit court may decree that the said several sums shall be paid over to him. Without any further proceeding, several executions are sued out in the name of the infants for the amounts due respectively, the executions being made returnable in less than four weeks; and the Virginia guardian enjoins the executions. Held: Although, under the statute, the defendants in the executions might have asked the court, or the judge in vacation, to quash them, as this must be done upon notice to the plaintiffs, and could only have been done by publication as to these foreign plaintiffs, under the circumstances the defendants were entitled to enjoin the executions.

For the reference to 81 Va., 329, see the case of *Sutton vs. Marye (Auditor)*, ante, Section 3577.

SECTION 3600.

In the case of *Enders's Executors vs. Burch*, 15 Grat., 64, decided January, 1859, it was held: When a court authorizes executions to issue upon judgments recovered during the term, the judgments become final from the time when execution may issue, and cannot afterwards be set aside by the court.

In the case of *James River and Kanawha Company vs. Lee*, 16 Grat., 424, decided November 23, 1863, it was held, p. 433: An office-judgment in an action of ejectment does not become final without the intervention of a court or a jury, but there ought in every such case to be an order for an inquiry of damages.

CHAPTER CLXXVI.

SECTION 3601.

In the case of *Puryear vs. Taylor*, 12 Grat., 401, decided May 18, 1855, it was held: A *feri facias* is a lien from the time it goes into the hands of the officer to be executed upon all the personal estate of the debtor, including debts due to him, with the exception stated in the statute, and this lien continues after the return-day of the execution, and only ceases when the right to levy the execution, or to levy a new execution upon the judgment, ceases, or is suspended by a forthcoming bond being given and forfeited, or by a *supersedeas* or other legal process.

A lien of a *feri facias* of prior date has priority over an attachment of subsequent date.

In the case of *Evans (Trustee) vs. Greenhow et als.*, 15 Grat., 153, decided April, 1859, it was held: The trustee and beneficiaries of a deed to secure *bona fide* debts without notice are purchasers for valuable consideration, within the meaning of the exception in the statute, and will be preferred to an execution-creditor of the grantor in the deed as to a chose in action thereby conveyed.

In the case of *Charron & Co. vs. Boswell et als.*, 18 Grat., 216, decided January, 1868, it was held: A *feri facias* placed in the hands of an officer for execution is a legal lien upon all the personal property and choses in action of the debtor, from the time it goes into the hands of an officer, except in the cases stated in said section. This lien continues after the return of the execution "no effects," and his priority over a subsequent execution lien under the same law, even though there has been a proceeding by suggestion under the junior sooner than under the senior execution; and this though the executions issued from different courts.

In the case of *Trevillian's Executors vs. Guerrant's Executors*, 31 Grat., 525, decided February 13, 1879, it was held: The lien of an execution of *feri facias* upon the debtor's choses in action, though not enforced in his lifetime, continues after his death as against the other creditors of the debtor.

In the case of *Frayser's Administrator vs. R. & A. R. R. Co. et als.*, 81 Va., 388, decided January 28, 1886. Railroad is under trust to pay certain debts. At suit of trust creditors, receiver is appointed and ordered, after executing required bond, to take possession and carry on the railroad. Between such appointment and the execution of said bond, a *fi. fa.* against the railroad company is placed in the sheriff's hands; and there are funds in bank to the credit of the suit, representing the earnings, etc., of the road. Held: The *fi. fa.* creditor is entitled to have those funds applied to satisfy his debt in preference to the trust creditor.

SECTION 3602.

See the cases cited *supra*, Section 3601.

SECTION 3608.

In the case of *Shirley vs. Long*, 6 Rand., 735, decided by two judges only, August, 1827, it was held: When a debtor takes the insolvent oath, and delivers in a schedule, the sheriff is vested by the act of assembly with all the insolvent's estate, rights and interests, whether they are named in the schedule or not, and whether the property be in the possession of the debtor or in that of some other person. The clause of the act, "for such interest therein as such prisoner hath, and may lawfully part withall," is borrowed from the English statutes of bankruptcy, and has been used in all of our statutes of bankruptcy from 1726 to 1748, inclusive, as applying to partial interests in real estate, such as fees-tail, life estates, estates for years, remainders, reversions, etc., and not to personal estate. It is still to be so understood in the act of 1769, and in the revised laws of 1792 and 1819, and is not to be taken as a restriction on the vesting in the sheriff of the whole of the debtor's chattels, whether he may part with or deliver possession of them or not.

Therefore, if an insolvent debtor, having made a fraudulent gift of a slave to a child, still retaining possession thereof in his schedule, disclaims all title to said slave, the law vests in the sheriff the legal title to the slave, the gift being void, and he may recover it in a court of law from the debtor. The sheriff has the right to sell and pass by deed a slave or other chattel which the insolvent debtor has made a fraudulent gift of to his child (but of which he retains the possession), and the purchaser, under such sale, may recover the slave or other chattel, although the sheriff had not possession of it at any time.

If the property so fraudulently given be not in the possession of the insolvent debtor, but of some other person, although the title vest in the sheriff, it seems that he cannot sell the property in such case, but must proceed by summons against the person holding it.

But even if the act were violated by selling the chattels of the insolvent before they came into the possession of the sheriff, yet, as the legal title is vested in him, if he does sell, the sale is not void, and the purchaser may recover. The sheriff is a trustee for the creditors, and for a violation of his trust he may be responsible, but that does not prevent the legal title passing to the purchaser.

A deed from a sheriff, which conveys all "the right, title, and interest vested in the sheriff by law, in and to eight negroes conveyed by a debtor to his children," without naming the negroes, is sufficiently descriptive to pass them. The identity

of the negroes is matter of proof, and as soon as they are identified the deed operates on them.

SECTION 3609.

In the case of *Dillard vs. Thornton*, 29 Grat., 392, decided November 22, 1877, it was held, p. 398: Where, under a defective judgment, a *fi. fa.* is issued, and there is a proceeding by suggestion against the persons indebted to the defendant, such defendant may, upon proper notice, appear in such proceeding and have the judgment vacated and all proceedings thereunder quashed.

A notice to reverse or correct a judgment by default, or to quash an execution, need not be in writing. All that is requisite is, that there should be reasonable notice. It is too late to make the objection in the appellate court that the notice was insufficient, when the parties appeared and made no such objection in the court below.

SECTION 3610.

In the case of *The Baltimore & Ohio Railroad Company vs. Gallahue's Administrators*, 12 Grat., 655, decided September 11, 1855, it was held: When a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer, under its corporate seal.

In the case of *Bickle et als. vs. Christman's Administratrix*, 76 Va., 678 and 690-'93, decided September 28, 1882. Judgment-creditor garnisheed decedent's administratrix and got judgment by default *de bonis testatoris*. Decedent had owed a debt to the debtor of the judgment-creditor, but that debtor had assigned it to B., who sued and got a judgment against the administratrix *de bonis testatoris*. Held: The judgment did not bind administratrix personally, because it was *de bonis testatoris*. It did not bind the decedent's estate in her hands, because it is well settled that process of garnishment at law will not lie against personal representatives.

SECTION 3614.

See the case of *Shirley vs. Long*, 6 Rand., 735, cited *ante*, Section 3608.

In the case of *Clough vs. Thompson*, 7 Grat., 26, decided May 4, 1850, it was held: Upon taking the oath of insolvency, all the property and rights of the insolvent debtor are vested in the sheriff, who, as representative of the creditor, is entitled to assert the legal and equitable rights of the creditor and to set aside fraudulent conveyances of the insolvent debtor, and recover the property for the benefit of the creditor.

In the case of *Staton vs. Pittman (Sheriff)*, 11 Grat., 99, decided April, 1854. Judgments had been recovered against

N., and executions sued out thereon had been returned "no effects." In this state of things, slaves sold at public auction on a credit were cried out to N., and he induced T. to take them and give his bond for the price, upon the understanding that N. would afterwards take them and pay T. the price, and he told T. he was indebted to his sister, R., for washing, mending, etc., and owed her a great deal of money, and he wished to give the slaves to her as a compensation for what he owed her. T. kept the slaves about three months, and then N. paid T. the price of the slaves, and T. gave N. a receipt in the name of R., and a day or two afterwards T. sent the slaves to the house of B., the father of R., where R. then lived, she being about fourteen years old, and the slaves and R. both remained there, she claiming them as hers, but it not appearing that B. set up any claim to them.

Whilst the slaves were yet at the house of B. the sheriff tried to levy upon them as the property of N., but when he came in sight the doors of the servants' houses were shut. Afterwards N. was taken on a *ca. sa.* and took the insolvent debtor's oath, and then the sheriff brought separate actions of detinue against B. and R. to recover the slaves. Held: The arrangement by N. was fraudulent as to his creditors.

Though N. never had possession of the slaves, yet as he paid the purchase-money to T. they became the property of N. upon which his creditors would have been entitled to levy their executions, and the subsequent transfer of the possession to R. without consideration, and upon a fraudulent arrangement between N. and R., did not bar the action of the sheriff for the slaves.

CHAPTER CLXXVII.

In the case of *Wood vs. Davis*, 1 Wash., 69, decided at the fall term of 1791, it was held: It is not necessary that the time appointed for the delivery of the property should be stated as that at which the sale is to take place.

In the case of *Irvin, Galt & Co. vs. Eldridge & Brackenridge*, 1 Wash., 161, decided at the spring term, 1793. The case of *Wood vs. Davis*, *supra*, was affirmed; the same point was the only one in issue.

In the case of *Smith & Moreton vs. Wallace*, 1 Wash., 254, decided at the spring term, 1794. The clerk refused to accept a bail-piece, because it did not mention the name of a defendant on whom the writ had not been served. Held: The bail-piece was good, and should have been accepted.

In the case of *Hubbard vs. Taylor*, 1 Wash., 259, decided at the spring term, 1794, it was held: The condition must show against whom execution was issued, and whose property was taken in execution.

In the case of *Worsham vs. Eggleston*, 1 Call, 48 (2d edition, 41), decided October 16, 1797, it was held: If, before the act of 1794, the sheriff, in taking a forthcoming bond, included his commissions on the debt, it was erroneous; but in such a case the bond is not void, and the judgment shall be entered for the sum due without the commissions.

In the case of *Wilkinson vs. McLochlin & Co.*, 1 Call, 49 (2d edition, 42), decided November 17, 1797, it was held: If in a forthcoming bond the *teneri* be right, though the *solvendum* be wrong, it will not vitiate; the bond is good.

In the case of *Winston vs. The Commonwealth*, 2 Call, 290 (2d edition, 246), decided April 30, 1800, it was held: One forthcoming bond may be taken on several executions. Two separate bonds may be included in one instrument.

In the case of *Bartley vs. Yates*, 2 H. & M., 398, decided May 2, 1808, it was held: Though there be a total blank for the name of the surety in the obligation part of a forthcoming bond, yet his name being mentioned in the recital of the condition, and he having signed and sealed it, was held sufficient to charge him.

A blank being left in the condition of a forthcoming bond for the name of the high sheriff, to whom the property was to be delivered at the time and place of sale, was held not to vitiate it, the name of the high sheriff having been mentioned in a former part of the condition.

In the case of *Glascok's Administrators vs. Dawson*, 1 Munf., 605, decided May 23, 1810. A writ of *fi. facias* against an administratrix, "to be levied, as to certain damages and costs, of the goods and chattels of her intestate, and, as to other damages and costs, of her own goods and chattels," was returned "executed on certain slaves, the property of the administratrix, and a forthcoming bond taken," etc. The forthcoming bond, being given by the administratrix *eo nomine*, but expressing that the *fi. fa.* was against the goods and chattels of the said administratrix, was decided to be variant from the *fi. fa.*, and, therefore, was quashed.

In reviewing a judgment by default on a forthcoming bond, the appellate court will compare it with the execution on which it was taken.

In the case of *Bronaughs vs. Freeman's Executor*, 2 Munf., 266, decided May 2, 1811, it was held: A forthcoming bond mentioning the persons against whom the execution issued, and "they were desirous of keeping in their possession until the day of sale the property taken by the sheriff," sufficiently describes it as their property.

Where a judgment upon a forthcoming bond is obtained against a defendant having legal notice and appearing by attorney, but not moving to quash the bond, nor stating by plea

or bill of exceptions any variance between it and the execution, the appellate court is not to reverse the judgment on the ground of such variance.

The sheriff's fee for taking the forthcoming bond may be included in it.

In the case of *Beale vs. Wilson et als.*, 4 Munf., 380, decided March 20, 1815, it was held: A forthcoming bond appearing in other respects to be in proper form ought not to be quashed on the ground that in the obligatory or penal part thereof a blank is left for the names of the obligors.

A forthcoming bond being inserted in the transcript of the record is to be taken as the forthcoming bond on which the court gave judgment, without any certificate by the clerk to that effect.

If a judgment quashing a forthcoming bond be reversed, the appellate court will not proceed to give judgment for the plaintiff, unless it regularly appear that the defendants had legal notice of the motion, or appeared to oppose it. If, therefore, there be no bill of exceptions making the notice stated in the record a part thereof, and it does not appear by the judgment itself that the defendants had legal notice, or appeared in the court below, the cause should be sent back to give the plaintiff an opportunity to prove his notice, and the defendants to make any defence thereto which their case may admit of according to law.

In the case of *Harpers et al. vs. Patton*, 1 Leigh, 306, decided June, 1829, it was held: *Fi. fa.* against three, A., T. and H. Forthcoming bond taken, the condition whereof does not distinctly state to which of the three defendants the property taken in execution belonged, and omits to state that it was restored to the debtor. Held: The bond is good.

Judgment on forthcoming bond, instead of awarding execution thereon, is, that plaintiff recover the debt against defendants. Held: Irregular in form, yet well in substance.

For reference to 1 Leigh, 442, see *Meze vs. Hower*, cited *ante*, Section 3583.

For reference to 3 Leigh, 392, see *Turnbull vs. Claiborne*, *ante*, Section 3587.

In the case of *Douglass vs. Fagg*, 8 Leigh, 588, decided July, 1837. M. sells lands to F., who gives two bonds for the purchase-money. D., for whose benefit the purchase is made, pays off the first bond and part of the second. The balance he delivers to F. to be paid to M., but it is not paid over, and suit is brought for the same on the second bond against F. Judgment being rendered, F. gives a forthcoming bond with surety, which is forfeited, and afterwards obtains an injunction upon giving bond with surety to pay the amount of the judgment in

case the injunction shall be dissolved. The injunction is afterwards dissolved, and judgment rendered against the surety in the injunction bond, which he satisfies. Then the surety claims for this money paid him in satisfaction of the vendor's claim, that the vendor had a lien upon the land, and files a bill to be substituted in the place of the vendor and have the benefit of the lien. Held: The claim to substitution cannot be sustained, and the bill must therefore be dismissed.

In the case of *Hairston vs. Woods*, 9 Leigh, 308, decided March, 1838. By a *fiery facias* the sheriff is commanded to cause principal, interest, and costs to be levied of the goods and chattels of J. W., in the hands of S. H., his administrator, if so much thereof he hath, but if not then out of the goods and chattels of S. H. There being no goods and chattels of J. W. in the hands of S. H., the sheriff levies the execution on the individual property of S. H., and takes a forthcoming bond, which recites the execution as being against the goods and chattels of S. H., administrator of J. W., deceased. Held: There is no substantial variance between the execution and the recital thereof in the forthcoming bond.

In the case of *Spencer vs. Pilcher*, 10 Leigh, 490 (2d edition, 512), decided July, 1839. A forthcoming bond dated the 1st day of November, 1834, being conditioned for the delivery of the property "on the third Monday of November next," it is contended that there could be no breach of the condition until the third Monday in November, 1835. Held: By the court of appeals (construing the instrument according to the subject-matter and the evident meaning of the parties), that the day for the delivery of the property was the third Monday of November, 1834.

A forthcoming bond being forfeited, notice is given that a motion will be made on it. After the notice, and before the term to which it is given, a *supersedeas* is awarded to the original judgment, and it is perfected by giving bond and security. The motion is then continued from term to term, until there is a decision affirming the original judgment. After that decision, but before a copy of it is received by the court in which the motion is pending, the motion is heard, and judgment entered against the obligors. It is objected that the court proceeded on its own unofficial information that the original judgment had been affirmed. But the only evidence in the record to show that a *supersedeas* had been awarded is the *supersedeas* bond. Held:

1. The right to move a forthcoming bond is not suspended by a *supersedeas* to the original judgment.

2. Whether this be so or not, the writ of *supersedeas* not having been given in evidence in the court below, there is no sufficient foundation for the objection to the proceedings of that court upon the motion.

In the case of *Booth vs. Kinsey*, 8 Grat., 560, decided April, 1852. A debtor in execution executes a forthcoming bond to the creditor, and a third person and the obligee execute the bond with the debtor as his sureties. The bond being forfeited, the obligee gives notice to the principal obligor and the other surety of a motion for award of execution upon the bond against them, but the notice does not mention the obligee as a co-obligor. Held: That the bond is a valid bond to bind the other surety, but that he is only liable as a co-surety with the obligee.

That if the principal creditor proves insolvent, the surety may be relieved to the extent of one moiety of the debt, either by bill in equity or by motion under the statute for the relief of sureties. The notice is not defective for failing to mention the obligee as a co-obligor.

In the case of *Washington vs. Smith*, 3 Call, 13, decided May 1, 1801, it was held: A forthcoming bond given by the defendant only, without any security, will support a motion, and judgment will be rendered on it in favor of the plaintiff.

In the case of *Garland et als. vs. Lynch*, 1 Rob., 545 (2d edition, 576). The decisions in *Randolph's Administratrix vs. Randolph*, 3 Rand., 490, *Taylor vs. Dundass*, 1 Wash., 92, and *Downman vs. Downman's Executor*, 2 Wash., 189, approved. In conformity with the principle of the first case. Held: That if judgment be rendered against two, and one gives a forthcoming bond with security which is forfeited, the other is not discharged from the original judgment, if the obligors in the forthcoming bond prove insolvent. But also held, according to the decisions in the two last cases, that the forfeited forthcoming bond will prevent any execution or other proceeding on the original judgment until the same be quashed.

Even after execution has been awarded on a forthcoming bond, the bond may be quashed on the motion of the creditor to enable him to have execution on the original judgment, if the case be one in which the execution on the forthcoming bond has proved unavailing, without any default to the creditor.

Where the sheriff takes from the owner of goods levied on under execution a forthcoming bond with security, and, upon the same being forfeited and execution awarded thereon, the obligors prove insolvent, the sheriff will not generally be liable to the creditor on account of such insolvency, if he can establish that the security was sufficient at the time of taking the bond. But where execution against two is levied on the goods of one, and he gives a forthcoming bond with the other as his only surety, such surety being already bound, is not security such as the law requires; and if the execution on the forthcoming bond prove unavailing, the sheriff will, in this case, be liable to the creditor, although he may prove that the surety in the forth-

coming bond was sufficient in point of estate at the time of taking the bond. In a suit on a sheriff's bond under the act there is a demurrer to the evidence, and it appearing thereby that the party for whose use the suit is brought had an execution against two, which was levied on the goods of one, who gave a forthcoming bond with the other as security, and that the bond being forfeited the execution awarded thereon proved unavailing, the circuit court holds the evidence sufficient to support the action. Some of the evidence which had been introduced tending to show that part of the debt might have been made under the execution on the forthcoming bond if the creditor had not interfered, the counsel for the defendants then insists that the jury weigh the evidence in assessing the damages. But the opinion of the circuit court is that the plaintiff must recover the amount of his debt, or nothing, and that the evidence cannot be urged before the jury in mitigation of damages. Held: That in fixing the damages absolutely at the amount of the debt, and thus taking from the jury all discretion, the circuit court erred.

In the case of *Lusk vs. Ramsay*, 3 Munf., 417, decided November 9, 1811, it was held: The surety in a forthcoming bond has a right to deliver the property on the day of sale, if he can on that day peaceably obtain possession thereof. If the sheriff, after taking a forthcoming bond, accept the same goods from the defendant in discharge of his body from another execution, and prevent the surety in such bond from delivering them on the day of sale therein appointed, the court of equity, on a bill for discovery and injunction, exhibited by the surety, will require the sheriff, and all parties concerned, to answer a charge of fraud and combination, and (whether fraud be established or not) will perpetually enjoin a judgment rendered against the surety upon the forthcoming bond as unconscionable against him; leaving the plaintiff in that judgment to his remedy against the sheriff, and the sheriff to his remedy against the person who indemnified him, or to whom, by mistake, or in his own wrong, he paid the money in satisfaction of the second execution.

The plaintiff, in the second execution, to satisfy which the sheriff improperly sells the goods, need not be a party to such suit in chancery, because the surety in the bond wants no decree against him.

In the case of *Taylor vs. Dundass*, 1 Wash., 92, decided at the spring term, 1792, it was held: A replevy bond is the same as if the estate had been sold to the amount of the debt, and though it is an indulgence to the defendant, still the execution is considered as levied and the judgment discharged.

In the case of *Downman vs. Downman's Executor*, 2 Wash.,

243 (1st edition, 189-'91), decided at April term, 1796, it was held: A forthcoming bond should be made payable to the creditor, and not to the sheriff; the amount of the execution ought to be recited, and the condition should be to deliver the property at the time and place of sale, and not when demanded. If the bond be defective in any of the above instances the court may, and ought to, quash it on motion.

A faulty forthcoming bond whilst in force is a satisfaction of the judgment, and a second execution cannot issue till it is quashed. The common course is to quash the execution, as well as the bond, if a motion for that purpose be made, otherwise it is not necessary.

In the case of *Randolph's Administratrix vs. Randolph*, 3 Rand., 490, decided October, 1825, it was held: Where judgment is obtained against principal and surety to a bond, and the latter gives a forthcoming bond which is forfeited, the original judgment is not thereby satisfied, although any farther proceedings on it will be barred until the forthcoming bond shall be quashed.

For reference to 1 Rob., 545, see *supra*, this chapter.

In the case of *Robinson vs. Sherman*, 2 Grat., 178, decided July, 1845. A judgment is obtained against three persons, and execution is issued thereon, which is levied on the property of one of them, who thereupon gives a bond with security for the forthcoming and delivery of the property on the day of sale; and this bond is forfeited. Held: The execution and forfeiture of the bond did not discharge and extinguish the original debt as against the other joint debtors.

The surety of a joint debtor in a forthcoming bond becomes, upon the forfeiture thereof, surety for the debt, and, when he has discharged it, is entitled to be substituted to all the rights of the creditor against the original debtors subsisting at the time he became so bound for the debt. The surety in a forthcoming bond is entitled to recover from the original debtors the principal, interest, and costs of the original judgment, but not the costs incurred by the execution and forfeiture of the forthcoming bond. The original debtors are each bound for the whole amount of the debt to the surety in the forthcoming bond who discharges it.

In the case of *Leake vs. Ferguson*, 2 Grat., 419, decided January, 1846, it was held: On a joint judgment against several, the service of a *ca. sa.* on one, and the execution and forfeiture of a forthcoming bond by him, does not extinguish the lien of the judgment upon the land of the others. In such a case, the party upon whom the *ca. sa.* was served, and who executed the forthcoming bond, having been a surety of the principal debtor in the judgment, his surety in the forthcoming bond having

paid the debt is entitled to the creditor's remedies against the land of the principal debtor; and this, though the land was sold by the principal debtor, and had come into the hands of a *bona fide* purchaser for value without notice before the service of the *ca. sa.*

In the case of *Jones, etc., vs. Myrick's Executors*, 8 Grat., 179, decided October, 1851, it was held: A forthcoming bond forfeited has the force of judgment so as to create a lien upon the lands of the obligors only from the time the bond is returned to the clerk's office. There being no evidence that the bond was returned to the clerk's office before the day on which there was an award of execution by the court, it will be regarded as having been returned to the office on that day.

A judgment confessed in court in a pending suit, and the oath of insolvency taken thereon by the debtor upon his surrender by his bail, has relation to the first moment of the first day of the term; but a forfeited forthcoming bond which is not returned to the clerk's office until some day in the term after the first, when there is an award of execution thereon, has no relation; and therefore the assignment by operation of law under the first has preference over the lien of the forthcoming bond.

Though a forthcoming bond is forfeited and not quashed, yet in equity the lien of the original judgment still exists; and if the obligors in the bond prove insolvent, so that the debt is not paid, a court of law will quash the bond so as to revive the lien of the original judgment. And a court of equity having jurisdiction of the subject, will treat the bond as a nullity, and proceed to give such relief as the creditor is entitled to under the original judgment.

In the case of *Ballard et als. vs. Whitlock*, 18 Grat., 235, decided January, 1867, it was held: A forthcoming bond, with condition to deliver property taken in execution on a day of sale occurring after the return-day, is valid.

A judgment and award of execution upon a forfeited forthcoming bond having been entered by default upon a day prior to that to which notice was given, the court in which the judgment and award of execution was rendered has jurisdiction on the motion of the plaintiff to set aside the judgment and quash the execution, upon reasonable notice to the defendants.

In the case of *Rhea et als. vs. Preston*, 75 Va., 757, decided July 21, 1881, it was held, p. 774; A forfeited forthcoming bond stands as a security for the debt, and though while in force no execution can be taken out or other proceeding be had at law to enforce the original judgment, yet the bond is not an absolute satisfaction. For if it be faulty on its face, or the security when taken be insufficient, or the obligors, though solvent when the bond is taken, become insolvent afterwards, the plaintiff

may, for these or other good reasons, on his motion, have his bond quashed and be restored to his original judgment. And though the bond be not quashed, if it appear that it may properly be, a court of equity which looks to substance rather than form, and when occasion requires it treats that as done which ought to be done, will regard the bond as a nullity, and the original judgment as in full force.

In the case of *Barksdale & Terry vs. Fitzgerald*, 76 Va., 892 and 895.

1. Subrogation.—Principal and Surety.—Evidence.—Case Here.—Judgment against T. and another docketed April, 1872; *fi. fa.* levied and forthcoming bond taken with E. as surety; bond forfeited and returned May, 1873, but not docketed; judgment on the bond against all the obligors January 19, 1874, and docketed. E. claims that he paid the judgment as surety, and asks to be substituted to the lien of the judgment on the land of T., conveyed by trust deed to secure F., recorded January 4, 1874; *fi. fa.* on last judgment levied on principal obligor's property, but, with consent of surety, held up by plaintiff's order. The debt was then paid without sale. On the last *fi. fa.* is an endorsement purporting to be signed by W. & S., the judgment-creditor's attorneys, to the effect that the *fi. fa.* was satisfied by E., and one of the attorneys deposed that he was induced to hold up the *fi. fa.* by the promise of one of the principals or the surety, E., or both, to see the money paid at an early day, whilst the testimony of the sheriff tends to show that if payment was made by either the principal or E., it was probably by the former. Held:

1. The endorsement on the *fi. fa.* is not evidence against any other than the judgment-creditor.

2. The *onus* of proving the payment by himself, so as to entitle him to the relief he asks, rests on E., and as it is insufficient, the other questions involved are left undecided.

See the references cited to Section 3574.

In the case of *Lipscomb's Administrator vs. Davis's Administrator*, 4 Leigh, 303, decided February, 1833, it was held: The statute of limitations, whereby the remedy on a judgment by debt or *scire facias* is limited to ten years, is no bar to a motion on a forthcoming bond of more than ten years standing. It seems that a forthcoming bond has not the force of judgment till it is returned forfeited, and filed in the clerk's office; and even after it is filed, it is only in a partial sense that it has the force of judgment before execution upon it is awarded.

In the case of *Pleasants & Co. vs. Lewis*, 1 Wash., 273, decided at the fall term, 1794. A forthcoming bond for one thousand bushels of wheat was taken; a quantity of wheat was delivered, and received without objection by the sheriff; it was afterwards found to contain about five hundred bushels. Held:

Condition not performed by a partial delivery, and penalty forfeited.

In the case of *Nicholas vs. Fletcher*, 1 Wash., 330, decided at the fall term, 1794, it was held; It is not necessary for the plaintiff to prove a forfeiture after the sheriff has returned upon the bond, but it is incumbent on the defendant to prove performance.

In the case of *Bernard vs. Scott's Administrators*, 3 Rand., 522, decided November, 1825, it was held: Where a forthcoming bond is given, and the debtor, on the day of sale, pays to the creditor the full amount of the debt, interest, and costs, except the sheriff's commission, the bond will be forfeited, and a motion will lie upon it.

In the case of *Rucker vs. Harrison*, 6 Munf., 181, decided October 15, 1818, it was held: If a *supersedeas* to judgment, execution being levied and a forthcoming bond taken, be issued before the day of sale, and thereupon the property be not forthcoming, the penalty of the bond is saved, and no motion lies upon it.

For references to 2 Wash., 189, 191, and to 1 Rob., 545, see *supra*, this chapter.

In the case of *Jones vs. Hull*, 1 H. & M., 211, decided June 2, 1807, it was held: The sheriff's failure to make a return on an execution is no ground for reversing a judgment obtained on a forthcoming bond taken in pursuance thereof.

For reference to 1 Munf., 605, see *supra*, this chapter.

For references to 2 Munf., 266, and 4 Munf., 380, see *supra*, this chapter; also for 1 Wash., 161, and 4 Munf., 380.

In the case of *Hewlett vs. Chamberlaine*, 1 Wash., 367, decided at the fall term, 1794, it was held: Where the bond is made payable to the sheriff an action of debt may be maintained by the creditor.

In the case of *Booker's Executor vs. Coutts's Executor*, 1 Call, 243, (2d edition, 213), decided May 15, 1798, it was held: Executors may maintain an action of debt upon a three months replevy bond payable to their testator.

In the case of *Beale vs. Downman et als.*, 1 Call, 249 (2d edition, 219), decided May 15, 1798, it was held: If a forthcoming bond be taken payable to the sheriff, he may maintain an action of debt upon it.

In the case of *Syme vs. Johnson*, 3 Call, 523 (2d edition, 453), decided June 30, 1790, it was held: It is not a valid objection to a surety to an appeal bond that he was surety to the injunction bond also.

In the case of *Edmonds vs. Green*, 1 Rand., 44, decided January, 1822, it was held: A confession of judgment on a forthcoming bond will operate as a release of errors in the original

judgment. Therefore, where an office-judgment is erroneously entered up against the principal and special bail, the latter afterwards gives a forthcoming bond, confesses judgment on the said bond, he cannot avail himself of the error in the original judgment.

In the case of *Cooper (Guardian) vs. Daugherty's Administrators et als.*, 85 Va., 343, decided August 23, 1888, it was held: Equity will treat as a nullity a forfeited forthcoming bond, on the execution issued on the judgment whereon there has been a return of *nulla bona*, and regard the lien of the original judgment as still subsisting for the benefit of the creditor.

In the case of *Newberry vs. Sheffey (Commissioner)*, 89 Va., 286, decided July 6, 1892, it was held: Under Code, Section 3396, judgment on a forthcoming bond may be had against the sureties, though the principal has never been served with a notice of the motion.

SECTION 3620.

See references to Section 3210.

SECTION 3621.

In the case of *Allen et als. vs. Hart*, 18 Grat., 722, decided April, 1868, it was held: The defence of set-off is admissible in a motion upon a forthcoming bond taken on a warrant of distress.

In the case of *Carter et als. vs. Grant's Administrator*, 32 Grat., 769, decided February 5, 1880, it was held: On proceedings upon a forthcoming bond given on a distress for rent, whether by motion or by action on the bond, the plaintiff must prove the contract of rent for which the distress was sued out. On such proceeding, though the warrant of distress was for more rent than was due, the plaintiff may have judgment for the less amount due.

TITLE LI.

CHAPTER CLXXVIII.

In the *Homestead Cases*, 22 Grat., 266, decided June 13, 1872, it was held: Article 11, Section 1, of the Constitution of Virginia, and the act of June 27, 1870, Chapter 157, passed in pursuance thereof, in relation to homestead exemptions, are in conflict with Article 8, Section 10, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, so far as the Virginia

Constitution and Acts apply to debts contracted before that Constitution went into operation.

In the case of *Rose and Wife vs. Sharpless & Son*, 33 Grat., 153, decided April, 1880, it was held: Where a householder or head of a family executes a homestead deed as a part and in furtherance of a design to hinder, delay, and defraud his creditors in the recovery of their just debts, such deed will be vitiated and invalidated by such conduct.

The Constitution and Laws of Virginia not allowing property to be claimed as exempt for debts contracted for the purchase price of such property or any part thereof, where a large portion of goods claimed as exempt has not been paid for, and is so mingled with those that have been, as to put it out of the power of the vendors to distinguish between the two, the *onus* is on the person claiming the exception to show which have been paid for, and he failing to do this, they will all be treated as not having been paid for as far as the homestead deed is concerned, and therefore not exempt under the law. *Quære*: Can a "homestead" be claimed in a shifting stock of goods used in the way of trade?

In the case of *Shipe, Cloud & Co. vs. Repass et als.*, 28 Grat., 716, decided July 26, 1877, it was held: Where a grantor in a conveyance of land had claimed homestead in bonds given for a part of the purchase-money by the grantee, and the conveyance is afterwards set aside as fraudulent and void as to judgment-creditors of the grantor, he may claim homestead, as against the creditors, in the land or the proceeds of the sale thereof to the amount of said bonds.

In the case of *Boynton et als. vs. MacNeal et als.*, 31 Grat., 456, decided February 6, 1879. B. conveys a house and lot to H. in trust for the separate use of B.'s wife. M., a creditor of B., files a bill to set the deed aside as fraudulent and void as to creditors of B., and so the court decrees. B. then executes a deed of homestead of the house and lot, and files his petition in the cause to be allowed his homestead. Held: B. is entitled to his homestead in the house and lot as against M., the creditor.

In the case of *Marshall vs. Sears' Executors*, 79 Va., 49, decided April 17, 1884, it was held: Where there is a fraudulent conveyance of property, which is subsequently annulled at the suit of the creditor, the grantor is not estopped, as against the creditor, to assert his right of homestead in the premises.

In the case of *Brockenbrough (Executor) et als. vs. Brockenbrough (Administrator) et als.*, 31 Grat., 580 and 596, decided March 13, 1879. A deed of trust to secure certain debts conveys certain real estate, and the grantor reserves in it, to himself and his family, all exemptions and property allowed by the

Constitution of Virginia and by all laws passed in pursuance thereof, and, in addition thereto, all exemptions allowed under the bankrupt laws. Held: The reservation is legal and valid.

In the case of *Blose vs. Bear et al.*, 87 Va., 177, decided December 4, 1890, it was held: Lien of judgment attached before homestead was claimed in land cannot be enforced during the homestead's existence; but after the homestead is abandoned, it has priority over a trust deed executed during the occupancy of the land as a homestead.

SECTION 3630.

In the case of *Farinholt vs. Lukard*, 10 Va. Law Journal, 213, decided February 11, 1886, it was held: One engaged in carrying the United States mail over a country post-route is a "laboring person" within the meaning of those words as used in the Virginia Constitution, Article XI., Section 1; and the fact that he owns the horse and vehicle used by him for that purpose does not alter the case.

In the case of *The Commonwealth vs. Ford*, 29 Grat., 683, decided January 17, 1878, it was held: The third exception in the proviso to the 1st Section of Article 11, of the Constitution of the State in relation to homestead exemptions, which is, "For liabilities incurred by any public officer, or officer of a court, or other fiduciary, or any attorney-at-law for money collected," embraces the liability of a collector of taxes and also of his sureties in his official bond, and therefore the said sureties are not entitled to their homestead exemptions, as against the Commonwealth, in a proceeding against them and their principal to recover the amount of taxes for which the collector had failed to account.

In the case of *Reed et als. vs. Union Bank of Winchester et als.*, 29 Grat., 719, decided January 31, 1878, it was held: The act which authorizes the waiver of the homestead exemption is not in conflict with the 12th Article of the Constitution of the State; and if a party executing his bond or note waives his homestead exemption as to the bond or note, neither he nor his wife can set up said homestead exemption as against the said bond or note.

In the case of *Linkenhoker's Heirs vs. Detrick et als.*, 81 Va., 44, decided September 24, 1885, it was held: The act which authorizes the waiver of the homestead exemption, whether made before or after the property has been set apart, is not in conflict with the 11th Article of the Constitution of this State; and if a party executing his bond or note before or after the property has been set apart as his homestead exemption waives his homestead exemption as to the bond or note, neither he nor his wife in his lifetime, nor after his decease, neither his widow

nor his infant children, can set up said homestead exemption as against said bond or note.

In the case of *Wray vs. Davenport*, 79 Va., 19, decided April 3, 1884, it was held: Constitution, Article 11, secures homestead, yet legislature may prescribe mode of setting it apart, only it cannot defeat or impair the benefit thereof. The statute is within legislative authority, and to avail himself thereof householder must actually claim the exemption and set it apart as prescribed.

In the case of *Calhoun vs. Williams*, 32 Grat., 18, decided July, 1879, it was held: An unmarried man who has no children or other persons dependent upon him living with him, though he keeps house, and has persons hired by him, is not a householder or a head of a family within the meaning of these terms as used in the Constitution and Laws of Virginia, and therefore is not entitled to the homestead exemption as provided by the same.

The terms "householder" and "head of family" are held to have the same meaning in the provision of the Constitution and statute relating to homesteads.

In the case of *Kennerly vs. Schwartz*, 11 Va. Law Journal, 697, decided September 22, 1887, it was held: Where a judgment has been obtained against one who is not a householder or head of a family, and has become a lien upon his land, and he subsequently becomes a householder or head of a family, the judgment has priority over his claim to a homestead exemption in the land, but he may claim such exemption in the land after satisfying the judgment.

In the case of *Lindsay vs. Murphy*, 76 Va., 428.

1. Homestead.—Citizens.—The privilege of homestead is accorded, under the Constitution of Virginia, only to citizens of this State whilst they remain such.

2. Idem.—Domicile.—Change of domicile from this State puts an end to the homestead privilege.

3. Domicile.—Change.—Domicile is "residence with no present intention of removal." Mere absence, however long, effects no change of domicile.

4. Idem.—Burden of proof of change of domicile is on him alleging it.

5. Case at Bar.—M. long resided in Virginia, where he had a family and homestead. Embarrassed, he left his family here, took some personal property, and went to South Carolina, and commenced business there. The family, except one daughter at school, followed him, because his creditors deprived them of the means of subsistence. The proof is, he went to South Carolina to raise money to pay his debts, without intending to give up his domicile in Virginia. On a bill to subject the house and

lot duly set apart as M.'s homestead to the lien of a judgment, on the ground that the exemption has been forfeited by his removal. Held: M., not having ceased to be a citizen of this State, did not lose or abandon his homestead exemption.

In the case of *Whiteacre (Sheriff) vs. Rector et ux.*, 29 Grat., 714, decided January 31, 1878, it was held: A homestead exemption cannot be claimed against a fine due the Commonwealth, imposed for a violation of the criminal laws.

In the case of *Frazier vs. Baker et ux.*, 5 Va. Law Journal, 565, decided September, 1881, it was held: The homestead exemption allowed under the Constitution and Laws of Virginia cannot be claimed against a judgment for a tort.

In the case of *Burton vs. Mill*, 78 Va., 468, decided March 13, 1884, it was held: The homestead exemption does not protect against a demand for damages for breach of promise to marry, which is not a debt contracted, but a *quasi* tort.

In the case of *Oppenheimer vs. Howell et als.*, 76 Va., 218.

Homestead.—The primary object of the act is to authorize the sale of a homestead, and the investment of the proceeds in a new one, to be held on like terms as the original. In it there is nothing to authorize the debtor, who has squandered one homestead, to appropriate another against subsequent creditors.

In the case of *Hatcher vs. Crew's Administrator et als.*, 83 Va., 371, decided April, 1887, it was held: Where a fraudulent conveyance of property is subsequently annulled at the suit of the creditor, the grantor is not estopped as against the creditor to assert his rights to homestead in the said property.

The fact that the homesteader has claimed his homestead exemption in the bankrupt court, and has been allowed a part thereof by the assignee, does not affect his claim to the balance.

In the case of *Sears's Executor vs. Marshall*, 83 Va., 383, decided May, 1887, it was held: Decree or former appeal remanding cause to circuit court, with direction to assign to appellant (then) as his homestead the proceeds of certain property embraced in a deed that has been annulled as fraudulent, concludes with the words, "unless he appears not entitled to the same on other grounds"; and the circuit court disregarded the new objections presented by the creditor (the then appellee) to such assignment, did make the assignment. There is no error in the order of the circuit court. The intention of those words not being to open up the matter at large to new objections.

In the case of *Wilkinson vs. Merrill et als.*, 87 Va., 513, decided March 19, 1891, it was held: Where homestead exemption has been regularly set apart, it is for the benefit of the householder and his family, and is not ended by the latter's decease.

SECTION 3634.

In the case of *White vs. Owen et als.*, 30 Grat., 43, decided

March, 1878, it was held: A deed of trust to secure a debt executed by the grantor and his wife, conveying real and personal property which had been previously set apart by the husband as his homestead, has priority over the homestead exemption, and the said property may be subjected to satisfy the debt. *Quere*: Whether the deed of trust by the husband, in which his wife did not join, would have priority to the homestead exemption?

SECTION 3635.

In the case of *Helm vs. Helm's Administrators et als.*, 30 Grat., 404, decided July 18, 1878, it was held: A widow, whose husband has died leaving no children and no debts, and has not claimed the homestead in his lifetime, is not entitled to a homestead in his estate as against his heirs.

An order of a county court setting apart a homestead, made upon the *ex parte* application of his widow, is of no effect as against the heirs.

In the case of *Hanby's Administrator vs. Henritze's Administrators*, 85 Va., 177, decided August 2, 1888, it was held: This section declares that the homestead shall continue after householder's death for benefit of his widow and children until her marriage or death and the children become of age, and after its expiration allows the property to be sold for all his debts accrued before or after the homestead was set aside, and is not unconstitutional.

SECTION 3636.

In the case of *Hartorf vs. Wellford (Judge)*, 27 Grat., 356, decided March 30, 1876, it was held: A householder dying leaving a widow, without having had a homestead assigned him in his lifetime, his widow, remaining unmarried, is entitled to claim the same and have it assigned to her.

SECTION 3639.

See *Wray vs. Davenport*, 79 Va., 19, cited *ante*, Section 3630.

SECTION 3646.

See *Oppenheimer vs. Howell*, 76 Va., 218, cited *ante*, Section 3630.

SECTION 3647.

See *Reed vs. Union Bank*, 29 Grat., 719, cited *ante*, Section 3630.

See *Linkenhoker's Heirs vs. Dietrick et als.*, 81 Va., 44, cited *ante*, Section 3630.

SECTION 3649.

In the case of *Strange's Administrator vs. Strange et als.*, 76 Va. 240.

After the exempted property has been set apart, the residue shall be applied towards paying *all* the decedent's debts *ratably* (unless there be some entitled to priority), and after the residue has been exhausted, the exempted property may be subjected to pay such portions of the homestead-waived debts as remain unpaid.

In the case of *Scott vs. Cheatham et als.*, 78 Va., 82, decided November 28, 1883, it was held: This exemption is a privilege conferred by law on the debtor, which he may waive or claim at his option.

Creditor with waiver of homestead is not a lien or preferred creditor; he has merely the right to apply homestead to satisfy his debt so far as unpaid, after taking his ratable share of his debtor's estate outside of the homestead.

If homestead is not claimed by debtor during his life, nor by his widow after his death, the whole estate must be distributed ratably among all, unless there be some entitled to priority. If claimed either way, and the homestead is waived as to some debts, and not as to others, all the debts share ratably in the surplus above the exempted property, and when such surplus has been exhausted, the exempted property may be subjected to pay such portion of the waived debts as remain unpaid.

In the case of *Richardson vs. Butler*, 1 Va. Law Journal, 120, decided in the Chancery Court of the city of Richmond, February, 1877, it was held: Under the homestead laws of Virginia, the homestead right is not, in an absolute sense, an estate in the land. The fee is left under the law as it was before, subject to a right of occupancy which cannot be disturbed while the homestead character exists. But when the land is sold it loses its character as homestead, and becomes subject in the purchaser's hands to all prior liens which have been duly recorded against the homesteader.

SECTION 3652.

In the case of *Crump vs. The Commonwealth*, 75 Va., 922, decided January, 1882, it was held: An oath by a laboring man, a householder and head of a family, in a proceeding by garnishment to subject his wages, not exceeding fifty dollars per month, due him from his employer, to the lien of a *fi. fa.* execution that he did not sign a writing purporting to be signed by him, waiving all exemptions, including his claim as a laborer, is immaterial in such proceeding, inasmuch as the fifty dollars exemption to laborers cannot be waived so as to give a lien by *fi. fa.* thereon.

See *Farinholt vs. Luckhard*, 10 Va. Law Journal, 213, cited *ante*, Section 3630.

SECTION 3657.

See *Calhoun vs. Williams*, 32 Grat., 18, cited *ante*, Section 3630.

TITLE LII.
CHAPTER CLXXIX.
CHAPTER CLXXX.

SECTION 3662.

The reference to 2 Va. Cases, 78, is in point, but so involved as to be of no authority on this question.

The case referred to in 2 Va. Cases, 483, is an involved opinion on a case of murder in the first degree, but throws no light on the distinction between murder of first and second degree.

In *Whiteford's Case*, 6 Rand., 721, decided by the General Court, November, 1828, it was held: To constitute murder in the first degree, it is not necessary that the premeditated design to kill should have existed for any particular length of time. If, therefore, the accused, as he approached deceased, and first came within view of him, at a short distance, then formed the design to kill, and walked up with a quick pace and killed him without any provocation then or recently received, it is murder in the first degree. The legislature in their description of offences which constitute murder in the first degree have at first enumerated some of the most striking instances of deliberate and cruel homicide; but finding it impossible to enumerate all of them, then proceeded, by general words, to embrace all kinds of wilful, deliberate and premeditated killing. It is improper to interpolate the word "such" in that general description. The offence of homicide by a workman throwing timber from a house into the street of a populous city without warning, or of a person shooting at a fowl *animo furandi*, and killing a man, are instances of murder in the second degree.

In *Jones's Case*, 1 Leigh, 598. The lines between murder of first and second degree were drawn out, but in such shape as to be useless here.

In *Bennett's Case*, 8 Leigh, 745, decided by the General Court, December, 1837. After a verdict of guilty on an indictment for murder, prisoner makes affidavit that T. C. is a material witness for him in the prosecution; that he was not summoned to attend the trial, because prisoner was not informed that he knew anything relating to the matter, and that prisoner considers that his testimony would have an important effect on a subsequent trial of the cause; and, on this affidavit, founds a motion for a new trial, which the court overrules: Held, the new trial was properly refused.

In *Mailes's Case*, 9 Leigh, 661, decided December, 1839, by the General Court. Indictment for murder charges that the prisoner, of his malice aforethought, did make the assault; but

the striking and wounding, and the killing and murder, are respectively charged to have been done "of his malice aforesaid." Held: A good indictment for murder.

In *Slaughter's Case*, 11 Leigh, 681, decided December, 1841, by the General Court. S., having conceived and declared design to kill P., the parties afterwards met in front of P.'s own house, and a quarrel ensued, in which S. gave the first offence. P. proposed a fight, upon which S. retired for a very brief time into his own house, armed himself with a loaded pistol, which he concealed in his pocket, and instantly returned, so armed, to the scene of quarrel; then P. threw a brickbat at S., which did not hit him, but falling short of him broke, and a small fragment struck S.'s child, standing within his own door, who cried out, and S., hearing his child cry out, but without looking to see whether he was hurt or not, exclaimed, "He has killed my child, and I will kill him," advanced towards P., deliberately aimed and fired the pistol at him, then retreated with his face towards P., and the shot took effect and killed P. Upon trial of indictment against S., verdict guilty of murder in the second degree. Held: The jury might well impute the killing to the previous malice, and not to the sudden provocation of P.'s assault, and, therefore, the verdict was right.

Two persons quarrel, and one throws a brickbat at the other, who has privately armed himself with a deadly weapon, and keeps it concealed in expectation of the affray, and on such assault being made upon him, immediately draws forth the weapon and with it kills the assailant, though then retreating. Jury finds this killing murder in the second degree. Held: Upon these circumstances, even without proof of any previous malice, the verdict could not be disapproved.

In *Hill's Case*, 2 Grat., 594, decided December, 1845, by the General Court, it was held: On a trial for murder, the dying declarations of the deceased, if made in the expectation of death, are competent evidence against the prisoner. The proof of the deceased's expectation of death is not confined to his declarations, but the fact may be satisfactorily established by the circumstances of the case. Regularly, the court should first ascertain that the deceased expected to die, before his dying declarations are permitted to be given in evidence to the jury. But if the court permits the dying declarations of the deceased to be given in evidence to the jury, reserving the question whether they were made under an expectation of death; and if it appears from the testimony that they were made in expectation of death, and were, therefore, competent testimony, this is no error of which the prisoner can complain.

Where homicide is proved, the presumption is that it is murder in the second degree. If the Commonwealth would elevate

it to murder in the first degree, she must establish the characteristics of that crime; and if the prisoner would reduce it to manslaughter, the burden of proof is upon him.

The rule of law is, that a man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act.

A mortal wound given with a deadly weapon, in the previous possession of the slayer, without any, or upon very slight provocation, is, *prima facie*, wilful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances.

In *Mc Whirt's Case*, 3 Grat., 594, decided June, 1846, by the General Court, it was held: On a trial for murder, it is not error that the clerk, in charging the jury, does not include in his enumeration the various species of homicide and involuntary manslaughter. A father is informed on one evening that his son, a small boy, has been wantonly whipped by a man. He meets with the man on the evening of the next day, and then with his fists and feet beats and stamps him, while he is unresisting, with so much violence that the man dies from the effects of the beating on the next night. There is evidence of deliberation, and the beating is cruelly severe. This is murder.

In trials for murder, the jury is the proper tribunal to weigh the facts and circumstances, as well as the testimony in the case; and the court cannot undertake to set the verdict aside because the jury have decided against the evidence, or without evidence.

In *Vaiden's Case*, 12 Grat., 717, decided May 21, 1855, it was held: On a trial for murder the necessity relied on to justify the killing must not arise out of the prisoners own misconduct.

In *Livingstone's Case*, 14 Grat., 592, decided November 7, 1857, it was held: Under a common law indictment for murder, the prisoner may be found guilty of murder in the first or second degree, or manslaughter.

Upon a trial for murder, it having been proved that the prisoner had beat the deceased, the complaint of the deceased of pain suffered by her within two hours of the beating, is competent evidence.

It being proved that a witness is a practicing physician, he is a competent witness to express an opinion as an expert upon a medical question.

Upon a trial for homicide it is competent for the Commonwealth to introduce physicians and surgeons to give their opinion on a state of facts testified to by themselves or other witnesses, in respect to a wound or beating proved to have been inflicted on the deceased, as to whether such wound or beating

would be a cause adequate to produce death, or was the actual cause of death.

In such case the questions put and the answers given should be so put and given as not to elicit or express an opinion by the physician or surgeon on the credit of the witnesses, or the truth of the facts testified to by others.

When in a case of homicide it appears that a wound or beating was inflicted on the deceased which was not mortal, and the deceased, whilst laboring under the effects of the violence, becomes sick of a disease not caused by such violence, from which disease death ensues within a year and a day, the party charged with the homicide is not criminally responsible for the death, although it should also appear that the symptoms of the disease were aggravated, and the fatal progress quickened by the enfeebled or irritated condition of the deceased caused by the violence.

In *Bull's Case*, 14 Grat., 613, decided November 10, 1857, it was held: In an indictment for murder the omission of the word "deliberately" will be fatal on general demurrer.

On a trial for murder, the Commonwealth, to introduce the dying declarations of the deceased, proved that he was told that his physicians thought that if he could not be relieved of the shortness of breath under which he was then suffering he would die very soon. He then made the statements which were proposed to be introduced as evidence; and he was asked if these were made as his dying declarations, to which he answered that they were. The deceased was then told that the doctors were of opinion that he was certainly dying, and that he would die very soon; and what he had said was repeated to him, and he was asked if he made that statement again, and did he make it as a dying declaration; and he said he did. The statement is admissible as a dying declaration.

On a trial for murder, when the evidence repelled the idea of self-defence, the court instructed the jury that if they believed from the evidence that the deceased and the prisoner were engaged in a sudden and mutual combat, in which no weapon dangerous in itself was used, and during the progress of the fight the prisoner struck the deceased an ordinary blow or blows with his fists or feet, without any intention either to kill the deceased or to do him great bodily harm, but to repel his attack, and that the death of the deceased was caused thereby accidentally and apart from the prisoner's intention, then the prisoner is guilty of involuntary manslaughter. This is not error. In such a case, the court farther instructs the jury that though no weapon dangerous in itself is used, but only the fists and feet, yet if the jury are satisfied from the evidence that the manner of inflicting the blows was cruel and unusual, and ex-

ceeded in number and violence what was necessary to repel the deceased, and he died of such beating, then the prisoner is guilty of voluntary manslaughter. This is not error.

In *Bristow's Case*, 15 Grat., 634, decided July, 1859. Deceased strikes the prisoner's father with his fist, and a fight ensues, when the prisoner, who sees it, comes up and catches the deceased by the collar of his coat behind, and strikes the deceased from behind with a pocket knife, wounding him in the right side. The prisoner, who was about seventeen years old, had lately left the school of the deceased, and had used language on more than one occasion before the affray, and also used language after it, but before it was known the deceased was dangerously wounded, which evinced hostility to him. Held: The killing is murder.

In *Boswell's Case*, 20 Grat., 860, decided March, 1871, it was held: A person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become, on that account, irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does, and yet he is responsible. He may be incapable of express malice, but the law implies malice in such a case from the nature of the instrument used, the absence of provocation, and other circumstances under which it is done.

If permanent insanity is produced by habitual drunkenness, then, like any other insanity, it excuses an act which would be otherwise criminal.

Insanity, when it is relied on as a defence to a charge of crime, must be proved to the satisfaction of the jury to entitle the accused to an acquittal on that ground. If, upon the whole evidence, the jury believe he was insane when he committed the act, they will acquit him on that ground, but not upon any fanciful ground, that though they believe he was sane, yet as there may be a rational doubt of such sanity, he is therefore entitled to acquittal.

If a person kill another without provocation and through reckless wickedness of heart, but, at the time of doing so, his condition from intoxication was such as to render him incapable of doing a wilful, deliberate, and premeditated act, he is guilty of murder in the second degree.

In *Dock's Case*, 21 Grat., 909, decided January 31, 1872, it was held: On a trial for murder it is not competent for the Commonwealth to introduce evidence in chief as to the character of the person on whom the offence was committed. If the prisoner, in execution of a malicious purpose to do the deceased a serious personal injury or hurt by wounding and beating him, killed him, the offence is murder.

In *Read's Case*, 22 Grat., 924, decided December 11, 1872, it

was held: Every unlawful homicide must be either murder or manslaughter, and whether it be the one or the other depends alone upon whether the party who perpetrated the act did it with malice or not, malice either express or implied. Where there has been a previous grudge, and also an immediate provocation, it is for the jury to determine whether the shooting was induced by the previous grudge or the immediate provocation, and it is not for an appellate court to reverse their judgment, which the judge who tried the case declines to set aside.

In *Stoneman's Case*, 25 Grat., 887, decided June, 1874, it was held: On the trial of S. for the murder of E., the Commonwealth having shown that E. and O., the sister of S., had been married, the prisoner may introduce in evidence the decree in a suit by O. against E. for a divorce, either to render O. competent as a witness for him, or to show that E., being no longer the husband of O., was a mere intruder upon the prisoner's family. But the pleadings and depositions are not admissible as evidence for such other purpose.

An objection to a question asked and to the witness answering it, is overruled, and an exception taken, which does not state the answer; the appellate court cannot consider it.

On the trial of S. for the murder of E., if S. shot E. under a reasonable apprehension that his own life or that of some member of the family was in imminent danger, or under a reasonable apprehension that the deceased intended to burn the dwelling-house of his mother, or commit some other known felony, and that there was imminent danger of such design being carried into execution, he is justified in so doing, though such danger was unreal.

The bare fear that a man will commit murder or other atrocious felony, however well grounded, unaccompanied by an overt act indicative of any such intention, will not warrant the killing of the party by way of prevention. There must be some overt act indicative of imminent danger at the time.

There must be some act of the deceased meaning present peril, or something in the attending circumstances indicative of a present purpose to make the apprehended attack. This act so done, or circumstances thus existing, must be of such a character as to afford a reasonable ground for believing there is a design to commit a felony, or to do some serious bodily harm, and imminent danger of carrying such design into immediate execution. Then the killing will be justifiable, though there was in fact no such design by the deceased.

If an instruction correctly expounds the law, and is expressed in terms familiar to the books, and well understood by the judicial mind, and especially if the jury or the counsel do not ask for an explanation of it, the appellate court will not set the ver-

dict aside, because its true import and meaning possibly may not have been comprehended by the jury.

In *Howell's Case*, 26 Grat., 995, decided December 16, 1875, it was held: The jury having found the prisoner guilty of murder in the first degree, and the court of trial having refused to set aside the verdict and grant a new trial, the appellate court, even if they had some doubt about the sufficiency of the evidence to convict the prisoner of murder in the first degree, would not reverse the judgment.

Murder committed by any of the specific means enumerated in the statute is murder in the first degree, whether there was any actual intent to kill or not.

In *Willis's Case*, 32 Grat., 929, decided November, 1879, it was held: All homicide is presumed to be murder in the second degree. In order to elevate the offence to murder in the first degree, the burden is on the Commonwealth; and to reduce it to manslaughter, the burden is on the prisoner.

Whilst voluntary intoxication is no defence to the fact of guilt, yet where the question of intent or premeditation is involved, evidence of it is admissible for the purpose of determining the precise degree of the crime. And in all cases where the question is between murder in the first degree and second degree, the fact of the prisoner's drunkenness may be proved to shed light on his mental status, and thereby enable the jury to determine whether the killing was from a premeditated purpose or from passion, excited by inadequate provocation. But caution is necessary in the application of this doctrine, as there may be many cases of premeditated murder in which the prisoner previously nerves himself for the deed by liquor. In such cases as these, drunkenness is entitled to no consideration in favor of the prisoner in determining the degree of his crime, but on the contrary tends to elevate the offence to murder in the first degree.

In *Mitchell's Case*, 33 Grat., 845, decided March, 1880. M. and two others are indicted for murder in the County Court of L., and upon their arraignment they elect to be tried in the circuit court. A writ of *venire* is issued by the county court for the summoning of a jury returnable to the circuit court, and the twenty-four men selected by the county court are summoned to the circuit court. On the motion of the prisoner the *venire* is quashed by the circuit court, and the court directs another *venire* of twenty-four to be summoned, and names the twenty-four summoned on the first *venire*. Held: The directing the same twenty-four men to be summoned is not error.

Upon the trial of a prisoner for murder he twice makes a confession, both of which are admitted in evidence. There is very little doubt that the first confession was made without any

promise or threat to induce it, and there is no doubt the last was so made. Held: The evidence is admissible.

In *Mitchell's Case*, 33 Grat., 872, decided March, 1880, it was held: There was no doubt but what the prisoner intended to kill the deceased, and that he struck the fatal blow when the deceased was endeavoring to escape from him, and the blow was on the back of the head, and the only questions were, whether the striking of the prisoner with a heavy stick to resent an insult offered him was a sufficient provocation to justify the killing of the deceased in the manner in which it was done, and whether the prisoner did not provoke the attack upon himself that he might have an excuse for killing the deceased. And the jury having found the prisoner guilty of murder in the first degree, and the county judge who presided at the trial, and the judge of the circuit court of the county having refused to grant a new trial, this court, seeing there is evidence to warrant the verdict, will not set it aside.

Upon the evidence in this case, three persons go together to rob a store. One, M., is posted some distance from the house to watch, and the other two obtain admittance into the storehouse, kill the owner and rob the store, and M. shares the booty. Held: M. is principal in the first degree of the crime of murder, and may be punished with death.

In *Wright's Case*, 33 Grat., 880, decided July, 1880, it was held: To constitute a wilful, deliberate, and premeditated killing, constituting murder in the first degree, it is not necessary that an intention to kill should exist for any particular length of time prior to the actual killing, it is only necessary that said intention should come into existence for the first time at the time of such killing, or any time previously.

In *Dejarnette's Case*, 75 Va., 867, decided January, 1881. Where the defence in a trial for murder is insanity, it is competent to ask a medical expert such a question as this: Suppose a man had inherited a predisposition to insanity, would great mental anxiety, loss of property or the honor of one's family, and losses of other kind be likely to develop the disease? Whilst the mere fact that the presiding judge in the trying court on his own motion charges the jury on the law of the case, if done correctly, is no ground for reversing the judgment, yet such is not the practice in Virginia, and is not desirable that it should become so.

Malice being a necessary ingredient in the crime of murder, the law infers it wherever the killing is deliberate and premeditated, and it would therefore be error to instruct the jury that they must believe the killing was malicious, deliberate and premeditated.

In *Wright's Case*, 75 Va., 914, decided January, 1882. A

fight was going on outside of a bar-room in which prisoner was, between the grandfather of the prisoner and two others; a good many other persons were standing around but not engaged in the fight. Prisoner, on hearing of the fight, seized a large stick, ran out into the crowd, striking several persons with it, breaking the arm of one, and struck one person who was not engaged in it, or noticing the fight, a blow on the head from which he died the next day. Held: Guilty of murder in the first degree.

The premeditated design to kill need not have existed for any length of time, but if the design at the time of killing was then formed, and the killing was done without provocation then or recently received, it is murder in the first degree.

Hatchett's Case, 76 Va., 1026. Criminal Proceedings.—Murder by Poison.—To entitle the Commonwealth to a verdict, it is essential to prove clearly, beyond a reasonable doubt, these three essential propositions, viz.:

1. That the deceased came to his death by poison.
2. That the poison was administered by the accused.
3. That he administered it knowingly and feloniously.

Idem.—*Idem* case at bar. H. is indicted for the murder of Z. by poison. There was no *post-mortem* and no analysis of the contents of the deceased's stomach, or of the vessel which contained the liquor administered, or sufficient proof that the accused administered it, or that he knew it contained poison; and that there was any motive or provocation for the deed. Held: The verdict must be set aside and new trial granted the accused.

In *McDaniel's Case*, 77 Va., 281, decided March 15, 1883. Much caution is used by this court in granting a new trial, where it is asked on the ground that the verdict is contrary to evidence, great weight being given to the verdict of the jury.

To constitute this offence the killing must be predetermined, and not under momentary impulse of passion; though the determination may not have existed any particular length of time. *Prima facie*, all homicide is murder in the second degree. *Onus* on prosecution to raise the offence to the first degree. A quarrel occurred between prisoner and deceased. Former gave the latter the lie. They separated. Twenty minutes later deceased, with light walking stick approached prisoner, saying that he would not stand what prisoner had said. Prisoner picked up a "bearing stick." Deceased asked "why he stood holding that stick?" Prisoner answered, "If you come here I will show you." Prisoner raised his cane to parry a blow from the prisoner, and may be, struck at, or struck the prisoner, who then struck the prisoner two blows with the "bearing stick," from which he died in about two hours. Held: The presumption is not warranted from the mere use of that weapon, without

any words or circumstances, other than those mentioned, tending to show the prisoner's intent, that such intent was not to repel an attack or to inflict bodily harm, but to kill. The facts do not prove murder in the first degree.

In *Lewis's Case*, 78 Va., 732, decided April 24, 1884, it was held: Malice is presumed from the fact of killing unaccompanied with circumstances of extenuation, and the burden of disproving malice is upon the accused. Every man is presumed to intend the natural and probable consequences of his own acts.

The necessity relied on to justify the killing must not arise out of the prisoner's own misconduct.

Threats by deceased to prisoner, directly or through others, are admissible to determine whether the prisoner had at the time of the killing reasonable ground to apprehend serious bodily harm.

In *Harrison's Case*, 79 Va., 374, decided September 18, 1884, it was held: Murder is where a man of sound sense unlawfully killeth another of malice aforethought, either express or implied. If express, the facts remain with the jury. If it is to arise from implication, it is a matter of law, the entire consideration whereof resides with the court.

It must be presumed that a man intends what is the natural and necessary consequence of his own acts. Where a case of self-defence has been *prima facie* made out, evidence of the dangerous character of deceased is admissible. It is no palliation that prisoner believed the man he attacks and kills to be a dangerous person, and in such case such evidence is inadmissible. Where such evidence is admissible the proof must be of the deceased's general reputation as a dangerous person, and not of the opinion of a particular individual.

Barbour's Case, 80 Va., 287, decided March 12, 1885, is a case in which the killing was held to be murder in the first degree, but it is of so wilful a character that it is not necessary as an authority.

In *Parrish's Case*, 81 Va., 1, decided November 28, 1884, it was held: Where one in defence of his person, habitation or property kills another, who manifestly intends and endeavors by violence or surprise to commit a forcible or atrocious felony upon either, such killing is justifiable homicide; and in such case the justification of the prisoner must depend on the circumstances as they appear to him.

In *Honesty's Case*, 81 Va., 283, decided January 7, 1886, it was held: An instruction otherwise right will not be vitiated by a conclusion in the words following: "And if there be a reasonable doubt whether the prisoner had willed, deliberated and premeditated to kill the deceased, or to do him some serious injury which would probably occasion his death, the jury ought not to find him guilty of murder in the first degree."

The necessity relied on to justify killing must not arise out of prisoner's own misconduct.

Provocation sought, or involuntarily provoked, cannot excuse killing or doing bodily harm. No provocation whatever can render homicide justifiable, or even excusable. The lowest grade to which it can reduce homicide is manslaughter.

If a man kill another suddenly, without any, or without a considerable, provocation, the law implies malice, and the homicide is murder.

The *onus* rests on accused to prove, if he relies on intoxication as a defence, that when he committed the offence his condition from intoxication was such as to render him incapable of doing a wilful, deliberate and premeditated act. And so of insanity. Both must be proved as independent facts.

The facts disclosed by the record here show a homicide committed deliberately with a deadly weapon, where the law implies the malice requisite for murder in the first degree, a man being presumed to intend the natural and probable consequences of his own act.

In *Lewis's Case*, 81 Va., 416, decided February 4, 1886, it was held: The well-settled rule of this court in granting new trials, when asked for on the sole ground that the verdict is contrary to the evidence, is to grant them very cautiously, and only when the verdict is manifestly wrong, great weight being due to a verdict rendered by a jury and approved by a judge, before whom the witnesses gave their evidence.

In *Tucker's Case*, 88 Va., 20, decided June 18, 1891. The accused and the deceased had long been inimical, and had made frequent threats to kill one another. On the day of the homicide both were seen going toward an orchard, a part whereof each possessed. The former, with his gun, two children, aged ten and twelve years respectively, a horse and sled, was going for apples. The latter, also with his gun, followed at no great distance, and a few hours later was found near the fence of the orchard dead, with his head crushed and his back pierced by a bullet. A Commonwealth's witness testified that on that day, from mountains three-quarters of a mile off, he heard accused's voice swearing, etc., in the orchard, saw smoke arise, heard report of gun, and later heard a second report, and immediately a man ran and disappeared in the orchard. The children for the defence testified that they were with the accused: that he did not shoot, but that some unseen person fired twice at him, one ball passing through his hat, the other through his shirt; that he did not hear of the homicide for several hours, and before hearing of it had started for a warrant to arrest deceased. Held: Evidence insufficient to warrant the verdict of guilty of murder in the second degree, and a new trial should have been granted the accused.

In *Hash's Case*, 88 Va., 172, decided July 2, 1891, it was held: A motion to quash a joint indictment against two persons, on the ground of omission to insert the copulative conjunction "and" between their names, is properly overruled where a comma is placed after the first name.

On an instruction that a man cannot in any case justify the killing of another upon the pretense of self-defence, unless he be without fault in bringing upon himself the necessity of so doing, held: Improper, because the word "pretense" implies groundlessness, and is calculated to prejudice the jury against the theory of necessary self-defence, relied on by the accused. The word "plea" should have been used instead of "pretense"; and because the true doctrine is that, although the slayer provoked the combat or produced the occasion, yet, if it be done without any felonious intent, intending, for instance, merely an ordinary battery or trespass, the accused may avail himself of the plea of self-defence.

Where the accused had built a fence upon the line between his land and that of the deceased, and it had been so used for a number of years, and the deceased had notified the accused not to remove it, the removal thereof would be nothing more than a trespass. But if the fence had been built by the accused on his own land, such removal would not be a tortious act at all. And in either event, if, to prevent such removal, the deceased had made an attack upon the accused with a deadly weapon, under circumstances calculated to excite in the latter's mind a reasonable apprehension of death or of great bodily injury to himself, under which he kills his assailant, he is entitled to avail himself of the plea of self-defence. An instruction to the contrary. Held erroneous.

In *Davis's Case*, 89 Va., 132, decided June 23, 1892, it was held: Accused met in the street his wife, from whom he had been for some time separated; becoming enraged, began firing at her as she ran into a house. He fired at her and another there, when she ran out by a side door. He, returning to the street, attempted to reload, succeeded after interference in getting one cartridge in, when deceased, whom he knew to be a policeman, arrested him, and was shot by him, and died in four days. Accused was not drunk, but was drinking. Held: Conviction of murder in the first degree should not be disturbed.

In *Tilley's Case*, 89 Va., 136, decided June 23, 1892. Prisoner and deceased, his mistress, left their companions in the public road in the afternoon and disappeared in the woods. She had about thirty dollars (part silver) in a purse. She was never seen alive afterwards. An hour later he was seen where the body was found, and avoided recognition. He left the State that night and did not return for several years. Her body was

found in a secluded place in the woods, partly consumed by fire, with a bullet hole in her head, such as would be made by a ball from the pistol then in his possession. The coin and purse could not be found. He gave a false name at the place he stayed that night, and when arrested several years afterwards. Held: The verdict "guilty of murder in the first degree" should not be disturbed, as the circumstances show that robbery was the motive of the homicide.

The Commonwealth was properly allowed to prove as part of the *res gestæ* that on the day of her death the deceased was on her way to a neighbor's house near where her body was found.

In *Hall's Case*, 89 Va., 171, decided June 23, 1892, it was held: Shortly after being shot the deceased said to his wife, it is a death shot this time, and that he wanted to go to heaven when he died, but did not express belief that he was going to die. To others he told who shot him, and the circumstances, but he did not say anything about dying. He died twenty-four hours after being shot. Held: His declarations were admissible as evidence.

Instructions unsupported by any evidence should be refused.

Instructions having been given to the jury that they could not find prisoner guilty of murder in the first degree, unless the evidence showed him guilty "to the exclusion of all reasonable doubt," and the jury having found him guilty of murder in the first degree, held: The prisoner should not have been prejudiced by the refusal of the court to instruct the jury that "the evidence of his guilt must be so strong as to exclude every reasonable hypothesis of his innocence," and that "mere suspicion, however strong, is not sufficient"; the law requires proof to the exclusion of every reasonable doubt.

In *Field's Case*, 89 Va., 690, decided February 16, 1893, it was held: A man is not justifiable in shooting another when there is a mere justifiable apprehension of immediate danger, no matter how sincere such apprehension may be; but there must be honest and reasonable belief of such danger, that is to say, the act done, or circumstances existing, must be of such a character as to afford reasonable ground for believing there is a design to commit a felony, or to do some serious bodily harm, and imminent danger of such design being carried into immediate execution.

In *Snodgrass's Case*, 89 Va., 679, decided February 16, 1893. Accused deliberately raised a pistol under arm of a witness and shot the deceased. Several hours before, he made threats to shoot deceased before sun-down, and talked angrily with him several times during the day, and flourished a pistol as if threatening him. Held: A verdict of murder in the second degree is fully warranted by the evidence.

Evidence of threats of the accused before, and threats to and assault upon a witness after, the shooting is admissible to prove the demeanor of accused as indicating his *animus*.

SECTION 3664.

The reference to 2 Va. Cases, 78, is not in point.

For 81 Va. 416, see *Lewis's Case*, cited *ante*, Section 3662.

In *Shipp's Case*, 86 Va., 746, decided March 27, 1890, it was held: Prisoner, after altercation with deceased, declared he would shoot him if caught off his land; met him soon after, accused him of slander, and aimed a gun at him; and when deceased, unable to retreat, picked up an iron pipe for self-defence, prisoner shot and killed him. Held: Evidence warrants the verdict of guilty of murder in the second degree.

SECTION 3665.

For the reference to 3 Grat., 594, see *Mc Whirt's Case*, cited *ante*, Section 3662.

For the reference to 14 Grat., 613, see *Bull's Case*, cited *ante*, Section 3662.

In *Dock's Case*, 21 Grat., 909, decided January 31, 1872, it was held: Where death ensues on a sudden provocation or a sudden quarrel, without malice *prepense*, the killing is manslaughter, and in order to reduce the offence to killing in self-defence the prisoner must prove two things: *First*, that before the mortal blow was given he declined further combat, and retreated as far as he could with safety; and *secondly*, he killed the deceased through the necessity of preserving his own life, or to save himself from great bodily harm.

For the reference to 22 Grat., 924, see *Read's Case*, cited *ante*, Section 3662.

The reference to 33 Grat., 757, is an error.

SECTION 3671.

In *Chapple's Case*, 1 Va. Cases, 184, decided by the General Court, it was held: This section applies to the stabbing of a slave as well as to a free person.

In *Trimble's Case*, 2 Va. Cases, 143, decided November, 1818, by the General Court, it was held: In an indictment for malicious and voluntary shooting, the term wilfully being used for voluntary is cured by the statute of *jeofails*. A conclusion against the acts of the General Assembly, where there is but one act, is also cured.

The omission to state that the grand jury was impaneled in the superior court of the county (the county itself being mentioned), if an error, is also cured.

An indictment for malicious shooting ought to charge that it

was done feloniously, and this under the act of 1817, which does not in terms declare it a felony, but makes it punishable with penitentiary confinement.

In *Lester's Case*, 2 Va. Cases, 198, decided by the General Court, June, 1820, it was held: An indictment which charges that a prisoner feloniously did break the jawbone of another with intent to maim, disfigure, disable or kill, and concludes against the form of the statute, is yet not a good indictment under the statute, because it does not aver that he did disable any limb or member, but only that he did break a bone with intent to disable.

If the prisoner be charged with feloniously breaking the jawbone of another, *contra formam statuti*, the indictment cannot be sustained as one for mayhem at common law, because a mayhem at common law, with one exception only, is not a felony.

In *Angel's Case*, 2 Va. Cases 231, decided by the General Court, November, 1820, it was held: Although the statute against unlawful shooting, etc., fixes a penalty when the act is done with intent to maim, disfigure, disable or kill (in the disjunctive), yet the indictment should charge the intents conjunctively.

Although all of the intents be laid, yet proof of either supports the indictment.

The reference to 2 Va. Cases, 273, is error, as the only point decided there relates to the validity of plea of *autrefois acquit*.

In *Derieux's Case*, 2 Va. Cases, 379, decided November, 1823, by the General Court, it was held: The record of the examining court shows that the prisoner was charged with a felonious stabbing, with intent to kill. The indictment contained four counts, of which the first charged a malicious stabbing with intent to kill; the second, a malicious stabbing with intent to maim, disfigure and disable; the third and fourth, an unlawful stabbing with the same intents respectively.

This variance between the record of the examining court and the indictment is no ground for quashing the latter. If an indictment charge that one feloniously did strike, cut and stab another, with intent to kill, etc., although the words strike and cut are not in the statute, yet the indictment ought not to be quashed, "because of the commixture of misdemeanor and felony" contained therein. Those words may be rejected as surplusage.

In *Woodson's Case*, 9 Leigh, 669, decided by the General Court December, 1839, it was held: An indictment, charging that the prisoner "at the county, and within the jurisdiction of this court, feloniously and maliciously did stab one P. T., with intention to maim, etc., and kill him," will not be quashed, upon objection that it does not allege any assault, striking or wound-

ing, nor that P. T. was within the county or jurisdiction, nor that the intent was felonious or malicious.

In *Canada's Case*, 22 Grat., 899, decided November 27, 1872. C. is indicted for feloniously and maliciously cutting, striking, wounding, etc., H., with intent to maim, disfigure, disable and kill. The indictment charges that C. made an assault upon H., and feloniously, etc. The jury find the prisoner not guilty of the malicious cutting and wounding as charged in the indictment, but guilty of an assault and battery as charged in the within indictment, and assess his fine at five hundred dollars. Held: This is an acquittal of the prisoner of the felony charged, whether of the "malicious" or "unlawful" cutting, etc., with intent to maim, etc., and it is a conviction for the misdemeanor of assault and battery.

Though the indictment only uses the word malicious, the jury might have found the prisoner guilty of the unlawful cutting, etc., with intent, etc. Though the indictment is for a felony, the assault and battery being charged in it, the prisoner may be acquitted of the felony, and convicted of the misdemeanor, and the jury may assess a pecuniary fine upon him, but not imprisonment. Upon such conviction the court may sentence the prisoner to be imprisoned in the county jail in addition to the pecuniary fine.

In *Read's Case*, 22 Grat., 924, decided December 11, 1872, it was held: Whether a prisoner on trial is guilty of malicious shooting with intent to kill depends upon the question, Whether, if he had killed the person at whom he shot, instead of only wounding him with intent to kill him, the offence would have been murder?

If the killing would not have been murder, then he is not guilty of the offence of malicious shooting, however he may have been guilty of another offence, as of unlawful shooting with intent to kill.

In *Murphey's Case*, 23 Grat., 960, decided March, 1873, it was held: Malice may be inferred from the deliberate use of a deadly weapon, in the absence of proof to the contrary.

In *Randall's Case*, 24 Grat., 644, decided January, 1874, it was held: Upon an indictment under the act concerning malicious, unlawful shooting, stabbing, etc., which charges that the prisoner did unlawfully shoot, etc., with set purpose and malice aforethought to kill and murder, etc., the jury find the prisoner guilty of malicious shooting, without saying who is shot, and fix the term of his imprisonment in the penitentiary at five years. No judgment can be entered on the verdict.

In *Hoback's Case*, 28 Grat., 922, decided January, 1877, it was held: On an indictment, under this section, of H., that he maliciously and of his malice aforethought did shoot one S.,

the jury returned their verdict: "We, the jury, find the defendant, H., not guilty of malicious shooting, as in the within indictment charged, but guilty of unlawful shooting, with intent to maim, disfigure, and kill; and we fix his term of confinement in the penitentiary at two years." The verdict is to be read in connection with the indictment, and, therefore, it sufficiently indicates the person shot.

In *Stuart's Case*, 28 Grat., 950, decided July, 1877, it was held: It is settled law in this State that where there are several counts in an indictment, and the jury find the accused guilty upon one of the counts, but say nothing as to the others, the verdict operates as an acquittal upon the counts of which the verdict takes no notice; and the court should enter a judgment accordingly. And the same rule applies where, on an indictment for murder, the jury find the prisoner guilty of manslaughter, or on an indictment for malicious stabbing, etc., with intent to maim, disfigure, or kill, the jury find the prisoner guilty of unlawful stabbing, with intent to kill.

Under an indictment with only one count, for malicious stabbing, shooting, or cutting, with the intent to kill, the accused may be convicted of the offence charged, or of unlawfully doing such acts, or, indeed, of any other offence, felony, or misdemeanor which is substantially charged in the indictment.

In *Jones's Case*, 31 Grat., 830, decided November 14, 1878, it was held: J. was indicted for malicious stabbing, etc., of W., with intent to maim, etc. The jury found J. guilty of unlawful cutting, "as charged in the within indictment," which has reference both to the cutting and to the intent, and is a sufficient finding of the intent with which the unlawful act was done to meet the requirements of the statute.

In *Price's Case*, 77 Va., 393, decided April 12, 1883, it was held: On an indictment for maliciously shooting, with intent to kill, etc., one S., the jury return their verdict: "We, the jury, find the prisoner guilty of unlawful shooting with intent to kill, as charged in the indictment, and fix the term of imprisonment at three years in the penitentiary." The verdict is to be read in connection with the indictment, and, therefore, it sufficiently indicates the person shot.

In *Jones's Case*, 87 Va., 63, decided November 13, 1890, it was held: Indictment charging that accused made assault with a stone, and did feloniously, maliciously, and unlawfully beat, wound, ill-treat, and cause bodily injury, etc., sufficiently conforms to this section.

SECTION 3673.

In *Walker's Case*, 2 Va. Cases, 515, decided by the General Court, June, 1826, it was held: A jail abandoned by the county

for the purposes of a jail, but open and accessible to the citizens of the county, is a public place under the gaming act.

The reference to 4 Leigh, 480, is an error.

SECTION 3674.

In *Hardy & Curry's Case*, 17 Grat., 592, decided January 26, 1867. An indictment for robbery charged that the prisoners "did make an assault" upon G., and one gold watch, etc., from the person and against the will of G., etc., "feloniously and violently did steal," etc. The jury acquitted the prisoners of the felony charged, but found them guilty of "assault and battery." On motion in arrest of judgment, held: The finding is valid.

In *Jordan's Case*, 25 Grat., 943, decided December, 1874, it was held: The prisoner is prosecuted for the robbery of a pistol. If he snatched the pistol from the hands of the prosecutor simply to prevent the prosecutor from using it against his assailants, without at the time intending to appropriate it, though he afterwards takes it away and sells it, this is not robbery of the pistol, though he and others went to the house of the prosecutor for the purpose of committing a robbery. But in such case, if the prisoner, when he snatched the pistol, had the intention to deprive the prosecutor of it, though he may also have had the purpose to prevent the use of it by the prosecutor, this is robbery. To constitute a robbery it is not necessary that the prisoner should intend to appropriate the property to his own use. If he intended to deprive the prosecutor of his property, that is sufficient.

In *Houston's Case*, 87 Va., 257, decided December 16, 1890, it was held: Where indictment charges accused with robbery by presenting of firearms, it is proper to charge the jury that if they find him guilty, as alleged in the indictment, they should fix his punishment according to the provisions of the first clause of this section.

SECTION 3675.

In *Mitchell's Case*, 75 Va., 856, decided November, 1880. On an indictment against M. for extorting money from R., an unmarried female, by threats to prosecute her for a criminal offence, on the issue of not guilty, R., as a witness on her examination-in-chief, spoke of what passed at two interviews between her and the accused, and on cross-examinations she stated that there had been several interviews between the two that she had spoken of, at which she ascertained that the accused was the person that she had seen wandering about her home; the witness will not be required to state generally what passed at these interviews, but only so much, if anything, as bears upon the issue, and what was said in respect to identifying each other in

connection with having seen him about the premises of her father.

On a trial a paper was produced, signed by the witness, R., in which she stated that she had, in March, 1869, given birth to a child which she had killed, and Dr. Bass had been sent for to deliver her of the after-birth, and introduced in evidence, which paper, the witness stated, she had been compelled by the accused to copy and sign and give to him, though she told him at the time it was a lie. And then the counsel for the accused proposed to ask the witness: In 1869 were you in the family way? Were you delivered of a child on March 23, 1869? Was Dr. Bass sent for to attend you? Did he deliver you of the after-birth on the following morning? But the court excluded all the questions. Held: The questions were irrelevant to the issue, and were properly excluded. Whether the female, R., was virtuous or vicious, she was equally entitled to the protection of the law.

SECTION 3678.

In *Anderson's Case*, 5 Rand., 627, decided by the General Court, November, 1826, it was held: The seduction of a female over sixteen years old (being not within the statute) cannot be punished by indictment. It would have been otherwise if a conspiracy had been charged.

SECTION 3680.

In *Bennet's Case*, 2 Va. Cases, 235, decided by the General Court, November, 1820, it was held: In an indictment for rape, if the charge is for carnally knowing and abusing a female child under ten, instead of a woman child, it is good after verdict.

In the same case "unlawfully" was omitted, this, too, is cured by the statute of *jeofails*, that word not being one of art.

The first part of the act against rape applies only to a rape on a female over ten years of age, the third section to cases where she is under ten years, and applies whether she consented or not, such a child being incapable of consent.

If the count for a rape under the third section charges more than is necessary (as that the prisoner "forcibly ravished," and "that it was done against the will and without the consent" of the person on whom it was committed), that part may be rejected as surplusage.

In *Field's Case*, 4 Leigh, 648, decided by the General Court, December, 1832. Upon an indictment it is found that a free negro, not intending to have carnal knowledge of a white woman by force, but intending to have such knowledge of her while she was asleep, got into bed with her, and pulled up her night garment, which waked her, using no other force. Held:

This was not an attempt to ravish, within the meaning of the statute.

In *Watts's Case*, 4 Leigh, 672, decided by the General Court, December, 1833, it was held: A white girl under twelve years of age, and not having attained to puberty, is a white woman, within the meaning of the statute, making it a felony punishable with death for a slave, free negro, or mulatto to attempt to ravish a white woman.

In *Brogy's Case*, 10 Grat., 722. On a trial for rape, the main question is as to the identity of the prisoner. The female is examined, and although she swears that the prisoner is the person that committed the outrage upon her, she declines to give a description of him as at the time of the outrage. The Commonwealth then introduces a witness to prove the particulars of the description of the person who committed the outrage, given by the female to the witness on the morning after the rape was committed, and before she had seen the prisoner, in corroboration or proof of the *causa scientiæ* of the female witness. Held: Though it is competent to prove the fact of a recent complaint by the female for the purpose of sustaining her credit, it is not competent to prove the particulars of her complaint; and so it is not competent to prove the particulars of the description given by her.

The female having declined to give a description of the person who committed the outrage, when upon oath, it is not competent to prove the description given by her when not upon oath.

In *Taylor's Case*, 20 Grat., 825, decided March, 1871. An indictment for rape does not charge that it was committed on a female, but the name given is a woman's name, and the indictment uses the pronouns "she" and "her" in speaking of the person upon whom the rape was committed. Held: Though it would have been better to use the word female, as it is the word used in the statute, yet the language used sufficiently shows that the rape was committed on a female, and is, therefore, good.

The question whether the name in the indictment is *idem sonans* with the true name of the person upon whom the offense was committed, is a question for the jury and not for the court.

The indictment charges that the rape was committed upon Helen Francis Davis, and the true name is Helen Francis Davids, but the proof is that she was as frequently called the first in the community as the last. The proof of the rape upon Helen Francis Davids is admissible under the indictment.

In *Christian's Case*, 23 Grat., 954, decided March 19, 1873, it was held: It seems that in an indictment for an attempt to commit a rape, the word ravish, as descriptive of the offence attempted, is not necessary, but the words "feloniously carnally to know," are sufficient.

Same case, page 958, the court said: Whether the proof is sufficient or not must depend on the circumstances of each case, among which the character and condition of the parties may have an important bearing. Acts of the accused, which would be ample to show and to produce conviction on the mind, that it was the wicked intent and purpose to commit this infamous crime, if done in reference to a female of good and virtuous character, would be wholly insufficient to establish guilt if they were acts done to a female of dissolute character and easy virtue.

In *Boxley's Case*, 24 Grat., 649, decided January, 1874, it was held: The prisoner is entitled to a new trial, on the ground of surprise, the testimony of the principal witness, as given in court, varying materially from that given before the committing justice, and the justice, who was a physician, having been called away at the time of the trial.

In *Givens's Case*, 29 Grat., 830, decided January, 1878, it was held: To carnally know a female child under twelve years of age, whether with or without her consent, is a rape. To attempt to carnally know a child under twelve years of age, without or with her consent, is an offence embraced in the statute.

The statute provides that the offence charged may be, at the discretion of the jury, punished with death or with confinement in the penitentiary. This is a death penalty, and the attempt to do the act forbidden is embraced in the statute. In a prosecution for carnally knowing a female child under twelve years of age, the jury find the prisoner not guilty of the act, but guilty of the attempt to commit it. The only witness as to the act was the child, who was proved by her mother to be between ten and eleven years of age. The court below having refused to set aside the verdict and to grant a new trial, the appellate court will not reverse the judgment.

In *Lawrence's Case*, 30 Grat., 845, decided March, 1878, it was held: The indictment for rape charges in one count that it was done by force, and against the consent of the female, and that she was under twelve years of age. The prisoner may be convicted under the indictment if the jury shall believe that she was under twelve years of age, though she consented to the act. The prisoner may be convicted, though the female told him that she was over twelve years of age, and he had reasonable cause to believe that she was over that age. He takes the risk, and if she is not over twelve years old, he is guilty under the statute.

In *Law's Case*, 75 Va., 885, decided March, 1881, it was held: A boy under fourteen years of age, who assists another person in an attempt to commit a rape, may be convicted as a principal in the second degree, and, under the Virginia statute, may

be punished the same as the principal in the first degree, if it appear, under all the circumstances of the case, that he had a "mischievous discretion."

In any case of felony, the principal in the second degree is punishable in Virginia as if he were the principal in the first degree.

The fact that a boy eleven years and eleven months old, of "average capacity" for his age, put his hand over the mouth of a female whilst his elder brother attempted to commit a rape upon her, is not sufficient of itself for his conviction as principal in the second degree of the felony of which his elder brother had been convicted. The evidence of malice, which is to supply age, must be beyond all doubt and contradiction.

In *Brown's Case*, 11 Virginia Law Journal, 237. There was simply no evidence to warrant a conviction, no questions of law raised at any stage of the proceedings.

In *Fry's Case*, 82 Va., 334, decided September 16, 1886, it was held: It is not allowable on cross-examination to ask prosecutrix at the trial of an indictment for rape, if she had been before a person of unchaste character.

In *Smith's Case*, 85 Va., 924, decided March 21, 1889, it was held: An indictment for rape in the words of this section defining the offence is good.

In *Mitchell's Case*, 89 Va., 826, decided March 30, 1893. On the trial for rape, after the jury were directed to consider of their verdict, the clerk called their attention to the charge which had been given to them as to the punishment, and, at his suggestion, the jury took such charge with them to their room. Held: No error.

SECTION 3681.

The references to 2 Va. Cases, 144, and 11 Leigh, 586, both relate to stolen negroes, and are no longer of value.

In *Davenport's Case*, 1 Leigh, 588, it was held: The offence is complete by the kidnapping without actual sale.

SECTION 3682.

The reference to 11 Grat., 697, is entirely upon the civil aspect of this offence, and has no bearing upon the criminal view.

SECTION 3686.

The reference to 2 Va. Cases, 576, is an error.

In *Lambert's Case*, 9 Leigh, 603, decided by the General Court, June, 1838, it was held: An indictment at common law, charging that the defendant did fight a duel with pistols, is bad on demurrer.

SECTION 3691.

In *Jones's Case*, 1 Va. Cases, 270, decided by the General

Court, it was held: A judge out of court has power to commit a witness who may refuse to give testimony by affidavit under this section.

SECTION 3692.

In *Cullen's Case*, 24 Grat., 624, decided November, 1873, it was held: By the 8th section of the bill of rights of Virginia a person is not only secured against giving evidence against himself on his own trial, but he cannot be required, on the trial of another, to testify, if his evidence will tend to criminate himself.

Even if a person may be required to give evidence on the trial of another which might tend to criminate himself, if the statute afforded him a complete indemnity by discharging him from all prosecution for the offence (of which *quære*) the act of October 7, 1870, amending Section 1, Chapter 12, of the Code of 1860, does not afford that indemnity, and, therefore, in requiring any person engaged in a duel to testify against another prosecuted for having fought, etc., such duel, is unconstitutional.

Under the principles of the common law and the statutes against dueling, it may well be apprehended that the surgeon of a party to a duel would be regarded in law as being concerned in, or as aiding or abetting the duel.

The fact that the witness has testified before the coroner and stated the facts does not deprive him of the privilege, it is not a waiver of it by him.

In *Temple's Case*, 75 Va., 892, decided March, 1881, it was held: The act of criminal procedure, which provides that a witness giving evidence in a prosecution for unlawful gaming shall never be proceeded against for any offence of unlawful gaming committed by him at the time and place indicated in such prosecution, does not apply to a prosecution for managing and conducting a lottery, and a witness cannot be required to testify in such a case if he will thereby criminate himself.

The fact that the witness testified before the grand jury, and that it was on his testimony that the indictment was found, will not deprive him of his privilege to decline to testify on the trial of the party indicted.

In *Kendrick's Case*, 78 Va., 490, decided March 27, 1884. K. was sworn and sent to the grand jury to testify as to charge against S. of unlawful gambling, and refused to answer questions propounded by grand jury because the answers would tend to criminate himself. Held: Statute secures full protection to witnesses testifying in prosecutions for unlawful gaming, and K. is not justified in refusing to testify on the ground that his answer will tend to criminate and disgrace him.

CHAPTER CLXXXI.

SECTION 3695.

In *Posey's Case*, 4 Call, 109, decided November, 1787, it was held: In an indictment at common law it is not necessary to state that the house burnt was a dwelling-house, for the word house imports it; and if upon the trial it appears that it was not a house upon which arson could be committed, it is the duty of the judges to direct the jury to acquit the prisoner.

In *Stevens's Case*, 4 Leigh, 683, decided by the General Court July, 1834. Indictment for arson describes the house burned as "the county jail and prison of the County of H., being the house of L. J., sheriff and jailer of the said county. Held: The burning of such jail is felony by the statute, and whether the jail may be properly said to be the house of the sheriff and jailer or not, that part of the description is unnecessary and may be rejected as surplusage.

In *Howel's Case*, 5 Grat., 664, decided June, 1848, it was held: In indictments for statutory offences the language of the statute defining the offence should be strictly followed. In an indictment for arson under the statute it is not sufficient to use the words set fire to the house, but the word burn must be used, that being the word employed in that section of the statute to define the offence.

In *Curran's Case*, 7 Grat., 619, decided June, 1850, by the General Court, it was held: An indictment for arson, according to the form at common law, is sufficient in a case of arson in the day time.

To convict of the offence of burning at night, it seems the indictment must charge the burning in the night.

Though the offence of burning in the day time may be charged in the common law form, yet it is more appropriate to charge the burning in the day time.

The indictment charges the setting fire to and burning the dwelling-house of E. on the 11th of February, 1850. The verdict is "guilty of arson in the day time, on the 11th of February, 1850." The verdict is sufficiently certain.

In *Hooker's Case*, 13 Grat., 763, decided November 23, 1855, it was held: A house, though it was built for a dwelling-house, and had been used as such, and although it was about to be used as such again, yet having been unoccupied for ten months previous, and being unoccupied when it is burned, is not a dwelling-house within the meaning of the statute.

In *Page's Case*, 26 Grat., 943, decided April 1, 1875, it was held: A count in an indictment which charges that the prisoner at night did burn "a certain other house called a barn or stable of one R. there situate, the same being an out house not adjoin-

ing the dwelling-house, nor under the same roof, but some persons usually lodging therein at night, to-wit:" etc., does not set out an offence for which the punishment is death.

On such a count the prisoner having been found guilty, and sentenced to be hung, the appellate court will reverse the judgment. But as the count does charge the burning of a barn and stable, which is punishable by imprisonment in the penitentiary, the additional description of the barn in the count may be rejected as surplusage, and he will be remanded to be tried for that offence.

To make an out-house not adjoining a dwelling-house, nor under the same roof, parcel thereof, within the meaning of the statute, two things must appear: *First*, That such out-house is within the curtilage of the dwelling house, and occupied therewith; and, *Second*, That some person usually lodges therein at night.

A dwelling-house, in the meaning of the statute, embraces all its parcels, including such an out-house as is parcel thereof. The burning of such an out-house is the burning of a dwelling-house in the meaning of the law, and may be so described in the indictment, and proof of the burning of the out-house will as much sustain the indictment as would proof of the burning of the principal dwelling-house, or the whole of it, including all the parcels.

SECTION 3696.

In *Butler's Case*, 81 Va., 159, decided December 3, 1885, it was held: An indictment for the burning of "a certain store-house, not adjoining or occupied with the dwelling-house of one S.," sufficiently describes the store-house as the property of S.

SECTION 3697.

The reference to 27 Grat., 1009, is not in point.

SECTION 3698.

In *Erskin's Case*, 8 Grat., 624, decided December, 1851, by the General Court, it was held: The malicious burning of wheat threshed from the straw is not a violation of the act.

For the reference to 26 Grat., 943, see *Page's Case*, cited *ante*, Section 3695.

SECTION 3699.

For reference to 4 Leigh, 737, see *Stevens's Case*, *ante*, Section 3695.

In *Erskins's Case*, 8 Grat., 624, decided December, 1851, by the General Court, it was held: The malicious burning by the owner of a house on his own land, the house being then the legal occupancy of another, is a violation of the statute.

In *Wolf's Case*, 30 Grat., 833, decided March 21, 1878. An

indictment charges that the accused "did feloniously and maliciously burn a certain barn and the property therein, being the property of one H. H. Dulaney, and situated in the county aforesaid, which said barn and the property therein was then and there of the value of one thousand five hundred dollars. Held: Sufficient.

In *Richard's Case*, 81 Va., 110, decided November 19, 1885, it was held: Statute provides punishment for burning "any building, the burning thereof is not punishable under any other section" of said chapter. Indictment under said section must describe the building with such particularity as will inform accused what building is meant.

SECTION 3701.

In *Earhart's Case*, 9 Leigh, 671, decided by the General Court, December, 1839. Indictment for unlawfully, wilfully, and maliciously setting fire to the woods near the plantation of A. M., and burning said woods and a fence belonging to said A. M., is described in the record of the finding as an indictment "for setting fire to the woods and burning same." Held: A sufficient record of the finding.

SECTION 3704.

In *Weldon's Case*, 4 Leigh, 652, decided by the General Court, July, 1833, it was held, p. 660: An indictment charging that goods were feloniously taken from a dwelling-house, and charging that this was done in the night time, is not a good indictment for burglary, but is only an indictment for larceny.

In *Finch's Case*, 14 Grat., 643, decided January 27, 1858, it was held: An entry into a dwelling-house in the day time through a door that was so closed that it came within the casing, and to open which required some degree of force, constitutes in law a breaking, though there was no fastening of any other kind on the door.

The word "break" in the Code is borrowed from the law of burglary, and is to be understood as it would be when used in a charge of burglary.

In *Speers's Case*, 17 Grat., 570, decided January 21, 1867, it was held: An indictment which charges a breaking into a house with intent to steal, and the stealing therefrom, is an indictment for house-breaking and not for larceny, and is good.

To such a count may be added a count for simple larceny of the same goods, and the jury may find the prisoner guilty on each count, and fix a several punishment for each offence.

In *Vaughn's Case*, 17 Grat., 576, decided January 21, 1867. A person committed on a charge of larceny by a justice is sent in charge of a special constable and the prosecutor to jail, and on the way this constable says to him, "you had as well tell all about it." After they had ridden about a mile after this remark

without any other remark having addressed to the prisoner, he voluntarily says to the prosecutor, "I will tell you all about it," and proceeds to tell how and by whom the breaking and larceny were committed. The constable is a person in authority over him, and the statement is not admissible in evidence.

In *Clarke's Case*, 25 Grat., 908, decided June, 1874, it was held: D. and H. rent a room jointly of S., of which each has a key. C. rents an adjoining room, the doors of the two rooms entering upon the same porch near each other. They frequently interchange visits. On the night of March 11, 1874, D. locks his door, takes out the key, and starts to church. On his way he meets H., who says he is going to his room, and will follow him to the church soon. H. and C. conspire to steal D.'s goods in the absence of D. on this night, and H. opens the door with his key, and they enter the room and take and carry away the trunk of D. with its contents. This is not such a breaking as will constitute burglary in C. The indictment charging not only the breaking and entering, but the stealing of the trunk and its contents of a stated value, C., though acquitted of the burglary, may be found guilty of larceny.

In *Walker's Case*, 28 Grat., 969, decided, July, 1877, it was held: Though the mere possession of the stolen property might not be *prima facie* evidence of the burglary or house-breaking charged in the indictment, yet, in connection with other evidence of such burglary or house-breaking, evidence of possession of the stolen goods is admissible.

In *Taliaferro's Case*, 77 Va., 411, decided April 12, 1883, it was held: It is well settled that the exclusive possession of goods recently stolen, unaccompanied by a reasonable account of how the possession was acquired, creates a presumption that the possessor is a thief, and is sufficient to warrant his conviction of larceny. But it has never been decided in this State that possession is even *prima facie* evidence of guilt in cases of burglary and house-breaking. The question was discussed, but not decided in *Walker's Case*, 28 Grat., 969. The contrary is laid down by several authorities.

In *Wright's Case*, 82 Va., 183, decided July 1, 1886, it was held: Indictment charging a breaking into the dwelling-house of J. with intent to steal, and stealing therefrom, is an indictment for burglary, and is good. Such indictment charging that prisoner six labor tickets, of the value of six dollars, then and there feloniously did steal, take and carry away, is good, though it does not specify the articles nor state that they were the property of J. or of any other person.

Though the mere possession of the stolen property might not be *prima facie* evidence of the burglary charged in the indictment, yet, in connection with other evidence of such burglary,

evidence of exclusive possession of the stolen property is admissible.

In *Gravelly's Case*, 86 Va., 396, decided December 5, 1889, it was held: Recent possession of stolen goods is not *prima facie* evidence of guilt of burglary; but such possession is a material fact to be considered by the jury, and, with other culpatory facts, such as a refusal by the accused to give any, or his giving a false account of how he came by the goods, will warrant a conviction.

SECTION 3705.

In *Lawrence's Case*, 81 Va., 484, decided February 25, 1886, it was held: Indictment in usual form for "house-breaking" is not sufficient, because it does not negative the idea that the bar-room which was broken and entered adjoined any dwelling-house other than that of the owner of the bar-room.

SECTION 3706.

In *Benton's Case*, 89 Va., 570, decided January 26, 1893, it was held: A felony is such an offence as may be (not must be) punished by death or confinement in the penitentiary. Breaking and entering a house in the night time with intent to commit larceny may be punished by imprisonment in the penitentiary or in jail, at the discretion of the jury.

SECTION 3707.

In *Thompson's Case*, 2 Va. Cases, 135, decided by the General Court, June, 1818, it was held: In larceny at common law the indictment need not charge that the goods were stolen from the possession of the owner or of any other person.

In *Angel's Case*, 2 Va. Cases, 228, decided by the General Court, November, 1820, it was held: In an indictment for the larceny of bank-notes under the statute it is not necessary that it should charge that the stealing was from the possession of any one.

In *Chiles's Case*, 2 Va. Cases, 260, decided by the General Court, June, 1821, it was held: Indictments for horse-stealing need not conclude *contra formam statuti*; and even if it were proper that they should, the omission would be cured by the statute of *jeofails*.

In *Poindexter's Case*, 6 Rand., 667, decided by the General Court, November, 1828, it was held: If a person be indicted for grand larceny, and the jury convict him of petit larceny, without ascertaining the value of the goods stolen, the verdict is sufficient.

A verdict which does not ascertain what goods were stolen, nor their value, nor whether they are forthcoming or not, nor what articles are not forthcoming, if any, nor the value of such as are not forthcoming, but merely finds the prisoner guilty of

petit larceny on an indictment for grand larceny, will not be set aside as erroneous.

The reference to 7 Leigh, 152, is an error.

In *Walker's Case*, 8 Leigh, 743, decided by the General Court, December, 1837. A person employed by a mercantile firm as a salesman in their store, having full control of the goods in the store-room and the money in the cash-drawer, for the purpose of his employment, abstracts a part of the goods and money with a fraudulent intent to convert the same to his own use. Held: He is guilty of larceny.

In *Booth's Case*, 4 Grat., 525, decided June, 1847, by the General Court, it was held: On a trial for larceny the court instructs the jury that it must be proved that the original taking was felonious; but that the jury had a right to infer, from all the facts and circumstances of the case, the felonious intent in the original taking; and that not in one case in a hundred could it be proved directly that the original taking was felonious. There is no error in the instruction.

In *Hunt's Case*, 13 Grat., 757, decided November 23, 1855, it was held: Upon trial for larceny of a bank-note, the property of G., of the value of twenty dollars, it is error to instruct the jury, that if they believe from the evidence that G. lost a bank-note of the value of twenty dollars, and that the same was afterwards found in the possession of the prisoner, they ought to find him guilty, unless his possession of the note was explained by testimony.

The mere possession of goods which had been actually lost does not furnish any conclusive or even *prima facie* proof of guilt; of itself it does not raise the suspicion of guilt.

To constitute larceny in the finder of the goods actually lost, it is not enough that the party has general means by the use of proper diligence of discovering the true owner. He must know the owner at the time of the finding, or the goods must have some mark about them, understood by him or presumably known by him, by which the owner can be ascertained; and he must appropriate them at the time of finding, with intent to take entire dominion over them.

In *Tanner's Case*, 14 Grat., 635, decided November 17, 1858, it was held: Lost property may be the subject of larceny.

To constitute a larceny of lost property the person finding it must know or have the means of knowing the owner, or have reason to believe that the owner may be discovered, and he must intend at the time of finding the property to appropriate it to his own use.

In *Jones's Case*, 17 Grat., 563, decided October 4, 1866, it was held: In a trial for larceny to convict the prisoner there

must be satisfactory proof that the property stolen was the property of the person stated in the indictment.

In *Hughes's Case*, 17 Grat., 565, decided January 18, 1867, it was held: In an indictment for larceny, the name of the owner of the property charged to have been stolen must be stated; and if it appears that the person so stated to be the owner was a married woman at the time of the larceny, it is error, and the prisoner should be acquitted.

In such a case if there is a verdict and judgment against the prisoner, which on appeal is reversed, when the case goes back a *nolle prosequi* may be entered, and a new indictment may be found.

In *Leftwich's Case*, 20 Grat., 716, decided November, 1870, it was held: The statute for punishing persons obtaining money or other property which may be the subject for larceny, and an indictment for an offence may be either in the form of an indictment for larceny at common law, or by charging the specific facts which the act declares shall be deemed larceny. In an indictment under this statute for obtaining money under a false pretense, it is not sufficient to describe it as "ninety dollars in United States currency," but it should show what kind of United States currency was obtained.

In *Price's Case*, 21 Grat., 846, decided January, 1872, it was held: If a person be indicted for the simple larceny of a thing, and the proof be that it was stolen by some other person and received by the accused, knowing it to have been stolen, the proof will sustain the charge; the act making the receiving of a thing stolen, knowing it to be stolen, larceny. P. is indicted for receiving a horse which had been stolen, knowing that it had been stolen. The indictment may charge especially the fact of receiving the horse, with the knowledge that it had been stolen, or it may charge P. with the larceny of the horse, and the latter would seem to be the better practice. If property be stolen and recently thereafter be found in the exclusive possession of the prisoner, then such possession of itself affords sufficient grounds for presumption of fact that he was the thief, and, in order to repel the presumption, makes it incumbent on him, or being called on for the purpose, to account for such possession consistently with his innocence. If he gives a reasonable account of it, then it devolves on the Commonwealth to prove that such account is untrue. If he gives an unreasonable account of it, then it devolves on the prisoner to sustain such account by evidence. What is such a recent possession as raises a presumption against a prisoner in the meaning of the rule, is a question for the jury, and depends upon the nature of the property and other circumstances of the particular case.

In *Harvey's Case*, 23 Grat., 941, decided March, 1873. H.

was indicted for the larceny of three bee-hives of the value of five dollars, three swarms of bees of the value of three dollars, and forty pounds of honey of the value of five dollars of the goods and chattels of C. The jury by their verdict found him guilty as charged in the indictment, and ascertained the term of his imprisonment in the county jail at three months, and the judgment of the court was for three months imprisonment. W. then moved in arrest of judgment, because, *First*, The jury was not authorized to fix the term of his imprisonment; and, *Second*, Two of the three subjects of larceny charged in the indictment are not proper subjects of larceny. Held: Though the jury had no authority to fix the imprisonment, it was a mere surplusage, and the verdict of guilty was good, and the imprisonment was the act of the court.

It may be intended after verdict that the bees were reclaimed, and the honey the property of C.

If any one of three subjects mentioned in the indictment might be the subject of larceny, it is sufficient, and the verdict will not be arrested.

In *Johnson's Case*, 24 Grat., 555, decided November, 1873, it was held: A. was standing in a street in R., holding six dollars in his open hand, which he was counting, and J., passing by, took the money out of his hand and walked off, no force being used beyond what was necessary to withdraw the money. A. asked J. for it several times as she walked off, but she would not return it. This is grand larceny under the statute, if done *animo furandi*. The indictment against J. is for stealing six dollars of "United States treasury notes." Upon an exception to the refusal of the court to grant J. a new trial, the certificate of facts states that A. was holding some money, etc. The facts certified do not sustain the verdict.

In *Anable's Case*, 24 Grat., 563, decided November, 1873. Upon an indictment for larceny, proof that the accused obtained money by false pretenses will sustain the indictment. A. was the secretary of the board of supervisors of the county of H., and there was to his credit on the books of the treasurer, for claims held by him against the county, \$1,649. Blank warrants, signed by the chairman of the board, were left with him, and he filled up and sold warrants to a considerably larger amount than the sum due to him. Warrants to nearly the amount due are registered, and among these one for \$350, sold to W. But there were other warrants sold before the one sold to W.; but if they had been registered before W.'s, the fund would have been exhausted, and would have left nothing to be applied to W.'s warrant. Upon an indictment of A. for larceny of the check given by W. for payment of the warrant, held: The warrants are to be paid in the order in which they are regis-

tered, and, there being sufficient to pay W.'s warrant as well as all the warrants registered before it, A. cannot be convicted of the larceny charged.

W. having bought his warrant of N., an agent of A., and having given a check payable to the order of N., and the indictment charging the larceny of the check of W. endorsed by N., and the proof being that N. endorsed his name after receiving the check, *quære* whether this is a variance.

For the reference to 25 Grat., 908, see *ante*, Section 3704, *Clarke's Case*.

For the reference to 25 Grat., 943, see *Jordan's Case*, *ante*, Section 3674.

In *Williams's Case*, 27 Grat., 997, decided March, 1876. W. was indicted for stealing \$150, the money of S. On the trial it was proved that J., a detective, arrested W., who made a confession, which was made under a promise, and was excluded as evidence. In this confession he directed J. to go to certain gamblers and get the money back from them. J. sent for the gamblers named, and told them what W. had said, and they paid over to J. and S. \$104, though one of them protested that W. had not been at his house, and the others denied that he had lost the money claimed with them. The balance of the money, \$46, was paid over by the father of W. Held: It not being proved that the money paid to J. was the same lost by S., the statement of W. and J., and what passed between J. and the gamblers and the father of W., is not competent evidence.

In *Trodgon's Case*, 31 Grat., 862, decided November, 1878. Upon the prosecution of T. for obtaining goods from M. & Co. upon false pretenses, evidence that the accused, in the same city, and at or about the same time, purchased goods from other parties, B. & O., upon the same false pretenses, is admissible to show the intent of the accused in making the representations to M. & Co., but not as proof that the accused had committed other offences not charged in the indictment, and this though the statute has made the obtaining of goods on false pretences larceny. A statement is made by T. of his partners and of the condition of the partnership to one of the firm of M. & Co., who encloses it in a letter to another member of the firm, then in New York, and asks if he shall send the goods, and he receives a reply by telegram to send them. The statement is admissible as evidence.

On the 15th of March, 1878, L., having received an order to send some goods to T. & Co., obtained from B. a copy of the representations made to him by T. on the 28th of February, 1878, which were the same representations made to M. He mailed a copy to T. & Co., asking if that statement represented the true condition of their affairs, and received, by due course of mail,

a letter signed T. & Co., saying that it did, and that the business was still prospering. Held: The testimony of L., his letter to T. & Co. containing the statement, and the answer received by him, are admissible as evidence in this case to show the intent of the accused.

Whenever the intent or guilty knowledge of a party charged with a crime is a material ingredient in the issue of the case, other acts and declarations of a similar character, tending to establish such intent or knowledge, are proper evidence to be admitted, provided they are not too remotely connected.

Although, under the statute of Virginia, the obtaining of goods by false pretenses is made larceny, and an indictment under the same for larceny is sufficient, yet every ingredient entering into the offence of obtaining goods by false pretenses must be shown as fully as if the statute had not thus passed.

In *Robinson's Case*, 32 Grat., 866, decided January, 1879. On a trial for stealing certain bank-notes, "the numbers and denominations of which are unknown to the jurors," the evidence of the Commonwealth shows that the numbers and denominations of the notes were known to the jurors, and for this variance between the indictment and the evidence; and then, against the objection of the prisoner, excludes the evidence; and then, against the objection of the prisoner, discharges the jury. On a second indictment for the same offence, held: That if the jury had, on the first trial, rendered a verdict in favor of the prisoner, it would not, under the statute, have been a bar to another indictment and trial for the same offence; and therefore the discharge of the jury was no injury to the prisoner.

In *Shinn's Case*, 32 Grat., 899, decided March, 1879, it was held: The check having been given to S., the secretary, in payment of a debt due to the association, was the property of the association, and though payable to S., as secretary, it was also payable to bearer, and it was the duty of S. to turn it over to the treasurer. If S. had accounted for the money, that fact would, of course, show that he had no intention to appropriate the check; not having done so, it was a question for the jury whether he intended to embezzle the check; and to convict him, it was necessary for the jury that they should be satisfied that his intention existed before, or at the time, the check passed into possession of the bank.

If S. drew the money on the Avery check with the intention of using the same for his own purpose, and not for the liquidation of the Avery debt, though probably with the intention to return the same at some future day to the building association, he is guilty of the embezzlement of the check.

In *Hey's Case*, 32 Grat., 946, decided November, 1879, it was

held: To sustain the prosecution under the statute four things must be proved: *First*, That the goods or other things were previously stolen by some other person. *Second*, That the accused bought or received them from another person, or aided in concealing them. *Third*, That at the time he so bought or received or aided in concealing them, he knew they had been stolen. *Fourth*, That he so bought or received them *malo animo*, or with a dishonest purpose.

In *Wolverton's Case*, 75 Va., 909, decided November, 1881. An article, to be subject to larceny, must be of some value; but it may be worth less than the smallest coin. The indictment in this case charged the value of the lock stolen to be thirty cents. There was no distinct proof of any specific value, nor was it necessary; the evidence showed that it had a key in it, and was used in fastening a door. Held: This was sufficient to show that it was of some value.

In *Taliaferro's Case*, 77 Va., 411, decided April 12, 1883. K.'s dwelling is broken open and her goods stolen therefrom. Next day the goods are found on a bed in a room occupied by prisoner and another woman, P., whose friend often came and spent the night there. On the second day prisoner sold the goods, worth nine dollars, for seventy-five cents, and said she got them of P., but made contradictory statements. Prisoner was indicted for burglary, and convicted of house-breaking. Held:

1. Even in cases of simply larceny, in order to raise the presumption of guilt from the possession of stolen goods, it is necessary that they be found in the exclusive possession, and subject to the exclusive control, of the accused. Such was not the case here.

2. Prisoner's conflicting statements as to how she came by the goods certainly excite a strong suspicion against her, yet the testimony is insufficient to establish her guilt of burglary or house-breaking.

In *Hall's Case*, 78 Va., 678, decided March 13, 1884. H., in a drunken spree, unhitched and mounted a horse in the presence of its owner, and of the warehouse man, and of a number of factory hands in the warehouse yard where the horse was hitched, claiming the horse as his own, and attempted to ride it out of the lot homeward. He was arrested, remanded to jail, tried, and found guilty of the larceny of the horse. He moved for a new trial, which was denied. On error, held: The facts do not evince felonious intent, and do not warrant the verdict.

See *Gravelly's Case*, 86 Va., 396, cited *ante*, Section 3704.

In *Perrin's Case*, 87 Va., 554, decided March 26, 1891, it was held: To constitute larceny in finder of lost goods, the finder must know the owner at time of finding, or the goods must

have some mark about them presumably understood by him, whereby the owner can be ascertained, and he must appropriate them at the time with intent to take entire dominion over them.

In *Anthony's Case*, 88 Va., 847, decided March 10, 1892, it was held: When indictment charges joint defendants with conspiracy to commit a larceny, and then charges them with actually committing the larceny in pursuance of the conspiracy, there is no misjoinder.

Obtaining goods under false pretenses, with intent to defraud, is larceny, and it is not a misjoinder to include a count therefor, with other larceny counts in the indictment.

SECTION 3708.

In *Mosely's Case*, 2 Va. Cases, 154, decided by the General Court, June, 1819, it was held: An indictment which charges a larceny of bank-notes "of the value, etc., of the money, goods and chattels of one G. F., and from the said G. F.," is a sufficient averment of property in the said G. F., the person from whom they were stolen, after verdict, for the words money, goods and chattels may be rejected as surplusage.

A general description of a bank-note current in the United States is sufficient in the indictment for the larceny thereof.

See *Angel's Case*, 2 Va. Cases, 228, cited *ante*, 3707.

In *Pomeroy's Case*, 2 Va. Cases, 342, decided by the General Court, June, 1823, it was held: The law which made it felony to steal any bank-note embraced any available chose in action bearing that name. That law being re-enacted in 1819, should not be taken to be altered by implication when incorporated with other laws on the same subject, unless that implication be unopposed by matters calling for the original construction.

The legislature did not mean to restrict the meaning of the term "bank-note" to those of chartered banks, because it makes the stealing "of any other writing or paper of value" to be larceny, which expression would include any available chose in action called a bank-note. The term "bank-note" ought not, therefore, to be considered in this restricted sense.

To support the allegation in an indictment, that the bank-notes purport on their faces to be notes of certain banks, the notes produced in evidence must correspond therewith.

When an indictment charges that the prisoner committed a larceny of certain bank-notes, "purporting on their faces to be, and being bank-notes of and issued by banks chartered," etc., the latter part of the charge may be rejected as surplusage, because it constitutes an independent allegation of an immaterial fact, and the fact constituting the offence is fully charged without it. It is not, therefore, necessary in such case to give proof of the charters of those banks.

The words, "or any other writing or paper of value," furnish a good rule for limiting and explaining the words, "warrant or certificate," in the same section; which mean papers of that description being of value and capable of conversion.

In *Moore's Case*, 2 Leigh, 701, decided June, 1830, it was held, p. 706: In an indictment for larceny of bank-notes, it is not indispensably necessary to produce the stolen notes upon the trial.

The reference to 13 Grat., 757, is to *Hunt's Case*, cited *supra*, Section 3707.

See *Leftwich's Case*, 20 Grat., 716, cited *ante*, Section 3707.

In *Adams's Case*, 23 Grat., 949, decided March, 1873, it was held: In an indictment for stealing bank-notes it is sufficient to state that the notes were for a certain sum of money, without stating their value.

In such a case since the statute, the value of the bank-notes is not traversable.

See *Johnson's Case*, 24 Grat., 555, cited *ante*, Section 3707.

For the reference to 32 Grat., 866 and 899, see *supra*, Section 3707.

SECTION 3714.

In *Rutherford's Case*, 2 Va. Cases, 141, decided by the General Court, November, 1818, it was held: The receiving of a stolen bank-note is not the receiving of stolen goods within the meaning of the statute.

In *Dowdy's Case*, 9 Grat., 727, decided August 16, 1852. An indictment containing several counts, one for larceny, others for receiving stolen goods, knowing them to have been stolen, and others for aiding another person to conceal stolen goods, knowing them to have been stolen; the charges in all the counts, however, relate to the same goods which in different counts are laid to be the goods of different persons or of a person unknown. Held: It is not a case in which the court should quash some of the counts, or compel the prosecution to elect on which count the prisoner shall be tried.

See *Price's Case*, 21 Grat., 846, cited *ante*, Section 3707.

The reference to 24 Grat., 31, is an error.

See *Trodgon's Case*, 31 Grat., 862, cited *ante*, 3707.

See *Heys's Case*, 32 Grat., 946 and 950, cited *ante*, 3707.

SECTION 3716.

See *Shinn's Case*, 32 Grat., 899, cited *ante*, 3707.

SECTION 3717.

In *Smith's Case*, 4 Grat., 532, decided June, 1847, by the General Court, it was held: It is not necessary that the party

charged with embezzlement should be the captain of the boat to bring his offence within the statute.

SECTION 3720.

See *Walker's Case*, 8 Leigh, 743, cited *ante*, Section 3707.

SECTION 3722.

In *Speer's Case*, 2 Va. Cases, 65, decided by the General Court, June, 1817, it was held: The false passing as a true note a false and forged note, purporting to be a note of a bank (which bank never existed), and procuring goods by means thereof, is not such an offence as comes within the act to prevent the deceitfully obtaining goods, etc., by privy token or counterfeit letters, but it is a public cheat indictable at common law if the defendant knew that it was such false note, and it is necessary to aver in such case the *scienter* in the indictment.

See *Leftwich's Case*, 20 Grat., 716, cited *ante*, Section 3707.

See *Anable's Case*, 24 Grat., 563, cited *ante*, Section 3707.

In *Dull's Case*, 25 Grat., 965, decided January, 1875, it was held: If P. & L., at the house of the accused, by the use of false pretenses, obtained from F. the sum of five hundred and seventy dollars, the accused is not guilty of the offence unless he was present, aiding and abetting therein, or suffered or permitted the said P. & L. to use said house, with knowledge that they intended to use the same for the employing of such pretenses. But if the accused was within easy call, with intent to aid or assist them in their purpose, or in escaping, or in getting rid of or misleading the person from whom such money was obtained, that is a present aiding and abetting, and the accused is as guilty as if he were personally present. The obtaining money by false pretenses is made larceny by the statute; and the penalty for the offence is the same as in other cases of larceny.

On an indictment for larceny, the clerk charges the jury in the usual form. If on the trial it appears that the money charged to have been stolen was obtained by false pretenses, another charge made by the clerk is not necessary nor proper.

In *Fay's Case*, 28 Grat., 912, decided January, 1877, it was held: F. is indicted for the larceny of two hundred and eight dollars of notes of United States currency, the property of R. The proofs refer to F.'s obtaining money from R. by false pretenses. To sustain the prosecution the Commonwealth must prove every fact which would be required to be alleged in an indictment for obtaining money on false pretenses. In such an indictment it would be a material allegation that the money was obtained by the false pretenses alleged, and therefore it is necessary to be proved under the indictment for larceny in order to a conviction.

The false pretenses, either with or without other causes, must have had a decisive influence upon the mind of the owner, so that without their weight he would not have parted with the property.

Unless the selling of the property by F. to R. was by false pretenses, with intent to defraud the buyer, the case is not within the statute. Therefore the fraudulent intent must have existed at the time false pretenses were made by which the money was obtained.

In the absence of proof that such money as is charged in the indictment to have been stolen was received by the prisoner, he cannot be properly convicted.

See *Trodgon's Case*, 31 Grat., 862, cited *ante*, Section 3707.

SECTION 3729.

Reference to 2 Rand., 791, error; no such page.

In *Maclin's Case*, 3 Leigh, 809, decided by the General Court, July, 1831, it was held: The statute of 1822-'23, Chapter 34, does not authorize a criminal prosecution for killing dogs belonging to another.

In *Israel's Case*, 4 Leigh, 675, decided by the General Court, December, 1833. Indictment at common law, charging defendant with rescuing property that had been distrained by a sheriff for public dues from a bailee, to whose safe-keeping the sheriff had committed it, without charging that the defendant knew in what right the bailee held it. Held: Indictment defective for not averring that the defendant had such knowledge; and this defect is not cured by verdict by the statute of *jeofails* in criminal cases.

In *Percavil's Case*, 4 Leigh, 686, decided by the General Court, July, 1834. Upon an indictment on the statute of 1822-'23, the jury find in a special verdict that defendant shot and killed hogs, the property of another, the hogs being on the defendant's own land at the time of his shooting and killing them. Held: The verdict is defective and insufficient in not finding the essential ingredients required by the statute to constitute the misdemeanor, viz.: that defendant killed the hogs "knowingly and wilfully, without lawful authority."

The provisions of that statute are not confined to property *ejusdem generis* with that specially there enumerated, and the circumstance of the property destroyed being at the time on defendant's land does not take the case out of the statute.

In *Ratcliffe's Case*, 5 Grat., 657, decided June, 1848, by the General Court, it was held: An indictment which charges that defendant knowingly and wilfully removed a fence from the lands of P., and did injure and expose the growing crop of P. then on said lands, charges but one offence, and is valid.

If the defendant removed the fence under a claim of right, believing it to be his own, and that he had a *bona fide* right to it, he committed no offence against the statute.

In *Davis's Case*, 17 Grat., 617, decided February 12, 1867, it was held: The killing of a dog is not an indictable offence.

CHAPTER CLXXXII.

SECTION 3733.

In *Foulkes's Case*, 2 Rob., 836, decided December, 1843, by the General Court, it was held: Upon a trial for forgery of a written instrument, the Commonwealth may, without producing as a witness the party, by whom the instrument purports to be signed, and without accounting for his absence, prove by the evidence of other witnesses that the instrument is not genuine; such evidence, not being in its nature secondary to that of the party whose signature is in question.

On trial for an indictment for forgery of a letter of credit with intent to defraud W. and W., the Commonwealth proves that a draft presented by the prisoner to W. and W. at the same time with the letter of credit, had been filed, together with an indictment against the prisoner for forging the same, with the clerk of the court, who, upon making search for the draft among the papers in his office, has been unable to find it, and thereupon the Commonwealth offers secondary evidence of the contents of the draft; no notice having been given to the prisoner, before the jury was impaneled, of any intention to offer such evidence. Held: The foundation so laid for the admission of the secondary evidence is sufficient.

Indictment for forging with intent to defraud W. and W., a letter in the following terms:

NOTTOWAY, April 24, 1841.

GENT.: Agreeable to Mr. Wm. J. Watkin's request, I take pleasure in making you acquainted with his name, and would say to you that he is very extensively engaged in the manufacturing of tobacco, and has made some large purchases, and says that he wishes to patronize you (on my recommendation). You may be assured that whatever he engages to do he will certainly perform. He says it is probable that he will want one thousand dollars by the 1st of May to meet his engagements, and if he apply for the amount I have no doubt but you will accommodate him. The roads are in such condition that it is impossible to get any produce to market. Write me a few lines by Mr. Watkins, and say what the chance is for a rise in tobacco. Your compliance with the above will very much oblige your obedient servant,

JOSEPH M. FOULKES.

P. S.—Mr. Watkins prefers giving a negotiable note payable in Petersburg Exchange Bank, where he can always have an opportunity of sending at the shortest notice and draw. He is not a gentleman of low, mean degree, but one that is a perfect gentleman in every sense of the word. I am confident, as I have observed to him, that you will either let him have the money, or endorse for him.

J. M. F.

Held: This is not a writing whereof forgery can be committed, either at common law or under the statute.

In *Chahoon's Case*, 20 Grat., 733, decided January, 1871, it was held: Upon a trial for forgery, to prove that the paper was forged, a witness was introduced, who said that he knew H., the party whose signature was in question and who was dead about two years, was his tenant, had seen him write, think he knew his handwriting tolerably well, but could not swear to a particular signature as his without knowing the fact, though he had sufficient knowledge or recollection of his signature to enable him to give an opinion as to the genuineness of his signature, though he would not swear absolutely about it; says, I think it is not his handwriting, but, at the same time, I cannot say on oath positively it is not. This is admissible evidence.

On such a trial the Commonwealth may prove that H. was prompt in the payment of debts, and that he owned a large property, real and personal, and was doing a good business.

Forgery of a paper may be by performing the act in person, or by being present, procuring and assisting in the forgery.

Uttering a forged paper may be proved by showing that the prisoner attempted to employ as true the forged writing, with a knowledge at the time of the said attempt that the same was forged with intent to fraud; and any assertion or declaration by word or act that the forged writing is good, with such knowledge or intent, is an uttering or attempt to employ as true the said writing, if such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in the said writing.

To convict of forgery the jury must be governed entirely by the testimony before them, and they must not presume the guilt of the accused by reason of his failure or neglect to produce evidence in his own behalf; but if the jury believe that it is in the power of the accused to produce evidence in elucidation of the subject-matter of the charge against him, then his failure to produce such evidence may be considered by the jury in connection with the other facts proved in the case.

The forgery charged was the note of H., an unnaturalized

foreigner. The forging it was in fraud of the administrator of H., and the heirs of H., if he had any, or the State, if he had none.

The bringing the suit at law, as counsel upon the forged note, and recovering judgment thereon, and the filing a bill to enforce payment of the judgment out of the real estate of H., and having the same sold and receiving the proceeds, the same being done with knowledge that the note was a forgery, was an attempt to employ the said note as true within the meaning of the statute.

Though the suit at law was brought in the County Court of Henrico, and the suit in equity was in the Circuit Court of Henrico, yet as both these courts were held within the limits of the city of Richmond, and the prisoner lived in the city, the Hustings Court of the city had jurisdiction to try the prisoner.

In *Sands's Case*, 20 Grat., 800, decided January, 1871, it was held: On the trial for the forgery of a note of H., who is dead, the Commonwealth may prove that H. was prompt in the payment of his debts, and that he owned a large property, real and personal, and was doing a good business. To convict a prisoner of uttering or attempting to employ as true a forged writing, it must be shown that the accused himself uttered or attempted to employ as true the said forged writing, or was present at the time such forged writing was uttered or attempted to be employed as true, by some other person aiding and assisting such person to utter or employ the same as true, and it must be further shown that the accused knew at the time that the said writing was in fact forged; and that such uttering and attempting to employ as true was made or done by him with the intent to defraud; but any assertion or declaration, by word or act, directly or indirectly, that the forged writing is good, with such knowledge and intent, is an uttering or attempting to employ as true the said writing, provided that such assertion or declaration was made in the prosecution for the purpose of obtaining the money mentioned in the said writing.

In *Coleman's Case*, 25 Grat., 865, decided March, 1874, it was held: A public record must be a written memorial, intended to serve as evidence of something written, said or done, made by a public officer authorized by law to make it, but that authority need not be derived from express statutory enactment.

Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right, but his duty, to keep a written memorial, whether expressly required to do so or not; and when kept it becomes a public document, a public record, belonging to the office and not to the officer.

The warrant book of the sinking fund, kept by the second

auditor in his office, of the transactions of the commissioners of the sinking fund of the State, is a public record, and is of itself evidence of what it contains, to be considered with the other evidence in the case.

SECTION 3735.

See *Speer's Case*, 2 Va. Cases, 65, cited *ante*, Section 3722.

In *Hensley's Case*, 2 Va. Cases, 149, decided by the General Court, June, 1819, it was held: The false uttering of a forged bank-note of another State or district may be prosecuted as the false uttering of a promisory note for the payment of money under the statute.

In *Rasnick's Case*, 2 Va. Cases, 356, decided by the General Court, June, 1823, it was held: An indictment which charges a prisoner with the offences of falsely making, forging and counterfeiting; of causing and procuring to be made, forged and counterfeited, and of willingly acting and assisting in the said false making, forging and counterfeiting, is a good indictment, though all of these charges are in a single count, the words of the statute being pursued, and there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct.

One who brightens base pieces (which are brought to him ready formed with the impression and appearance of dollars, except that they are of a dark color, like lead, and not then passable) by boiling them in lye and rubbing them with a woolen cloth, and subjecting them to other processes, thereby rendering them, by their resemblance to real dollars, more fit for circulation, is guilty of counterfeiting. He completes the offence, and thereby subjects to the penalties of the law, not only himself, but all who acted a part and were present and assisting at the transaction from beginning to end, or who did do anything thought necessary by themselves to impose on the public, by making the base coin resemble the true.

In *Brown's Case*, 2 Leigh, 769, decided by the General Court, November, 1830. An indictment for passing a counterfeited bank-note to a slave, with intent to defraud the bank, is good.

In *Murry's Case*, 5 Leigh, 720, decided July, 1835, by the General Court. Upon an indictment for passing a counterfeit note of the Bank of Louisville, without alleging that the bank is a chartered bank, or that there is no such bank, and without alleging that the note was passed "to the prejudice of another's right," or "for the prisoner's own benefit, or for the benefit of another." Held: The offence so charged is a felony within the meaning of the statute, and the indictment is good and sufficient.

In *Buckland's Case*, 8 Leigh, 753, decided by the General

Court, June, 1837. It is a felony, under the statute, to pass a counterfeit note of the Bank of the United States, dated at a time when that bank was in existence, though at the time of passing the note the charter of the bank had expired.

Indictment for passing a counterfeit note charges that the prisoner, on a particular day, at the county of M. and within the jurisdiction of the court, being possessed of the note, feloniously did pass the same, well knowing it to be a counterfeit at the time he passed it. Held: The time and place of passing the note, and of the *scienter*, are set forth with sufficient certainty.

In setting out a counterfeit bank-note *in hæc verba* in an indictment for feloniously passing the same, an endorsement, appearing to have been made on the note after it was passed, is properly omitted, and the omission is, therefore, no ground for the objection of variance. On the trial of an indictment for passing a counterfeit bank-note, the prisoner moves to exclude the note produced from going in evidence to the jury, on the ground that the name of one of the firm of engravers, set out in the description of the note in the indictment, does not appear on the note produced; the attorney for the Commonwealth proves that when he drew the indictment he had been able to make out the name on the note, from his knowledge that one of the firm of engravers bore that name, though he cannot say he would have been able to do so without the knowledge of that fact; but that the word had since become indistinct, he supposes, by handling the note. The court thereupon overrules the motion to exclude, and permits evidence to be given of the passing of the note produced. Held: It was right for the court to do so.

In *Kirk's Case*, 9 Leigh, 627, decided by the General Court, December, 1838, it was held: In a prosecution for passing a counterfeit coin to a person who resides in another State, if a *subpœna* for such person as a witness has been issued, and returned "not found," the fact of the passing and the counterfeit character of the coin may be proved without producing the coin at the trial.

It seems that in a prosecution for passing a counterfeit coin, the prosecutor is at liberty to prove the fact of the passing, and the counterfeit character, of the coin, without either producing the coin or accounting for its non-production.

In *Page's Case*, 9 Leigh, 683, decided by the General Court, December, 1839. A prisoner is committed for examination, is examined and remanded by the examining court for trial, for "feloniously using and employing as true for his own benefit a certain counterfeit note, well knowing the same to be counterfeit. Held: An indictment for forging the note is not warranted by the examination and must be quashed.

An indictment (described in the record of the finding and in the entry of the arraignment as an indictment for forgery) contains, *First*, A count for forging and counterfeiting a note, and, *Second*, A count for feloniously using and employing as true a counterfeit note; verdict finds the prisoner guilty of forgery as alleged in the indictment. Held: An acquittal must be entered on the second count.

In *Scott's Case*, 1 Rob. 695 (2d edition, 752), decided by the General Court, it was held: An indictment on the statute charging that the prisoner did knowingly have in his custody, without lawful authority or excuse, "one die or instrument" for the purpose of producing and impressing the stamp and similitude of the current silver coin called a half-dollar (no further describing the die or instrument) is insufficient.

For *Foulkes's Case*, 2 Rob., 836, here cited, see *ante*, Section 3733.

In *Cady's Case*, 10 Grat., 776, decided January, 1854, it was held: On a prosecution for uttering and attempting to employ as true a forged note purporting to be the note of the Bank of Delaware in Pennsylvania, a banking company authorized by the laws of Pennsylvania, the existence of such a bank may be proved by parol evidence. The averment that it was authorized by the laws of Pennsylvania is surplusage, and need not be proved. The time when the offence is alleged in the indictment to have been committed being stated in figures, is no error.

In *Powell's Case*, 11 Grat., 822, decided October, 1854, it was held: The words "to the prejudice of another's rights," in relation to forgeries, are descriptive not of the offence, but of the writings of which forgery may be committed; and it is not, therefore, necessary that they shall be inserted in the indictment in describing the offence charged.

The maker of a negotiable instrument passes it to the payee, with the name of a third person endorsed upon it, which name he forged; the forging of the name endorsed upon the paper constitutes the offence of forgery.

The description of the writing in the indictment as the endorsement of the person whose name is forged will not vitiate the indictment, though the simulated liability might not be that of technical endorser, but of a different character.

In *Wash's Case*, 16 Grat., 530, decided October 29, 1861, it was held: In a prosecution for uttering counterfeit coin, the guilty knowledge of the prisoner that the coin was counterfeit is a fact to be proved, and there can be no presumption of law from the existence of other facts of this guilty knowledge, though there may be a presumption of fact.

In *Jett's Case*, 18 Grat., 933, decided October, 1867, it was held: A State court has jurisdiction to punish an act made an

offence by the laws of the State, though the same act is made an offence by a law of the Congress of the United States.

A State court has jurisdiction to punish the offence of attempting to pass a forged note purporting to be a note of one of the national banks of the United States.

See *Sand's Case*, 20 Grat., 800, cited *ante*, Section 3733.

SECTION 3737.

In *Kearns's Case*, 1 Va. Cases, 109, decided by the General Court, it was held: Where in the forgery of an order on the treasury of the State the name of one of the auditors is incorrect, there is no forgery.

In *Ervin & Lewis's Case*, 2 Va. Cases, 337, decided by the General Court, June, 1823, it was held: A charge that a forgery of bank-notes was committed with intent to injure "divers good citizens of the Commonwealth and others," to the jury unknown, without setting out an intent to injure the president, directors, and company of those banks, or of any particular person, or body politic, by name, is good after verdict.

In *Huffman's Case*, 6 Rand., 685, decided by the General Court, November, 1828, it was held: If the examining court remand to the superior court for trial a prisoner charged with forgery, the prisoner may be indicted in the superior court, not only for the forgery, but also for procuring the instrument to be forged, and for acting and assisting in the forgery.

It is not necessary to set forth in the count the persons whom the prisoner procured to forge the instrument, or with whom he acted and assisted in the forgery. A general description in the words of the statute is sufficient. An indictment which charges that the prisoner caused and procured a certain instrument to be forged, and willingly assisted in the forgery, etc., is to be understood as charging that he caused it to be done in his presence, and that he aided, being present, in other words, as charging him as principal in the second degree, and not as accessory.

If an examining court remand a prisoner on a charge of passing a forged note, he may be indicted for passing it, knowing it to be forged.

In a bill of indictment with three counts, if in the third count it is omitted to be stated that the grand jury "on their oath" present (the first two counts being regular in that respect), the objection is obviated by the fact that the record states that the grand jury were sworn in open court.

A forged paper is passed by a prisoner bearing date in 1828; immediately after, the prisoner, with the knowledge of the holder, alters the date to 1827. The indictment sets forth its tenor, and describes it as dated in 1827. The paper is proper

evidence to go to the jury in support of the indictment, notwithstanding the proof that it bore date in 1828 when passed.

In *Martin's Case*, 2 Leigh, 745, decided November, 1830, it was held: Upon the trial of indictment for passing counterfeit bank-notes, proof that prisoner had, about same time, passed another note of same kind, which was thought to be a counterfeit, and which he took back, though this note is not produced at the trial, is admissible evidence to prove the *scienter*.

In a criminal prosecution for passing a counterfeit note, it is not necessary to prove the notes to be counterfeit by an officer of the bank of which the notes are counterfeited.

See *Brown's Case*, 2 Leigh, 769, cited *ante*, Section 3735.

In *Pendleton's Case*, 4 Leigh, 694, decided by the General Court, July, 1834, it was held: On the trial of indictment for forgery of a check on a bank, if there be proof rendering it highly probable that the original paper has been lost or destroyed, though this was not done by the accused or by his procurement, secondary evidence of the contents, character and description of the paper is admissible to sustain the prosecution.

In *Hendrick's Case*, 5 Leigh, 708, decided by the General Court, December, 1834. Upon an indictment for passing a counterfeit check or order of a president of a branch of the bank of the United States on the cashier of the bank, payable to R. T. or order, and endorsed by R. T. to bearer. Held: That whether the charter of the bank of the United States be constitutional or not, and whether the charter authorizes the issue of such checks or orders or not, the counterfeiting or passing counterfeits of such checks or orders is felony by the statute, and though the offender be indictable in the courts of the United States for the offence against the laws of the United States, he is also indictable in the courts of Virginia for the offence against the laws of the State.

On the trial of an indictment for passing a counterfeit bank-note or check, after evidence that the prisoner passed the note, and that it was counterfeit, evidence that it was counterfeit, evidence that the prisoner had in his possession and attempted to pass other counterfeit notes of the same kind to other persons the day after he passed those in the indictment mentioned, is admissible to prove the *scienter*.

For the reference to 5 Leigh, 720, see *Murry's Case*, quoted *ante*, Section 3735.

See *Buckland's Case*, 8 Leigh, 732, cited *ante*, Section 3735.

For *Foulkes's Case*, 2 Rob., 837, see *ante*, Section 3733.

In *Perkins's Case*, 7 Grat., 651, decided June, 1851, by the General Court. An indictment for forgery charged the forgery of a negotiable note, and set it out *in hæc verba*, without setting

out the endorsements on the back of it. On the trial, when the note was offered in evidence, it was objected to on the ground of variance. Held: It was not necessary to set out in the indictment the endorsements upon the note, or any other matter written upon the same paper, constituting no part of the note itself, and not entering into the essential description of that instrument.

The note said, "I promise to pay," etc. It was still a negotiable note, though a bank might refuse to discount it because of its informality.

After the case had been submitted to the jury and they had retired to consider of their verdict, they returned into court and asked the court to instruct them as to whether it was necessary that they should be satisfied that the prisoner did actually and personally forge the paper charged in the indictment in order to his conviction. The court instructed them that either the actual forgery by the prisoner, or his actual presence aiding and assisting with a felonious intent when the forged instrument was made, constituted the offence of forgery. Held: The instruction being responsive to the inquiry propounded by the jury, even if it was an abstract proposition, yet as the jury asked an instruction on the point, and the instruction given correctly stated the law, it is not cause for setting aside the verdict.

See *Powell's Case*, 11 Grat., 822, cited *ante*, Section 3735.

The reference to 31 Grat., 862, is an error.

In *Terry's Case*, 87 Va., 672, decided April 16, 1891, it was held: This section predicates the offence of forgery only of such writings as are, or may be, to the prejudice of another. If it be not so, the indictment does not charge an offence.

SECTION 3738.

In *Martin's Case*, 2 Leigh, 745, decided November, 1830. Upon the trial of an indictment against M., for passing counterfeit bank-notes, the prisoner appears to have been confederated with one L. in passing counterfeit notes, and present when L. passed such notes, the notes so passed by L. are produced in evidence against the prisoner. Held: They are proper evidence.

In *Spencer's Case*, 2 Leigh, 751, decided November, 1830, it was held: Upon trial of an indictment for forging bank-notes, the fact, if proved, of the forged notes mentioned in the indictment, and other forged notes of like kind, and the plates, implements, and materials for forging such notes, being found in the prisoner's possession, is *prima facie* or circumstantial presumptive evidence that the prisoner was the forger, proper to be given to the jury. And such forged notes, etc., being found in possession of the prisoner in the county of B., are like *prima*

facie evidence, proper to be given to the jury, of the fact that he committed the forgery there.

For reference to 5 Leigh, 708, see *Hendrick's Case*, quoted *ante*, Section 3737.

In *Scott's Case*, 14 Grat., 687, decided August 20, 1858, it was held: A prisoner is examined for forging and counterfeiting twenty-four pieces of silver coin, and is sent to the circuit court for further trial. He cannot be indicted for having in his possession ten or more pieces of coin, with intent to alter and employ the same as true. An indictment under the statute for feloniously having in his possession more than ten pieces of forged or base coin must allege that the prisoner had them in his possession at the same time; and the charge that on a certain day he had them in his possession is not sufficient.

There are counts in an indictment for forging and counterfeiting coin, and also a count for feloniously having in his possession twenty pieces of forged coin, not saying "at the same time." The prisoner having moved the court to quash the last count, which is overruled, there is a verdict and judgment against him, and he obtains a writ of error. This court, holding that the count is bad as an indictment for a felony, will not permit it to stand as a count for a misdemeanor, but will reverse the judgment and quash the count.

CHAPTER CLXXXIII.

SECTION 3741.

In *Hickman's Case*, 2 Va. Cases, 323, decided November, 1822, it was held: In a prosecution for perjury, if the indictment sets forth that a "warrant for debt due by account for rent" was sued out by the defendant, and the warrant given in evidence shows that the claim was not for rent, but for other things, this is such a variance that the warrant ought not to be given in evidence.

Stockley's Case, 10 Leigh, 678 (2d edition, 712), here cited, does not decide what is, or what is not, perjury, but only that perjury can be committed on *voir dire*.

In *Heath's Case*, 1 Rob., 729 (2d edition, 796), decided by the General Court, it was held: After a verdict of conviction for murder in the first degree, the prisoner adduces testimony that two of the jurors who tried the case, and who, on the *voir dire*, declared that they had not formed or expressed any opinion as to the guilt or innocence of the prisoner, had, in fact, previous to the trial, expressed decided opinions that the prisoner was guilty and ought to be hung; of which circumstance, the prisoner alleges, he had no knowledge until since the verdict was rendered; and on this ground he moves to set aside the verdict. Held:

1. Such inquiry was open, and the evidence admissible, for the purpose of showing perjury and corruption in the jurors.

But, 2. It belonged exclusively to the judge who presided at the trial to weigh the conflicting credibility of the witnesses adduced by the prisoner and of the jurors, and to decide whether, in justice to the prisoner, and upon all the circumstances of the case, a new trial ought, or ought not, to be awarded.

In *Thomas's Case*, 2 Rob., 795, decided by the General Court, June, 1843. An indictment for felony in giving false testimony before a grand jury charges that the defendant, being duly sworn, "did depose and give evidence to the grand jury in substance and to the effect following" (stating the testimony), which said evidence was wilfully false and corrupt; for in truth, etc. (falsifying the facts deposed to); "and so the defendant did, in manner and form aforesaid, commit wilful and corrupt perjury." On general demurrer to the indictment, held: Here is no sufficient averment that the defendant wilfully or corruptly swore falsely, and the indictment is defective as well at common law as under the statute.

In *Roach's Case*, 1 Grat., 561, decided December, 1844, by the General Court. A demurrer to an indictment for perjury was sustained, but no grounds of demurrer are stated.

In *Lodge's Case*, 2 Grat., 579, decided December, 1845, by the General Court, it was held: Indictments for perjury in Virginia must be according to the common law.

An indictment for perjury in swearing to an answer in chancery should set out the whole bill and answer.

In *Williamson's Case*, 4 Grat., 554, decided December, 1847, by the General Court, it was held: A clerk has no authority, when applied to for a marriage license, to examine a witness on oath as to the age of the parties.

The authority of a clerk to administer an oath out of court only extends to cases in which, without regard to circumstances, the making the affidavit is a necessary prerequisite to the performance of the official act which the clerk is called upon to perform.

The swearing falsely before the clerk that a person applying for a marriage license is over the age of twenty-one years, does not constitute the offence of perjury. But if, by such false oath, the person applying is enabled to obtain a marriage license, and the marriage takes place, the taking the false oath is a misdemeanor.

In *Litton's Case*, 6 Grat., 691, decided December, 1849, by the General Court. On a trial of a warrant for debt before a justice, founded on an order given by the defendant, he makes oath before the justice that he did not sign his name to the order. Upon an indictment for perjury in taking this oath,

held: That perjury may be committed in taking such oath. In such case the court should not quash the indictment, but should put the defendant to his demurrer.

In *Schwartz's Case*, 27 Grat., 1025, decided November 23, 1876. S. is examined as a witness against T., charged with the crime of rape. He is asked if he and T. had not agreed to commit the rape, and if he did not hear the cries of the girl whilst T. had her in the bushes; and he denies both. The examination is interrupted for a few minutes, and the witness is retired into another room, where he states to two of the officers and another person that to help T. he had sworn falsely; and when his examination is resumed he says that he and T. had agreed to commit the rape, and that he did hear the cries of the girl. S. is then indicted for perjury in making his first statement. There is no evidence against him but his own statements. Held: His statements are not sufficient to convict him.

In *Maybush's Case*, 29 Grat., 857, decided January, 1878, it was held: The act authorizes the clerk of a county or a corporation court, when an application is made to him for a marriage license, to require evidence that the female is over the age of twenty-one years, and to administer an oath to the person giving the testimony.

M. is prosecuted for subornation of perjury, found guilty, and judgment rendered against him. At the same term of the court, but after the conviction of M., G. is tried for the perjury and is acquitted. M. then moves the court for a new trial. G. having been acquitted of the perjury, M. should have a new trial, as, if G. was not guilty of the perjury, M. could not be guilty of subornation of perjury.

SECTION 3742.

The case referred to as 29 Grat., 857, will be found *supra*, Section 3741.

SECTION 3744.

In *Callaghan's Case*, 2 Va. Cases, 460, decided by the General Court, June, 1825, it was held: A corrupt agreement between two justices of the peace, A. and B., to the effect following: That A. will vote for C. for commissioner of the revenue, in consideration that B. will vote for D. as clerk; and that B. will vote for D. as clerk in consideration that A. will vote for C. as commissioner of the revenue; and the actual voting of the said two justices, in pursuance of said corrupt agreement, is not an offence within the statute against buying and selling offices, because corrupt bargains and sales, prohibited by that statute, are those by which the party bargaining or selling is to receive some profit, or some assurance of profit, directly or indirectly, to himself. But such corrupt agreement (and the execution of

it) is a misdemeanor at common law, for which an information on indictment will lie.

In *Newell's Case*, 2 Wash., 88 (2d edition, 119), decided at October term, 1795, it was held: In an information against a justice of the peace for bribery in an election for a clerk, it ought to be stated with certainty that an election was held, and that at that election the vote was cast.

SECTION 3749.

In *Old's Case*, 18 Grat., 915 and 924, decided October, 1867, it was held: The Code punishes the omitting or delaying to perform any duty pertaining to the office of one who is authorized to serve legal process.

The offence punishable by the act is the omitting or delaying to perform any duty, etc., not the doing any act.

The presentment should follow the terms of the statute or must use terms which show conclusively, or beyond any rational doubt to the contrary, that the accused is guilty of the offence described in the statute, and unless this is done, the addition that "so the accused did receive money for omitting and delaying to perform a duty pertaining to his office of constable," etc., will not cure the defect.

SECTION 3753.

In *Lewis's Case*, 4 Leigh, 664, decided by the General Court, July, 1833. A sheriff is not liable to criminal prosecution for a malfeasance in office committed by his deputy.

The Circuit Court of Richmond issues a *capias* against a person there indicted of felony, which is directed to the sheriff of Essex, and by him served, and then in Essex he wilfully permits the prisoner to escape. Held: In such case a criminal prosecution against the sheriff cannot be maintained in the Circuit Superior Court of Richmond for this official malfeasance committed in Essex.

SECTION 3755.

In *Cleek's Case*, 21 Grat., 777, decided June, 1871. Upon an indictment in the county court against C. the jury render a verdict of guilty, and that he be imprisoned in the county jail for ten months and pay a fine of ten dollars. No judgment on the verdict is entered at that time, nor is the case continued, but at the next term of the court the judgment is rendered. Before the ten months have expired C. escapes from the jail and is afterwards retaken. Held: The case was pending in a court, and it was proper to render the judgment on the verdict at the next term of the court.

C. is not entitled to be discharged at the end of the ten months, but is to be kept in prison beyond that period for the

length of time he was out when he escaped, and this though C. had been indicted for his escape.

SECTION 3767.

In *Feely's Case*, 2 Va. Cases, 1, decided by the General Court, June, 1815, it was held: Using means to prevent and preventing a witness from attending court, who has been duly summoned, is a contempt of court which may be punished by information.

SECTION 3768.

In *Morris vs. Creel et als.*, 1 Va. Cases, 333, decided by the General Court, it was held: After a *subpœna duces tecum* has been disobeyed, an attachment should not issue without first serving a rule to show cause why it should not issue.

In *Stuart's Case*, 2 Va. Cases, 320, decided November, 1822, by the General Court, it was held: The making of an affray and riot, accompanied by great noise and turbulence at the tavern (near the court-house) where the judge of the court was, and of which the rioters were advised, during the night of a term (but the court being then in recess), is not a contempt of court.

In *Dandridge's Case*, 2 Va. Cases, 408, decided by the General Court, June, 1824, it was held, p. 426: D., being interested in the event of a suit pending in court, met the judge of the court on the steps of the court-house as he was proceeding to take his seat on the bench (the hour having arrived to which court had been adjourned), being saluted by the judge with "Good morning, Mr. D.," he returned it by saying, "I do not speak to any one who acted so corruptly and in so cowardly a manner as to attack my character when I was absent, and so entirely defenceless," or words to that effect, alluding to the said judge's opinion expressed at the trial of the said cause at a former term. This is a contempt for which the said D. may be fined or imprisoned or both, although the court was not then actually in session.

An attachment for contempt has no other object than to bring the party into court; when the contempt is in open court, the party being present, there is no need of process to bring him in, nor any need of interrogatories to ascertain what has occurred in open court.

When the contempt is not in open court, the usual course is to issue a rule to show cause why an attachment should not issue, though the attachment sometimes issues without the rule. If the party appear to the rule to show cause, and instead of moving to discharge it, submit to interrogatories, there is no necessity for the attachment.

So if, before the rule to show cause why an attachment should not be awarded, the party be present in court and a rule be made upon him to show cause "why he should not be fined,

or committed for his contempt," returnable on the morrow, and he be recognized to appear on the return of the rule, the rule for an attachment, as well as the attachment itself, may be dispensed with. On the return of the said rule last mentioned, if the party be again ruled to appear on the next day to answer interrogatories, and he do not appear to answer on the next day, and he do not purge himself of the contempt, the court may proceed in the same way as if he had been attached, and those interrogatories had been propounded to him, and answered by him while so attached.

When the contempt consists of an insult to the judge, relating to his official conduct, and is expressed to his face, though out of court, a written statement made by him, especially if supported by the affidavits of others who heard the insult, is a sufficient ground for a rule.

In *Deskins's Case*, 4 Leigh, 685, decided by the General Court, July, 1834. A circuit superior court orders a *subpoena* for witnesses to attend the grand jury then in session, and they intentionally conceal themselves from the sheriff to prevent the process from being served, and so prevent it from being served till the grand jury is discharged. Held: Upon the construction of the statute, this is not a contempt punishable by the court in a summary manner.

In the case of *Baltimore and Ohio Railroad Company vs. City of Wheeling*, 13 Grat., 40, decided November 23, 1855, it was held: A proceeding for a contempt in disobeying an injunction is not an order in the cause, but is in the nature of a criminal proceeding, and the judgment in such a proceeding can only be reviewed by a superior tribunal by writ of error, and not always in that way.

In *Wells's Case*, 21 Grat., 500, decided November, 1871, it was held, p. 504: An appeal may be taken to the court of appeals from the judgment of a circuit court imposing a fine upon a person for a contempt of the court in aiding to obstruct the execution of the decree of the court.

Where a rule is made upon a person to show cause why he shall not be punished for a contempt of a court in aiding to obstruct in the execution of a decree of the court, he purges himself of the contempt by answering under oath that in what he had done he acted as counsel in good faith, without any design, wish, or expectation of committing any contempt of, or offering disrespect to, the court.

The duty of an attorney to his client cannot conflict with his obligation to demean himself honestly in the practice of the law, or to be faithful to his country. But if he acts in good faith, and demeans himself honestly, he is not responsible for an error in judgment.

See *Kendricks's Case*, 78 Va., 490, cited *ante*, Section 3692.

In *Miller's Case*, 80 Va., 33, decided January 8, 1885, it was held: Where a roll of a volunteer military company is filed with the clerk of the court, the members thereof are exempt from summons for jury duty, and if summoned, need not attend to make their excuses.

CHAPTER CLXXXIV.

SECTION 3774.

In *Mackaboy's Case*, 2 Va. Cases, 268, decided by the General Court, November, 1821, it was held: A record of a riot, on the view of the justices, is a conviction of so great authority that it cannot be traversed.

An inquisition ought to charge the offence with convenient certainty; it ought to be as special and *verbatim* as an indictment in ordinary cases. An inquisition, therefore, which charges only that the defendants were guilty of a riot, without setting forth the time, place, or manner of committing it, or any facts which in law constitute a riot, is defective and insufficient.

SECTION 3778.

In *Mesmer's Case*, 26 Grat., 976, decided October 9, 1875, it was held: A policeman who does not use more force than is necessary to arrest a person who is engaged in riotous and disorderly conduct, is not guilty of an assault and battery.

SECTION 3779.

In *Samannini's Case*, 16 Grat., 543, decided November 23, 1863, it was held: S. occupies a house, the front room on the first floor as a store, the back room as a dining-room, the upper room as a sleeping-apartment for her family; but the only mode of ascent to the upper story is outside of the house. A riotous destruction of the front door and window of the store-room is an offence under the act.

A partial pulling down or destruction of a dwelling-house is an offence under the act, in this differing from the English statute.

SECTION 3780.

In *Hicks's Case*, 7 Grat., 597, decided June, 1850, by the General Court, it was held: A jury may well find a habitual or general wearing of concealed weapons from evidence that the defendant was seen once wearing concealed weapons under circumstances which satisfied them that it was his general practice.

CHAPTER CLXXXV.

SECTION 3781.

In *Warner's Case*, 2 Va. Cases, 95, decided by the General Court, November, 1817, it was held: In a prosecution for bigamy,

where the first marriage took place in Pennsylvania and the second marriage in this State, it became a question how the said first marriage might be proved. By the law of Pennsylvania marriages may be solemnized by taking each other for husband and wife before twelve witnesses, and the certificate of their marriage under the hands of the parties and witnesses, at least twelve, and one of them a justice of the peace, shall be brought to the register of the county where they are married, and registered in his office. Decided that the parol evidence of one of the witnesses who was present at the marriage (and who proved that they took each other for husband and wife before twelve witnesses, one of whom was a justice of the peace) was proper, competent and sufficient to prove that such person was a justice of the peace, the commission of said justice or a copy thereof is not necessary, but the parol evidence of the witness that he knew the said justice, that he was generally reputed as such, that he acted as justice, and that witness had not heard to the contrary, is proper and sufficient.

The fact of the marriage in such prosecution may likewise be established by such parol testimony alone, without producing the certificate of marriage or a copy thereof from the register's office.

The acknowledgment of the husband that he is married, and his cohabitation with the woman as his wife, are proper evidence of the first marriage in a prosecution for bigamy.

There is no case in the 6 Rand. affecting this statute.

In *Moore's Case*, 9 Leigh, 639, decided by the General Court, December, 1838. On a trial for bigamy, a certificate stating that the prisoner was married to J. F. by the person whose name is subscribed thereto, and appearing to have been returned by him to the county court, but nowise showing that he was a person authorized to celebrate marriage, is offered in evidence by the prosecutor "for the purpose" (as a bill of exceptions filed by the prisoner states) "of proving, in connection with other evidence, a marriage between the prisoner and J. F.," and though objected to by the prisoner, is admitted by the court. On this ground prisoner applies to the General Court for a writ of error, which is refused.

On trial for bigamy, evidence may be given of prisoner's marriage under a license purporting to have been issued by the clerk of the proper court, and of the fact that such a license was issued to the prisoner, without producing the license itself, though it be within the power of the Commonwealth.

In *Oneale's Case*, 17 Grat., 582, decided January 23, 1867, it was held: A marriage contracted in Virginia after the secession of the State of Virginia, and before the re-establishment of the government under the Alexandria Constitution, is not therefore invalid.

On a trial for bigamy, where the charge in the indictment is that the first marriage took place in another State or country, it must be proved to the satisfaction of the jury that a valid marriage had taken place as stated.

In such a case the admissions of the prisoner and his acts are competent evidence to prove the marriage, without producing the record, or a witness present at the marriage.

In *Bird's Case*, 21 Grat., 800, decided November, 1871, it was held: On a prosecution for bigamy, where the marriage is alleged to have taken place in a foreign country or State, proof must be made of a valid marriage according to the law of that country or State; but no particular kind of evidence is essential to establish the fact, except that it cannot be proved by reputation and cohabitation.

When a witness testifies to a marriage in a foreign State, solemnized in the manner usual and customary in such State by a person duly authorized to celebrate the rites of marriage, and the parties afterwards lived together as man and wife, this is as satisfactory evidence of a valid marriage as can be expected or desired, and in such case it is not necessary to prove the laws of such State as to offer further evidence of a compliance with its provisions.

M. proves that he is a Catholic priest and a pastor of a church in Washington, D. C., and authorized to celebrate the rites of marriage, that by virtue of license issued by the proper officer in the usual form, he married B. and M. at his residence in said city, in the presence of two persons, and in accordance with the rules and customs of the Catholic church and the laws of the District of Columbia. It was proved that B. and M. afterwards lived together as husband and wife. On a prosecution of B. for bigamy, this is sufficient evidence of the marriage of B. and M.

SECTION 3783.

In *Hutchins's Case*, 2 Va. Cases, 331, decided by the General Court, June, 1823, it was held: An indictment under this statute charging that W. T. (the man) did incestuously intermarry with N. H. (the woman), is sufficiently certain to charge her as well as him, for he could not intermarry with her without her intermarrying with him also.

In *Perryman's Case*, 2 Leigh, 717, decided June, 1830. It is provided by statute "that if the brother hath married or shall marry his brother's wife," the marriage shall be dissolved, the parties fined, etc. Held: The marrying a brother's widow is an offence within the statute.

In the case of *Kelly vs. Scott*, 5 Grat., 479, decided January, 1849, it was held: In prosecution, prior to the act of 1827, for

marrying a deceased wife's sister, or for marrying the husband of a deceased sister, the parties might appear by attorney, and, upon a plea of guilty by the attorney, judgment might be entered declaring the marriage a nullity. A judgment declaring the marriage a nullity is valid, though it does not proceed to punish the parties, or to require them to enter into bonds with condition to live separate.

SECTION 3784.

In *Hill's Case*, 6 Leigh, 636, decided by the General Court, June, 1836, it was held: In an indictment upon the statute, against the clerk of a county court for issuing a marriage-license for the marriage of an infant never before married, without the consent of the infant's father or guardian, it is not necessary to charge that the clerk knew that the party was an infant, or that he issued the license maliciously or corruptly, or that a marriage took place in pursuance of the license.

SECTION 3786.

In *Anderson's Case*, 5 Rand., 627, decided by the General Court, November, 1826, it was held: Although our courts take cognizance of offences *contra bonos mores*, yet the adjudicated cases afford a safe rule for fixing the limits of the principle; if they are departed from, the criminal jurisdiction may be extended to cases which, though grossly immoral, were never yet thought of as indictable offences, such as slander and the like.

In *Isaacs and West's Case*, 5 Rand., 634, decided by the General Court, November, 1826, it was held: The offence of fornication (or the cohabiting together by a man and a woman in a state of illicit commerce, as man and wife, but without marriage) is not punishable as a common-law offence. The statute which prescribes a penalty for the offence must be pursued in such cases.

In *Jones's Case*, 2 Grat., 555, decided June, 1845, it was held by the General Court: Adultery or fornication committed with a slave is a violation of the statute.

In *Lafferty's Case*, 6 Grat., 672, decided December, 1849, by the General Court, it was held: Illicit intercourse between an unmarried man and a married woman is fornication in the man.

In *Nichol and Jane's Case*, 7 Grat., 589, decided June, 1850, by the General Court, it was held: In an indictment for lewd and lascivious cohabitation, the offence is charged from a day prior to the day when the statute went into effect, but as continuing to a day after the commencement of the act. The indictment is good.

In *Cregor's Case*, 7 Grat., 591, decided June, 1850, by the General Court, it was held: One credible witness is now sufficient to authorize a conviction for adultery or fornication.

SECTION 3787.

For the reference to 7 Grat., 589, see *Nichol and Jane's Case*, cited *supra*, Section 3786.

In *Scott's Case*, 77 Va., 344, decided January 25, 1883, it was held: An indictment for a statutory offence, charging the offence in the language of the statute, is sufficient.

An indictment for lewd and lascivious cohabitation may be either joint or separate.

In *Jones's Case*, 80 Va., 18, decided January 8, 1885, it was held: To sustain an indictment under this section the evidence must establish that the parties, not being married, lewdly and lasciviously associated and cohabited, that is, lived together in the same house as man and wife live together.

In *Pruner & Clark's Case*, 82 Va., 115, decided June 24, 1886, it was held: To constitute this offence it is essential that it be proved that the parties cohabit together, that is, live together in the same house as man and wife. Proof of occasional acts of incontinence merely is not sufficient.

SECTION 3788.

In *McPherson's Case*, 28 Grat., 939, decided May 1, 1877, it was held: A marriage between a white man and a woman who is of less than one-fourth of negro blood, however small this lesser quantity may be, is legal.

A woman whose father was white, and whose mother's father was white, and whose great-grandmother was of brown complexion, is not a negro in the sense of the statute.

In *Kinney's Case*, 30 Grat., 858, decided September, 1878. K., a negro man, and M., a white woman, both domiciled in the county of Augusta, Virginia, left Virginia and went to Washington, D. C., and were married there according to the regular forms for celebrating marriages, and after remaining absent from Virginia about ten days, returned to their home in Augusta county, Virginia, where they have since lived as man and wife. By the laws of Virginia, all marriages between a white person and a negro are absolutely void. On an indictment for lewdly and lasciviously associating and cohabiting together, held: Although such marriages are not prohibited by the laws of the District of Columbia, and this marriage was performed according to the ceremonies there prescribed, it is void under the laws of Virginia, and the parties are liable to indictment.

While the forms and ceremonies of marriage are governed by the laws of the place where the marriage is celebrated, the essentials of the contract depend upon and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated.

See *Scott's Case*, 77 Va., 344, cited *ante*, Section 3787.

In the case of *Jones vs. Commonwealth*, 79 Va., 213, decided July 24, 1884, it was held: An indictment in the language of the statute interdicting marriage between a negro and a white person is sufficient. To sustain a charge under said section the Commonwealth must prove an actual marriage, duly celebrated between the parties by a person duly authorized and qualified to celebrate it; or that the parties consummated the marriage in the *bona fide* belief that the person celebrating it was legally authorized and qualified to celebrate it according to the law of Virginia, and also the color and identity of the parties; and this must be fully proved by the best evidence attainable.

In *Jones's Case*, 80 Va., 538, decided June 18, 1885, it was held: In order to sustain an indictment under this section making the inter-marriage of a negro with a white person a felony, it is necessary first to establish that the accused is a person with one-fourth or more of negro blood, *id est*, a negro; and the burden of proving this lies on the Commonwealth.

SECTION 3799.

In the case of *Ex-Parte Marx*, 86 Va. 40, decided April 18, 1889, it was held: The fine prescribed for violating the Sabbath is recoverable before a justice and by a civil warrant. The constitutional right to trial by jury does not extend to such an offence.

SECTION 3801.

In *N. & W. R. R. Co.'s Case*, 88 Va., 95, decided June 25, 1892, it was held: Statutes forbidding inter-State freight trains to run on Sunday are by their necessary operation, whatever their professed object, a regulation of or an obstruction to inter-State commerce.

This section as to Sunday trains is inconsistent with United States Constitution, Act 1, Section 18, giving Congress power to regulate inter-State commerce, and void as to trains running between different States.

SECTION 3804.

In *Arrington's Case*, 87 Va., 96, decided November 20, 1890, it was held: Prosecution for selling liquor on Sunday contrary to this section is no bar to prosecution for selling same liquor without license contrary to act.

SECTION 3805.

In *Daniel's Case*, 2 Va. Cases, 402, decided by the General Court, June, 1824, it was held: An indictment for disturbing a religious congregation need not set out the means by which the disturbance was effected.

In *Jenning's Case*, 3 Grat. 624, it was held, by the General Court: The statute is applicable not only to disturbances which

are made while the religious services are progressing, but to disturbances made whilst the congregation is assembled for religious worship, though it be at night after the religious services are closed for the day and the congregation has retired to rest.

CHAPTER CLXXXVI.

CHAPTER CLXXXVII.

SECTION 3815.

In *Wyatt's Case*, 6 Rand., 694, decided by the General Court, November, 1828, it was held: The distinctive feature in the character of the games called A. B. C. and E. O. and faro-bank is, that the chances of the game are unequal, all other things being equal, and those unequal chances are in favor of the exhibitor of the games or tables. If other games resemble those standard games in that distinctive feature, they come within the terms of this section, being "gaming tables of the same or like kind," and are liable to the penalties denounced against those standard games, whatever may be the denomination of those other games, and whether played with cards, dice, or in any other manner. Under this construction, the exhibitor of a gaming table called haphazard, *alias* blind hazard, *alias* snickup, etc. Held: To be liable to the same punishment with the exhibitor of a faro-bank.

In *Huff's Case*, 14 Grat., 648, decided March 8, 1858, it was held: An indictment for gaming under the statute must charge the playing of one of the games specified, or it must show by averment that the gaming charged is of the like kind as those specified, that is, that the chances of the game are unequal, all other things being equal.

A presentment for gaming, not setting out any offence against the statute, may be quashed on motion.

In *Leath's Case*, 32 Grat., 873, decided January, 1873, it was held: An indictment under the statute for gaming pursues the language of the statute, except that it uses the word "and" in all the place of "or," thus charging the accused with exhibiting the games mentioned in the statute. This is correct. It charges but one offence, and is supported by proof of the keeping or exhibiting of any one of the games or tables mentioned, and on conviction there would be but one fine and one term of imprisonment.

The indictment charges the offence to have been committed in the city of Richmond, and within the jurisdiction of the court. This allegation is sufficiently certain. It is not an offence in which place enters into the offence, but it is an offence without regard to the particular house, building, or other particular locality

where it is committed. It is not necessary that the indictment should charge that the games or tables were kept or exhibited for gain. It is sufficient that it follows the language of the statute, and further charges that the accused did unlawfully keep and exhibit, etc. Upon the facts as certified in this case, the accused was properly convicted, and the judgment was reversed by the appellate court.

In *Nuckoll's Case*, 32 Grat., 884, decided March, 1879, it was held: The game of poker or draw poker, is not a game of the like kind with faro, keno, etc., and does not come within the statute. A person who does not take part in the game, but furnishes the room and gas in which poker or draw poker is played, for which he receives a moderate compensation from the parties playing, is not guilty under the statute of being concerned in interest in the keeping a table of the like kind with faro, keno, etc.

SECTION 3816.

In *Maddox's Case*, 2 Va. Cases, 19, decided by the General Court, November, 1815, it was held: A tavern-keeper, who is presented for suffering faro and loo to be played at his house, may be tried on the presentment alone, without any information, and if he refuses to answer to the presentment, judgment by default may be rendered against him.

SECTION 3818.

In *Butts's Case*, 2 Va. Cases, 18, decided by the General Court, November, 1815, it was held: On a presentment for gaming the defendant was charged with the offence committed at the booth of Price Skinner, the proof was of gaming at the booth of Clarke, the said Skinner having no right, interest, or agency in the booth, this proof is insufficient to support the charge.

In *Terry's Case*, 2 Va. Cases, 77, decided by the General Court, June, 1817, it was held: Playing at cards in a tavern is unlawful gaming, whether the party bets or not.

In *Walker's Case*, 2 Va. Cases, 515, decided by the General Court, June, 1826, it was held: An abandoned jail, used for the guard and open to all the citizens of the county, is a public place.

In *Windsor's Case*, 4 Leigh, 680, decided by the General Court, December, 1833. Indictment for gaming charges defendant with unlawful playing with cards, to-wit, at the game of all-fours, of loo, and of whist at a public place, to-wit, at the store-house of G., H. & Co. Held:

1. That to convict the defendant it is incumbent on the prosecutor to prove that he played at some one of the games specified in the indictment.

2. That, if the playing was at the store-house of G., H. & Co.,

in the night-time, after the business of the day was at an end, and the doors closed, the store-house in that state of things, *prima facie*, was not a public place, though it was so when it was open to the public in the day-time.

In *Sanders's Case*, 5 Leigh, 751, decided by the General Court, July, 1835, it was held: The lessee and occupier of a tavern is also the occupier under the same lease of a store-house, which, however, is not within the curtilage of the tavern, nor used in any way with the tavern. Held: The store-house is not a part or an appurtenance of the tavern, within the meaning of the statute against unlawful gaming.

To make a separate house an appurtenance of a tavern, within the meaning of that provision, such house must be used in connection with the tavern for the accommodation of guests as a part of the tavern.

In *Farmer's Case*, 8 Leigh, 741, decided by the General Court, December, 1837. On a day when many persons are assembled at a tavern for the purpose of mustering a party engage in gaming in a barn two hundred yards distant from the tavern house and in a separate enclosure, though on the same plantation, the barn being seventy or eighty yards in the rear of another barn in which spirits are sold by the tavern-keeper. Held: The first-mentioned barn is a public place, within the meaning of the act to prevent unlawful gaming.

In *Price's Case*, 8 Leigh, 757, it was held, by the General Court: In an indictment against a tavern-keeper for suffering the game of loo to be played in his tavern by certain persons named, will be supported by proof of his having suffered that game to be played therein, though by other persons than those named in the indictment.

If a party indicted for suffering an unlawful game to be played in his tavern was keeper of the tavern at the time of the playing, his having a license at the time is not necessary to his conviction. On conviction of a tavern-keeper upon an indictment for permitting unlawful gaming in his tavern, judgment cannot be rendered for revocation of defendant's license, acquired since the commission of the offence.

In *Sinkous' Case*, 9 Leigh, 608, decided by the General Court, June, 1838, it was held: An indictment charging the defendant with unlawful gaming "at the house of J. W., the same being a house of entertainment," is sufficient.

Wilson's Case, 9 Leigh, 648, decided by the General Court, June, 1839, was a mixed question of law and fact, and decided only that certain described premises was a race-field. No application as authority.

In *Roberts' Case*, 10 Leigh, 686 (2d edition, 720), decided by the General Court, December, 1840, it was held: A presentment

“for unlawfully playing cards at the grocery of D. and C” is defective in substance, for not alleging the grocery to be a public place, or a place of public resort.

In *Vandine's Case*, 6 Grat., 689, decided at December term, 1849, by the General Court. A cleared space in woods held not to be a public place within the meaning of the act.

In *Feazle's Case*, 8 Grat., 585, decided December, 1851, by the General Court, it was held: A store-house in a village, late at night after persons cease to come to the store to purchase goods, and the door is locked, is not a public place, within the meaning of the statute against gaming.

In *Shelton's Case*, 8 Grat., 592, decided December, 1851, by the General Court, it was held: Betting on a horse race is not within the meaning of the section.

In *Bishop's Case*, 13 Grat., 785, decided February 11, 1856, it was held: A presentment for playing at cards must charge that the place at which it occurred was a public place at the time of such playing, the name of the place not of itself importing that it was at all times a public place.

A presentment for playing at cards “at or near” a public place is objectionable for uncertainty.

In *Gibboney's Case*, 14 Grat., 582, decided September 8, 1857, it was held: An indictment for playing at cards at a public place may be sustained by proof that the party bet at faro at the time and place stated in the indictment.

In *Purcell's Case*, 14 Grat., 679, decided May 18, 1858, it was held: A room in an outhouse within the enclosures of a tavern lot, which had at one time been used in connection with the tavern, and the room over which is still so used, having been rented by a third party, and held, used, and controlled by him, independent of the proprietor of the tavern, though the occupier boarded at the hotel, and the servants belonging to it attended to the room, it is not a public ordinary, nor is it a public place in the sense of the act.

In *Neal's Case*, 22 Grat., 917, decided December 4, 1872, it was held: A licensed eating-house in a town is a public place in the meaning of the statute.

Betting on the game of “bagatelle” at a public place is a violation of the statute, and is equally so if the person plays as well as bets. It is unlawful to bet at any game at a public place.

SECTION 3820.

See *Maddox's Case*, 2 Va. Cases, 19, cited *ante*, Section 3816.

See *Saunders's Case*, 5 Leigh, 751, cited *ante*, Section 3818.

See *Price's Case*, 8 Leigh, 757, cited *ante*, Section 3818.

See *Purcell's Case*, 14 Grat., 679, cited *ante*, Section 3818.

SECTION 3824.

See 15 Grat., 653, cited *post*, Section 3837.

SECTION 3826.

In *Chubb's Case*, 5 Rand., 715, decided by the General Court, November, 1827, it was held: The act entitled "an act to prevent the sale of foreign lottery tickets within this Commonwealth" does not come within the operation of the twenty-ninth section of the gaming law, and is, therefore, not to be interpreted as if it were a remedial law, but like other penal laws.

A guarantee (or written assurance or promise, whereby the warranter binds himself that he will pay the prize which may be drawn to a certain number in a lottery) when sold by the proprietor of the lottery, or a duly authorized agent of the proprietor, is strictly a lottery ticket, although it is not written in the usual form of lottery tickets, and the sale of such guarantee by such proprietor, or his agent, is forbidden by the said act. If an individual opens an office and sells guarantees as a substitute for lottery tickets, he, the vendor, holding the tickets themselves for the benefit of the purchaser, sells those things which are substantially lottery tickets, and such sale is forbidden by this act.

See *Temple's Case*, 75 Va., 892, cited *ante*, Section 3692.

SECTION 3837.

In *Shumate's Case*, 15 Grat., 653, decided January, 1860. The section in relation to betting on elections is to be construed as a remedial statute. This section of the Code applies to all the preceding sections of the chapter.

A short time before the election of county officers for A. to be made in May, 1858, M. sold to S. a wagon at the price of one hundred and fifty dollars, and worth that sum, to be paid by S. when K., one of the candidates for office of county court clerk at said election, should be elected to that office, and not at all if he was not elected, and S. at the time of said sale put up his check agreeably to that understanding, and upon these terms took possession of the wagon. Held: This is a wager on the part of M. and S. within the meaning of the Code. Both M. and S. are liable to a fine not exceeding the amount that either might lose.

CHAPTER CLXXXVIII.

SECTION 3853.

See *Newell's Case*, 2 Wash., 88, cited *ante*, Section 3744.

CHAPTER CLXXXIX.

SECTION 3856.

In *Bailey's Case*, 78 Va., 19, decided November 19, 1883, it was held: Under this section a road which has merely been ordered to be opened, but has never been actually opened, is not a road such as that section prescribes a penalty for obstructing. Resisting the execution of the court's order to open such "road" is not an offence under that section, but a contempt of the court.

CHAPTER CXC.

SECTION 3879.

In *Barker's Case*, 2 Va. Cases, 122, decided by the General Court, November, 1817, it was held: Every offence to which a capital punishment is annexed by statute is a felony, and since the establishment of the penitentiary, every offence there punishable is in like manner a felony, unless it be by statute denominated a misdemeanor.

In *Rider's Case*, 16 Grat., 499, decided August 30, 1860, it was held: An indictment for petit larceny, which proceeds to charge that the person indicted had been previously indicted, tried, and sentenced for another petty larceny, is an indictment for a felony; and a county or a corporation court has no jurisdiction to try the prisoner. If, upon such an indictment, the prisoner is tried and found guilty, the verdict should be arrested, and all the proceeding subsequent to the indictment should be quashed.

In *Randall's Case*, 24 Grat., 644, decided January, 1874, it was held: All offences for which the penalty is confinement in the penitentiary are felonies, and the indictment for such offence must describe it as having been done "feloniously."

In *Benton's Case*, 89 Va., 570, decided January 26, 1893, it was held: A felony is such an offence as may be (not must be) punished by death or confinement in the penitentiary.

SECTION 3885.

In *Williamson's Case*, 2 Va. Cases, 211, decided June, 1820, by the General Court, it was held: An accessory may be tried after conviction, and before attainder of the principal under this statute. It is not necessary that the indictment against the accessory should aver the conviction of the principal, for they may be jointly indicted.

A verdict which finds a person indicted as being accessory to murder to be guilty thereof, but does not determine whether he is guilty as accessory to the murder in the first or second degree, is erroneous, and ought to be set aside and a *venire facias de novo* granted.

In *Thornton's Case*, 24 Grat., 657, decided January, 1874, it was held: An indictment for murder against T. and R. contains two counts: the second charges T. as principal and R. as accessory, before the fact; and, on the motion of T., the second count is struck out. At a subsequent term, on the trial of T., the clerk reads both counts, and charges the jury on both; and then the prisoner excepts. The court then directs the clerk to read the first count, which is done, and the clerk charges the jury upon it; and then the prisoner excepts to the second reading and charge. The second reading and charge was proper, and cures the error of the first.

In *Wren's Case*, 25 Grat., 989, decided January 22, 1875. W., a police officer, was indicted and tried as accessory after the fact to a felony committed by D. The jury put to the court the question, "Are we considering the question against W., or W., a detective officer? If a detective official, does the fact that he allowed D., after knowing D.'s offence, to go away unarrested, make him accessory after the fact?" Held: The court should have responded directly to the question in the negative.

In *Wren's Case*, 26 Grat., 952, decided April 22, 1875, it was held: An accessory after the fact to a felony is a person who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. To constitute an accessory after the fact, three things are requisite:

1. The felony must be completed.
2. He must know that the felon is guilty.
3. He must receive, relieve, comfort, or assist him.

It is necessary that the accessory have notice, express or implied, at the time he assists or comforts the felon, that he has committed a felony; and the mere fact that one receives a felon in the same county in which he has been attainted, is not sufficient to raise the presumption of knowledge; and the question of knowledge is a question for the jury.

Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man accessory after the fact: as that he concealed him in the house, or shut the doors against his pursuers until he should have an opportunity to escape, or took money from him to allow him to escape, or supplied him with money, a horse, or other necessities, in order to enable him to escape; or that the principal was in prison, and the jailer was bribed to let him escape, or conveyed to him instruments to enable him to break prison and escape.

Merely suffering the principal to escape will not make the party an accessory after the fact, for it amounts, at most, to a mere omission; or if he agree for money not to prosecute the felon, or if, knowing of a felony, he fails to make it known to

the proper authorities, none of these acts are sufficient to make the party an accessory after the fact. If the thing done amounts to no more than compounding a felony, or the misprision of it, the doer of it will not be an accessory.

The true test whether one is an accessory after the fact is, to consider whether what he did was done by way of personal help to his principal, with the view of enabling his principal to elude punishment, the kinds of help rendered appearing unimportant.

See *Maybush's Case*, 29 Grat., 857, cited *ante*, under Section 3741.

In *Mitchell's Case*, 33 Grat., 868. The statute was followed.

In *Hawley's Case*, 75 Va., 847, decided November, 1880. An indictment for felony is against four persons, M., P., C., and G. The first three counts are for the murder of H. The fourth count is against M., one of them, for murder, and against the other three for knowingly and wilfully aiding, abetting, and counselling the said M. to commit the felony aforesaid. And the count in the conclusion charges that the said M., P., C., and G., him, the said H., in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, etc. Held: The same count may contain a charge of murder against one, and a charge of being an accessory against others. If the conclusion of the count charging them as guilty of murder is not correct, it is not essential to the indictment, and may be struck out as surplusage.

In *Hatchett's Case*, 75 Va., 925, decided January, 1882, it was held: An accessory to a felony cannot be prosecuted for a substantive offence, but only as an accessory to the crime perpetrated by the principal felon. And in order to this conviction, although it is not necessary to show that the principal felon has been convicted, it is necessary to show that the substantive offence, to which he is charged as having been accessory, has been committed by the principal felon.

In *Oliver's Case*, 77 Va., 590, decided July 19, 1883, it was held: Though conspiracy has been proved, statements of a conspirator, made after the object of the conspiracy is accomplished, are inadmissible to criminate his co-conspirator.

In *Kemp's Case*, 80 Va., 443, decided April 16, 1885, it was held: It is well-settled law that mere presence is not sufficient to render one guilty of aiding and abetting the commission of crime. There must be something done or said by him to show his consent to the felonious purpose, and contributing to its execution.

SECTION 3886.

In *Uhl's Case*, 6 Grat., 706, decided December, 1849, by the General Court, it was held: Where a wife acts in the furtherance of a combination to commit a felony, in the presence of her

husband, she will be presumed to have acted under his coercion. But if the circumstances show that she was not acting under such coercion, but of her own free will, then she is accountable for her acts.

SECTION 3887.

In *Kemp's Case*, 18 Grat., 969, decided January, 1868, it was held: Several prisoners having been tried together for the same felony, and found guilty, the court may grant a new trial to one of them and render a judgment against the others.

SECTION 3888.

In *Clark's Case*, 6 Grat., 675, decided December, 1849, by the General Court, it was held: An indictment for an attempt to commit an offence ought to allege some act done by the defendant, of such a nature as to constitute an attempt to commit the offence mentioned in the indictment.

In *Uhl's Case*, 6 Grat., 706, decided December, 1849, by the General Court: On an indictment against several for an attempt to burn a barn. Held: That an attempt, according to the true intent and meaning of the statute, can only be made by an actual, ineffectual deed, done in pursuance of, and in furtherance of, the design to commit the offence. But if the parties combined to commit the offence, and they all assented to it, and a part of them only went to do the act, those who were absent, knowing with what intent the others went to the place, and assenting to the same, are principals in the offence.

The overt act done in the attempt to commit the offence need not be the last proximate act prior to the consummation of the felony attempted to be perpetrated.

In *Cunningham's Case*, 88 Va., 37, decided June 18, 1891, it was held: An indictment for attempt to commit rape, some act towards its commission must be alleged, but to aver that accused "violently and feloniously made an assault" in the attempt is sufficient.

SECTION 3889.

In *Chichester's Case*, 1 Va. Cases, 312, decided by the General Court. An indictment for assault was brought within a year, but was held insufficient; after a year had expired another indictment was found. Held: Barred by the statute.

In *Birchett's Case*, 2 Va. Cases, 51, decided June, 1816, it was held: An information in the nature of a writ of *quo warranto*, though in form a criminal proceeding, yet is in substance a civil proceeding, for the trial of a civil right, and therefore the act which limits the prosecution of informations on any penal law to one year does not apply to such informations.

In *Auditor vs. Graham*, 1 Call, 475 (2d edition, 411), decided

October 22, 1798, it was held: Motions are included in the terms "suits" and "actions" in the act of 1789 for limitation of actions upon penal statutes.

In *Earhart's Case*, 9 Leigh, 671, decided by the General Court, December, 1839, it was held: After a verdict of conviction for misdemeanor, an appellate court will presume that the offence was proved to have been within the period of limitations, where the record does not show the contrary.

In *Christian's Case*, 7 Grat., 631, decided June, 1850, by the General Court, it was held: A presentment for a misdemeanor is the commencement of the prosecution, and unless the prosecution is then barred by the statute of limitations it will not be barred by the failure to find an information or indictment upon the presentment before the time of limitation runs out. Upon a rule the defendant again appears and moves to quash the presentment on the ground: Because the supposed offence must be committed more than a year before granting the rule to file the information, and so was barred by the statute of limitations. Held: That under the facts and circumstances of the case the act of limitations does not protect the defendant against further prosecution by information.

SECTION 3892.

In *Linton's Case*, 2 Va. Cases, 205, decided by the General Court, June, 1820, it was held: If a person be stabbed in this State, and dies of his wounds in another, the prisoner cannot be tried for murder in any county of the Commonwealth, but he may be examined, indicted, and tried for the felonious stabbing in the county where the blow was inflicted.

SECTION 3893.

In *Gibson's Case*, 2 Va. Cases, 70, decided by the General Court, June, 1817, it was held: If a verdict be argued on and written out in the jury room and then brought into court, read by the clerk, and corrected in an immaterial point, and then receive the assent of eleven jurors (the twelfth being sick, having meantime withdrawn to the jury room without the knowledge of the court or the other jurors) it is a nullity.

A verdict in such case having been set aside as insufficient, a *venire facias de novo* may be awarded and a new trial had, either on the same indictment or another.

In *Quann's Case*, 2 Va. Cases, 89, decided by the General Court, November, 1817. An acquittal of forging an order, and of uttering as true a forged order, is no bar to a prosecution for the misdemeanor of fraudulently obtaining goods by means of a false privy token and counterfeit letter, the said privy token being the same order of the forgery and uttering of which he had been acquitted.

In *Vaughan's Case*, 2 Va. Cases, 273, decided by the General Court, November, 1821, it was held: If a person be indicted for shooting S. W. and acquitted thereof, and then indicted for shooting J. W., her plea of *autrefois acquit* will not be supported, although the same act of shooting is charged in each indictment, for the jury who tried the first indictment might have acquitted the prisoner on several grounds, which would not affect the second trial, as that the shot did not strike and wound S. W. or that she did not shoot S. W. with intent to maim, disfigure, disable or kill the said S. W.

If the prisoner to an indictment for shooting J. W. plead that she had been indicted and acquitted of the shooting of S. W., and that the shooting of which she is indicted is the identical shooting of which she had before been acquitted and no other, and the verdict find "that she hath not before been acquitted of the same offence," this finding is sufficiently responsive to the issue on that plea and, therefore, good.

In *Mortimer's Case*, 2 Va. Cases, 325, decided November, 1822, it was held: If a prisoner be acquitted of burning the barn of Josiah Thompson, he cannot plead this in bar of an indictment for burning the barn of Josias Thompson.

In *Lindsay's Case*, 2 Va. Cases, 345, decided by the General Court, June, 1823, it was held: A *nolle prosequi* entered by the attorney for the Commonwealth and a consequent discharge from custody, is not an acquittal or discharge from further prosecution, and, therefore, does not support the plea of *autrefois acquit*.

In *Jackson's Case*, 2 Va. Cases, 501, decided June, 1826, by the General Court, it was held: If a person charged with an assault and battery be recognized to appear at the next superior court to answer an indictment to be then and there preferred against him for the said offence, in the meantime fraudulently procure himself to be indicted for the same offence in the county court, and confess his guilt, and a small amercement be thereupon assessed on him, such fraudulent prosecution and conviction present no bar to the indictment preferred against him in the superior court. The plea of *autrefois convict* in such a case being replied to specially, the replication which sets forth such fraudulent prosecution and conviction, being well drawn, is a sufficient answer to the defendant's plea, and should be adjudged good on demurrer.

The reference to 81 Va., 290, is an error.

SECTION 3894.

In *Williams's Case*, 2 Grat., 568, decided December, 1845, by the General Court, it was held: If the court improperly discharge the jury without the consent of the prisoner, he is entitled to be discharged from the prosecution.

In *Smith's Case*, 7 Grat., 593, decided June, 1850, by the General Court, it was held: A conviction for advising, etc., one slave to abscond is not a bar to a prosecution for advising, etc., another slave to abscond, though the advising, etc., was to both at one time, and by the same words and acts.

In *Adock's Case*, 8 Grat., 661, decided December, 1851, by the General Court. A prisoner is remanded by the examining court to be tried for embezzling the goods of W.; he may thereupon be indicted for embezzling the goods of A., the embezzlement being of the same goods for which he was tried by the examining court.

A prisoner is indicted for embezzling the goods of W., and at the fifth term after he was examined for the offence he is tried and convicted, but the verdict is set aside for a variance between the allegation and the proof as to the ownership of the goods, and the case is continued. At the next term of the court the attorney for the Commonwealth enters a *nolle prosequi* upon the indictment, and the prisoner is indicted again for the same offence, the indictment in the first count being the same as in the former indictment, and another count charging the goods embezzled to be the goods of A. Upon his arraignment he moves the court to discharge him from the offence, on the ground that three regular terms of the court had been held since he was examined and remanded for trial, without his being indicted. The attorney for the Commonwealth opposes the motion, and offers the record of the proceedings of the circuit court upon the first indictment, to show that he had been indicted, tried, and convicted; which was objected to by the prisoner. Held: The record is competent evidence, and the only competent evidence upon the question. The second indictment being for the same act of embezzling as the first, and the prisoner having been indicted, tried, and convicted in time, and the verdict having been set aside for the variance, the second indictment was proper in time, and the prisoner is not entitled to be discharged.

In *Jones's Case*, 20 Grat., 848, decided April, 1871, it was held: On trial for felony, for which the shortest term of imprisonment is five years, the jury find the prisoner guilty and fix the term of his imprisonment in the penitentiary for three years, and the judgment is according to the verdict. Upon a writ of error to the judgment on the application of the prisoner, the judgment will be reversed, but the prisoner will not be discharged, but will be remanded for another trial.

In *Day's Case*, 23 Grat., 915, decided January, 1873, it was held: A plea of *autrefois acquit*, if it is good in substance, though informal, will be sustained, though demurred to. In the first place the defendant is charged as the "keeper of a house

of entertainment," in the second, as "keeper of an ordinary." The offence charged in both being the same, not only in kind, but in fact, the acquittal in the first case is a bar to the second.

In *Burress's Case*, 27 Grat., 934, decided January 13, 1876, it was held: To a plea of *autrefois acquit*, upon an indictment for forgery, the attorney for the Commonwealth cravesoyer of the former record and demurs to the plea.

The record shows that the indictment was for forging an order for forty-seven dollars and twenty-five cents, and that the order was for forty-seven dollars and twenty-three cents.

This was a variance which entitled the accused to an acquittal on that indictment, and therefore the acquittal on that indictment does not forbid the prosecution of the accused on another indictment for the same forgery, setting out the order correctly.

A person acquitted by the jury on the facts and merits on a former trial, may plead such acquittal in bar to a second prosecution for the same offence, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted. But it must appear from the record of the first case, or be averred in the plea and proved, that his acquittal was on the merits.

The act does not make a variance between the indictment and the forged paper immaterial. The accused must be acquitted on that ground if no other, and, if acquitted, the presumption, in the absence of evidence to the contrary, is that he was acquitted on that ground.

In *Page's Case*, 27 Grat., 954, decided February 3, 1876, it was held: A prisoner indicted for felony files a plea of *autrefois acquit*, and makes the record of his former trial a part of his plea, and he avers that the offence for which he had been before tried is the same offence for which he is now on trial, and necessary evidence to convict him in the present indictment, if introduced, would have convicted him on the first trial. The attorney for the Commonwealth replies that there is no record of the trial of the prisoner for the same identical felony and offence charged in the indictment on which the prisoner is then arraigned. The replication denies one of the essential averments of the plea, viz.: that the offence was the same as that for which the prisoner had been before tried, and is, therefore, a good replication to the plea.

In such a case it would not have been proper to traverse the allegation that the evidence necessary to convict him, etc. The two indictments being for similar offences, and in the same words, except as to time, which is immaterial, of course the same facts which sustain the one would, standing by themselves,

sustain the other; but when it is averred and shown that the two offences, though similar, are not in fact the same, but different offences, all foundation for the plea is taken away. Upon the trial of the issue on the plea of *autrefois acquit*, an instruction to the jury that if they believe, etc., that the house named in the indictment, for the burning of which the prisoner was arraigned and tried at a previous term of the court, is not the same house, nor the same burning charged in the indictment upon which he now stands arraigned, then they must find against the prisoner that the issue joined is correct; and it makes no difference that the offences charged in the two indictments are described as the burning of the dwelling-house of R., if the jury believe that in reality distinct houses and distinct burnings are referred to in the two indictments.

On the trial of the issue on the plea of *autrefois acquit*, R., whose dwelling-house was in both indictments alleged to have been burned, and who was the principal witness for the Commonwealth as to the burnings on both trials, may be asked and may state whether or not the verdict of the jury had relation to the house charged to have been burned in the indictment on which the prisoner was then arraigned. The inquiry is as to a "fact" not an "opinion."

The court may direct jurors to be summoned from another county or corporation for the trial of a prisoner upon the issue on the plea of *autrefois acquit*, as well as on the general issue.

In *Stuart's Case*, 28 Grat., 950, decided July, 1877, it was held: The mere pendency of one indictment is no bar to another, even for the same offence; the accused cannot be tried on both, but the Commonwealth may elect on which it will prosecute.

The discharge of a jury after they have rendered a verdict against a prisoner, but which verdict is adjudged to be a nullity because it was not duly perfected, and thereupon set aside as insufficient, is no bar to a prosecution under the same or a new indictment.

The reference to 32 Grat., 872, is to a case in which the statute is not construed, but only quoted as a final disposition of questions raised.

SECTION 3895.

In *Brown's Case*, 9 Leigh, 633, decided by the General Court, December, 1838, it was held: Where the confession of a prisoner is given in evidence, the whole must go to the jury; but the whole is not necessarily to be taken as true; on the contrary, if from opposing evidence or the confession itself, facts appear which are sufficient to satisfy a rational mind that a part is not true, it ought to be disregarded.

In *Smith's Case*, 10 Grat., 734, decided July, 1853, it was held: On a trial for felony, a confession of the prisoner may be given in evidence, unless it appears that the confession was obtained from the party by some inducement of a worldly or a temporal character in the nature of a threat, or promise of benefit, held out to him in respect of his escape from the consequences of the offence, or the mitigation of the punishment, by a person in authority, or with the apparent sanction of such person.

A person to whom a free negro is bound as an apprentice, though a justice of the peace, if not acting as such, and no way effected by the offence, is not a person in authority in the sense of the rule which excludes confessions made to a person in authority.

In *Shifflet's Case*, 14 Grat., 652, decided March 9, 1858, it was held: A young man living in the jailer's family, and who occasionally, in the absence of the jailer, attended on the prisoners and kept the keys of the jail, is not a person in authority whose threat or promise will exclude the confessions of a prisoner in the jail awaiting his trial. A prisoner is told, in answer to his assertion of his innocence, that the person to whom he is speaking does not believe one word he says, but that such person believes he knows all about it, and his mother too. Prisoner declares that his mother knew nothing about it. He is then told he need not say anything more about it, for that he had to go to the penitentiary anyhow. He says he knows that, but that his mother is innocent of it; and he requests the person to whom he is talking to go and tell certain persons he names to come to him. The person then says, What do you mean by what you say? In the name of God and all that is holy, have you let this charge rest on your mother, and she innocent of it? Prisoner again repeats she was innocent, and requests that the persons he had named may be sent for, which is done; and he makes confessions to them. Held: There was no inducement held out to the prisoner which will exclude his confession.

See *Vaughan's Case*, 17 Grat., 576, cited *ante*, Section 3704.

In *Thompson's Case*, 20 Grat., 724, decided November, 1870, it was held: That a confession of a prisoner tried for murder is voluntary, is a condition precedent of its admissibility, and the court must be satisfied that the confession was voluntary before it can be permitted to go to the jury; the burden of proof that it was voluntary is on the Commonwealth.

Though a confession may be inadmissible because not voluntary, it may become admissible by being subsequently repeated by the accused when his mind is perfectly free from the undue influence which induced the original confession. *Prima facie*, the undue influence will be considered as continuing, though

the presumption will be repelled by evidence, which, however, must be strong and clear.

In *Venable's Case*, 24 Grat., 639, decided November, 1873, it was held: Prisoner charged with murder makes a confession to a police officer on the morning of the day he is examined by the police-justice. Before that examination he has employed counsel, and is warned both by his counsel and the police-justice against making any statement or confession. Being committed by the justice, on getting to the jail he appears to be very much frightened and agitated; and upon getting there he makes a confession, and again, on the same day, confesses the deed to a woman of his acquaintance who is in the jail. Though the confession to the police-officer was properly excluded, the confession made after the warnings given him is proper evidence.

In *Little's Case*, 25 Grat., 921, decided September, 1874, it was held: On the trial of a prisoner for murder, a statement made by him to a person a few minutes after the homicide was committed, and near to the place, and in the presence and hearing of eye-witnesses of the homicide, who were not introduced as witnesses by the Commonwealth, should be admitted as evidence at the instance of the prisoner, as part of the *res gestæ*. At least the statement should have been heard by the court below, so that the court might determine whether all or any part of it was admissible evidence, and that the appellate court might reverse the judgment in that respect.

In *Page's Case*, 27 Grat., 954, decided February 3, 1876, it was held: The admissions and confessions of a prisoner may be given in evidence against him.

See *Williams's Case*, 27 Grat., 997, cited *ante*, Section 3707.

In *Parrish's Case*, 81 Va., 1, decided November 28, 1884, it was held: If the prosecution uses prisoner's statements, the whole must be taken together, and one part cannot be taken and the other left out.

In *Sprouse's Case*, 81 Va., 374, decided January 21, 1886, it was held: Accused will not be permitted to make evidence in his own favor by proving his self-serving declarations.

In *Brown's Case*, 89 Va., 379, decided November 10, 1892. Where all the evidence is purely circumstantial, and the circumstances themselves are not satisfactorily proved and are insufficient to establish clearly that the fire was of incendiary origin, and, if so, then to prove the guilt of the accused, though at third trial one detective testified to admissions made to him about the time of the fire which he had never mentioned before at the other trials, though he was a witness at both, and another detective testified as to admissions made to him in jail since the second trial, when he was kept in the accused's cell for several

days and nights, ostensibly as a murderer, and acknowledging his guilt as to the accused. Held: The testimony of the detective being replete with suspicion, the verdict should be set aside.

SECTION 3897.

In *Price's Case*, 77 Va., 393, decided April 12, 1883, it was held: Where in such case accused does not testify, it is improper for prosecuting attorney to comment on that fact. But if exception is not taken thereto till after verdict, it is too late, unless, under all the circumstances, the court can see that a proper verdict has been rendered and the accused not injured by the comment.

In *Sutton's Case*, 85 Va., 128, decided July 19, 1888, it was held: Remark of prosecuting attorney to the jury that prisoner had not accounted for his whereabouts at time of homicide nor his flight from the State without allusion to his failure to testify, comes not within this section.

In *Sawyer's Case*, 88 Va., 356, decided September 17, 1891, it was held: A remark of prosecuting attorney that "though he had no right to swear any man accused of crime, he had the right to prove his statement," is no violation of this section.

SECTION 3898.

In *Barbour's Case*, 80 Va., 287, decided March 12, 1885, it was held (p. 290): Conviction of petit larceny does not, in this State, disqualify one as a witness.

A witness cannot be impeached by proof of particular acts and offences committed by him.

In *Benton's Case*, 89 Va. 570, decided January 26, 1893. A person was convicted of breaking and entering a house in the night-time with intent to steal. At the trial the jury assessed his punishment at imprisonment in the county jail and a fine. Held: He was guilty of a felony, and not having been pardoned or punished therefor, was an incompetent witness.

SECTION 3899.

See *Kendrick's Case*, 78 Va., 490, cited *ante*, Section 3692.

SECTION 3900.

In *Campbell's Case*, 2 Va. Cases, 314, decided by the General Court, June, 1822, it was held: When two persons are jointly indicted of a felony and severally tried, the co-defendant in the same indictment is not a competent witness for the prisoner unless that co-defendant has been acquitted.

In *Byrd's Case*, 2 Va. Cases, 490, decided by the General Court, June, 1826, it was held: An accomplice is unquestionably a competent witness against a prisoner charged with crime.

The admissibility of an accomplice does not depend on the ancient and exploded doctrine of approvement.

In *Lazier's Case*, 10 Grat., 708, decided July, 1853, it was held: Two persons being jointly indicted for the same offence, and being tried separately, one is not an incompetent witness for the other by the reason of the joint indictment.

SECTION 3901.

In *Oliver's Case*, 77 Va., 590, decided July 19, 1883, it was held: Though conspiracy has been proved, statements of a conspirator made after the object of the conspiracy is accomplished are admissible to criminate his co-conspirators.

In *Kirby's Case*, 77 Va., 681, decided September 13, 1883, it was held: The inadmissibility of declarations of the injured party as part of the *res gestæ* depends on whether or not they were made recently after the injury, before sufficient time had elapsed for the fabrication of a story.

Code 1873, Chapter 195, Section 22, provided that "in a criminal prosecution, other than for injury on an action on a penal statute, evidence shall not be given against the accused of any statement made by him as witness upon a legal examination. Therefore evidence that a statement of witnesses for the accused conflict with the testimony of the accused as delivered on his examination as a witness at a former trial, is inadmissible.

SECTION 3904.

The reference to 1 Va. Cases, 79 is an error.

In *Crump's Case*, 1 Va. Cases, 172, decided by the General Court, it was held: In cases of misdemeanor, judgment for fine only may be rendered.

This may be done in the absence of the prisoner and no judgment of imprisonment can be so rendered save the statute under which indictment found specially authorize such proceeding.

In *Ray's Case*, 1 Va. Cases, 262, decided by the General Court, it was held: A fine ought to be assessed against each prisoner separately, and when jointly assessed it is ground for a new trial.

In *Jones's Case*, 1 Call, 555 (2d edition, 482), decided April 22, 1799, it was held: In an indictment for an assault against several, a joint award of one fine against all is erroneous, it should have been several against each defendant.

In *House's Case*, 8 Leigh, 755, decided by the General Court, December, 1837. On such indictment the jury find defendant guilty, ascertain the term of his imprisonment, and assess the fine, and the court renders judgment according to the verdict. Held: There is no error in such proceeding.

In *Pifer's Case*, 14 Grat., 710, decided August 30, 1858, it

was held: On a prosecution for a misdemeanor there is a verdict against the defendant for a fine, and the court enters up a judgment thereon for the fine and costs, and directs a *capias ad audiendum* against the defendant, and a subsequent term sentences him to six months imprisonment in the county jail. The judgment for the fine and costs was final, and no further judgment could be rendered in the case. The judgment for the imprisonment was therefore error.

In *Read's Case*, 24 Grat., 618, decided November, 1873, it was held: The accused having been tried by a jury in the county court and found guilty and sentenced, the errors in the proceedings of the justice on his second trial cannot affect the judgment of the county court.

SECTION 3905.

In *Rand's Case*, 9 Grat., 738, decided November 17, 1852, it was held: The act applies to the case of a prisoner on trial who had been convicted and sentenced previous to the passage of this act.

The act as applicable to such a case is not *ex post facto* and unconstitutional.

The act does not apply to the case of a conviction for an offence committed after commission of that for which the prisoner is on trial. The indictment must set out the time and place of the first conviction, and must show that the previous conviction was for an offence committed before the commission of that for which the prisoner is on trial.

Evidence having been improperly admitted to prove a former conviction, the whole judgment must be reversed, and a new trial awarded.

See *Rider's Case*, 16 Grat., 499, cited *ante*, Section 3879.

In *White's Case*, 79 Va., 611, decided December 4, 1884, it was held: Motion for continuance rests in the sound discretion of the court. But where one is convicted and sentenced on an indictment "for the first offence," and judgment is suspended by writ of error and *supersedeas* awarded by this court, and, pending such suspension, an indictment against the same one, under the same act, "for the second offence," is called for trial, and the defendant moves the court to continue the case until this court decides the case before it as aforesaid, the court below should sustain the motion and grant the continuance.

SECTION 3907.

See the references to Section 3905, *supra*.

SECTION 3908.

The reference to 1 Va. Cases, 157, is an error.

TITLE LIII.

CHAPTER CXCI.

SECTION 3913.

In *Spengler vs. Davy*, 15 Grat., 381, decided September 5, 1859, it was held, page 388: Probable cause is said to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offence with which he is charged."

In the case of *Scott & Boyd vs. Shelor*, 28 Grat., 891, decided July, 1877, it was held: Probable cause in a criminal prosecution is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.

SECTION 3914.

In the case of *Wells vs. Jackson*, 3 Munf., 458, decided March 26, 1814, it was held: A warrant to arrest a person of whom surety for the peace is demanded, being executed neither by a sworn officer nor by the person to whom it was directed by the magistrate, but by an individual selected by the prosecutor, who erased the name of the person appointed by the magistrate and substituted that of the person selected by himself, is thereby rendered altogether illegal and void as a justification, but may be given in mitigation of damages.

A warrant directing the "associates" of persons named to be arrested, without mentioning the names of such associates, is illegal and void as to them.

SECTION 3915.

In *Wortham's Case*, 5 Rand., 669 (quoted as 675), decided by the General Court, November, 1827, it was held: A volunteer informer ought to be made a prosecutor, and liable for costs in case of failure, but one who is compelled to be an informer cannot be considered a prosecutor.

In *Wellings's Case*, 6 Grat., 670, decided December, 1849, by the General Court, it was held: The county court has authority to require a party to enter into a recognizance to keep the peace, at least where the proceeding was commenced before the act of 1848.

SECTION 3916.

In *Read's Case*, 24 Grat., 618, decided November, 1873, it was held: When a person is tried by a justice of the peace for a

petit larceny and convicted, he has an absolute right of appeal to the county court, and in that court the cause is to be heard *de novo* upon the evidence, and the accused is entitled to be tried by a jury as in like cases originating in that court.

In such a case it is error in the county court to reverse the judgment of the justice, and remand the case to the justice to be tried, and any subsequent trial of the case by the justice is null and void. In such case the justice again tries and convicts the accused, and he again appeals to the county court. The proceedings before the justice on the second trial being null, the accused is in the county court upon the first appeal, and is to be tried by a jury as if the case had originated in that court.

The accused having been tried by a jury in the county court, and found guilty and sentenced, the errors in the proceedings of the justice on his second trial cannot affect the judgment of the county court.

SECTION 3927.

See *Mesmers's Case*, 26 Grat., 976 and 985, cited *ante*, Section 3778.

CHAPTER CXCI.

SECTION 3942.

In *Jackson's Case*, 23 Grat., 919, decided January, 1873. A jury of inquest find that the deceased was killed by J., and the justice who acted as coroner issued process, upon which J. is committed to prison. The grand jury in the county court find an indictment against J. for murder, and he is brought into court and arraigned, and on his arraignment elects to be tried in the circuit court.

The testimony of witnesses examined before a jury of inquest, and committed to writing, cannot be used to impeach the evidence given on the trial of the prisoner, unless their attention has been called to it, and to any discrepancies between that and their evidence.

SECTION 3945.

In *Wormley's Case*, 10 Grat., 658, decided April, 1853. *Quere*: If a coroner has authority to commit to a jail for trial a person charged by the inquest with felony?

If he has not such authority, it is too late to object to it after the prisoner has been regularly examined and sent on for trial, and has been indicted for the felony in the circuit court.

A justice of the peace acting as coroner, and having as coroner committed a person to jail for felony, may certify the fact of such committal as a justice of the peace.

On trial for murder, to contradict a witness for the prisoner, it is competent to introduce in evidence a deposition given by

him before the inquest taken down at the time by the coroner, and read to the witness and signed by him.

See *Jackson's Case*, 23 Grat., cited *ante*, Section 3942.

SECTION 3948.

For the reference to 10 Grat., 658, see *ante*, Section 3945.

CHAPTER CXCIIL.

SECTION 3951.

In the case of *Faulkner vs. Alderson*, 1 Va. (Gilmer), 221, decided March 30, 1821, it was held: The landlord of a tenant at will, may peaceably enter the premises, but an illegal search for stolen goods makes him a trespasser *ab initio*.

CHAPTER CXCIV.

SECTION 3956.

See *Spengler vs. Davy*, 15 Grat., 381, and *Scott & Boyd vs. Shelor*, 28 Grat., 891 and 905, cited *ante*, Section 3913.

SECTION 3957.

In the case of *Jones vs. Timberlake*, 6 Rand., 678, decided by the General Court, November, 1828, it was held: Although an escape-warrant ought regularly to show on its face that the person who issues it is a justice of the peace, yet on a *habeas corpus* sued out by the person arrested under it, if it is proved that he is a justice, the prisoner ought not to be discharged.

SECTION 3960.

In *Rutherford's Case*, 5 Rand., 646, decided by the General Court, November, 1826, it was held: When a prisoner who has been remanded for trial by the examining court to the superior court, on a charge of felony, and against whom a bill of indictment has been found by the grand jury, applies to the superior court to be let to bail on the ground that there is only a slight suspicion of guilt against him, that judgment and the finding of the bill are not conclusive evidence against the application, but the court may examine other evidence; but it is a question for the exercise of the sound discretion of the court, and if the court is satisfied that there is material evidence for the Commonwealth that is not before the court, was not before the examining court, or spread on the record, the court ought not to sustain the motion.

In the case of *John Tyler (Governor, etc.) vs. Greenlaw*, 5 Rand., 711, decided by the General Court, November, 1827, it was held: A justice of the peace, before whom is brought a prisoner charged with a felony, has power to bail him, where

only a slight suspicion of guilt falls on the party, and a recognizance taken before such justice, conditioned for the appearance of such prisoner before the examining court is good, and a recovery may be had thereon, if the party makes default.

Although the condition of a cognizance does not specify the court-house of the county as the place the prisoner is to appear, and the declaration on the recognizance avers that such was the condition, yet on *nul tiel* record pleaded, judgment ought to be rendered for the plaintiff, because the statute points out that as the only place where the examination shall be had.

The case referred to as 3 Leigh, 561, is not in point.

In *Semmes's Case*, 11 Leigh, 665, decided June, 1841, by the General Court. A prisoner in close jail, upon an indictment for murder, applies to the circuit superior court in term time to be admitted to bail, and that court refuses to bail him, and then he presents a petition to the General Court praying to be let to bail. Held: The General Court has original concurrent jurisdiction with the circuit superior court, and with the judge thereof in vacation, to admit the prisoner to bail for good cause to it shown.

It is good cause for admitting to bail a prisoner confined in close jail upon an indictment for murder, that he is laboring under a present, painful, severe, and dangerous disease, caused by his imprisonment, and likely to be so aggravated by a continuance thereof as probably to terminate fatally.

An infant prisoner being admitted to bail, his sureties were required to enter into the recognizance of bail, without his joining therein himself.

The General Court on the petition of a prisoner in custody on an indictment for murder, to be let to bail on account of the ill state of his health, forbore on the same account to bring him before it by *habeas corpus*, heard his application for bail in his absence, and resolved that he ought to be let to bail, whereupon the judge of the circuit superior court, wherein he was indicted, in vacation admitted him to bail accordingly.

In *Green's Case*, 11 Leigh, 677, decided by the General Court, December, 1841. Prisoner examined in a corporation court and sent on for trial in the circuit superior court on charge of aiding and abetting an officer of a bank to embezzle money and bank-notes confided to his care to the amount of one hundred thousand dollars or more, and of larceny of money and bank-notes of the bank to the same amount; twenty-four indictments are preferred against him for aiding and abetting the officer to embezzle, and for larceny of twenty-four several sums of the same money at several times as several and distinct offences; prisoner is brought to trial on one of the indictments and acquitted, it appears that the indictments are founded on a single

criminal transaction, and though the acts charged in the indictment might be prosecuted as several offences, yet they might all have been included in one indictment. Held: The acquittal of the prisoner in one case furnishes such a presumption of his innocence in the others that he is entitled to be bailed.

In *Summerfield's Case*, 2 Rob. 767, decided by the General Court, June, 1843. A prisoner having been examined by the county court and remanded for trial for the offence of feloniously passing two counterfeit half eagles, one of them to J. C. the other to W. M., two indictments are found against him, in one of which he is charged with passing one of the counterfeit coins to J. C. on the 13th day of October, 1842, in the other with passing the other coin to W. M. on the same day. Upon a trial of one of the indictments the jury find the prisoner not guilty. Held: His acquittal in that case does not entitle him to be let to bail in the other.

In *Hamlett's Case*, 3 Grat., 82, decided April, 1846, it was held: A justice of the peace has no general authority to admit to bail after an examining court has sent the prisoner to the superior court for trial.

If the examining court refuses to bail or is silent, a justice of the peace has no right to admit a prisoner to bail, though any judge of the General Court may. After a trial before an examining court, a justice, in taking a recognizance of bail, can only rightfully act as the agent of the examining court in execution of its judgment, and after it has judicially decided that the prisoner is bailable and fixed the amount of bail.

The recognizance of bail taken by a justice of a prisoner sent on for trial by the examining court must show on its face that the examining court had entered of record that the prisoner was bailable, and had fixed the amount in which bail should be taken.

In *Archer's Case*, 6 Grat., 705, decided December, 1849, by the General Court, it was held: A prisoner indicted for felony will be let out on bail when his continued confinement will endanger his life.

See *Spengler vs. Davy*, 15 Grat., 381, and *Scott & Boyd vs. Shelor*, 28 Grat., 891 and 905, cited *ante*, Section 2913.

SECTION 3965.

The reference to 2 Va. Cases, 351, is an error.

In *Craig's Case*, 6 Rand., 731, decided by the General Court, November, 1828, it was held: If, at a subsequent term of a court, after the default of the principal has been recorded, the sureties, on a rule against them, can show to the satisfaction of the court that the principal was rendered unable to appear at the proper court by reason of wounds and sickness, the court, in the exercise of a sound discretion, may spare the recog-

nizance and decline awarding the *sci. fa.*, especially if the prisoner be then in custody to answer the indictment.

In *Bias vs. Floyd (Governor)*, 7 Leigh, 640, decided July, 1836. Under the act allowing a prisoner to be bailed to appear and stand his trial at the superior court, a justice of the peace took a recognizance from a prisoner, with sureties, conditioned for his appearing to do what should be enjoined him by the court. After the recognizance had been so taken, words were interlined by the justice, specifying the charge against the accused, and the *scire facias* upon the recognizance described it as though the interlined words had formed a part of it originally. Held: That upon a rule for the purpose, the recognizance may be amended by striking out the interpolated matter; and then, upon a plea of no such record to the *scire facias*, judgment will be given for the defendants, because of the variance between the recognizance as amended and the recognizance as described in the *scire facias*.

In *Young's Case*, 1 Rob., 744 (2d edition, 805), decided by the General Court. On trial of indictment against W. Y., for felony in stealing a slave, prisoner is acquitted; whereupon the court makes the following order: "It appearing to the court by the testimony of witnesses this day examined on the trial of W. Y. that he is guilty of a misdemeanor, it is ordered that he be remanded to jail, and continued in the custody of the jailer of this court till the next term, to answer an indictment then to be preferred against him." In a bill of exceptions to this order filed by the prisoner, the offence for which he was so remanded is further described as "a misdemeanor under the statute, Supplement to Rev. Code, Chapter 184, Section 1, p. 243." On writ of *habeas corpus* sued out by W. Y., the General Court holds the commitment illegal, as not sufficiently specifying the offence, and discharges the prisoner out of custody under the same.

A party being acquitted of felony, and thereupon committed by the circuit court to take his trial for a misdemeanor, this court discharges him on *habeas corpus*, because the order of commitment does not sufficiently specify the offence; but it appearing from the record of the proceedings in the circuit court that there is reasonable ground to suspect the party of having committed a violation of the criminal law (other than the specific crime of which he was acquitted), proper to be made the subject of judicial inquiry, this court orders the sheriff to take him again into custody and carry him forthwith before a justice of the peace, to be dealt with according to law.

In *Gedney's Case*, 14 Grat., 318, decided May 4, 1858, it was held: In taking a recognizance, the justice, in putting the name of his county in the caption, uses a contraction, but the contrac-

tion is so used that it is obviously intended for a county, and there is no difficulty in ascertaining the county intended. This is not error. Though it is not stated in the body of the recognizance of what county the justice was, yet as it states that he was a justice of the said county, that refers to the county named in the caption, and is sufficient.

In *scire facias* upon a recognizance, a substantive and direct averment that the recognizance was transmitted by the justice to the clerk of the county court is not necessary. The recital of the recognizance, which purports to be taken by a justice in the county, and the implied averment of the transmission of the recognizance contained in the *prout patet per recordum*, is sufficient.

The mistake of the clerk in stating "as by a copy of the recognizance to our said county court transmitted," is not a fatal objection to the *scire facias* upon a demurrer thereto.

In *Caldwell's Case*, 14 Grat., 698, decided August 26, 1858, it was held: One *scire facias* may issue against several cognizors in one recognizance, but it must treat the recognizance as several, and the judgment must be several.

The recognizance is that the principal shall appear before the circuit court at a certain time to answer a charge of felony. At the time he was required to appear he was in the penitentiary, having been tried, convicted, and sentenced for another's felony. Afterwards, and before a judgment on the *scire facias* against his bail, his time under his sentence expires, and he is sent back to the jail of the county in which he was to appear for trial before the circuit court, and he is tried and acquitted. The prisoner's confinement in the penitentiary having rendered it impossible for him to appear at the court at the time prescribed in the recognizance, it constitutes a good defence for the bail to the *scire facias*.

In *Phillips's Case*, 19 Grat., 485, decided November 4, 1868, it was held: The act passed April 27, 1867, to revise and amend the criminal procedure, provided that it should go into operation on July 1, 1867, and it repeals the law in relation to examining courts. Still, a prisoner committed on a charge of murder on June 24, 1867, must be committed for examination; and it is proper to proceed, under the former law, in the examination of the prisoner before an examining court, and his trial before the circuit court.

In *Bolan's Case*, 24 Grat., 31, decided November, 1873, it was held: A *scire facias* upon a recognizance is made returnable to the term of the court. It is properly placed upon the docket at that term.

Prisoner is indicted for embezzlement, which is a felony, and he is admitted to bail. The recognizance is conditioned for his

appearance to answer an indictment for embezzlement. The *scire facias* upon the recognizance recites it, that he was to appear to answer to a certain felony whereof he stands accused. This is not a variance.

The fact that after the recognizance was executed by his sureties the prisoner was appointed a deputy United States marshal, and continued to act as such until the time for his appearance in court, does not relieve his sureties in the recognizance from their liability.

SECTION 3966.

In *Wormely's Case*, 10 Grat., 658, decided May 4, 1853, it was held, page 667: If the accused be entitled to an examining court, the commitment shall be for examination, and the recognizances be for appearance before such examining court. And if he be not so entitled, the commitment shall be for trial, and the recognizances be for appearance in the county or corporation court at such time as the case can be proceeded in before such court.

SECTION 3967.

In *Hopper's Case*, 6 Grat., 684, decided December, 1849, by the General Court, it was held: On a criminal trial, the witnesses are sworn and sent out of the courthouse, so as not to hear the testimony of the witnesses examined. In the progress of the trial, upon a question as to whether a witness introduced by the prisoner is a white man or a mulatto, the Commonwealth offers a witness who has been present at the trial. There is no objection to his being examined.

SECTION 3970.

The reference to 3 Leigh, 561, is an error.

See *Young's Case*, 1 Rob., 744, cited *ante*, Section 3965.

See *Spengler vs. Davy*, 15 Grat., 381, and *Scott & Boyd vs. Shelor*, 28 Grat., 891 and 905, cited *ante*, Section 3913.

CHAPTER CXCV.

SECTION 3977.

In *Strother's Case*, 1 Va. Cases, 186, decided by the General Court, it was held: An appointment under an act of congress to assist in taking a census does not disqualify the person from acting as a grand juror.

In *Cherry's Case*, 2 Va. Cases, 20, decided by the General Court, November, 1815, it was held: Where a bill of indictment is found by a grand jury, one of whom is an alien, or otherwise disqualified by law, the bill or presentment may be avoided by plea.

In *Long's Case*, 2 Va. Cases, 318, decided by the General

Court, November, 1822, it was held: A plea in abatement, that one of the grand jury is the owner of a mill, is good.

In *Wilson's Case*, 2 Leigh, 739, decided November, 1830. A. obtains a license to keep an ordinary; A. opens a tavern under this license, and B. is his partner in the business; but A. alone resides at the tavern and acts as keeper thereof. Held: B. is not the keeper of an ordinary, disqualified to serve on grand juries within the meaning of the statute.

In *Towles's Case*, 5 Leigh, 743, decided by the General Court, July, 1835, it was held: A naturalized citizen of the United States, or a native citizen of any other State of the Union, domiciled in Virginia, being entitled to all the privileges of a citizen of this State, is a citizen, and qualified as such to serve on grand juries.

In *Kerby's Case*, 7 Leigh, 747, decided December, 1836, by the General Court, it was held: A party in possession of land under a contract of purchase, having refused to accept a conveyance tendered him, and instituted a chancery suit in which the question as to the sufficiency of the title is yet undetermined, is not a freeholder, qualified to serve as a grand juror.

In *Moran's Case*, 9 Leigh, 651, decided by the General Court, June, 1839. To indictment in Petersburg Circuit Court, defendant pleads, *First*, That one of the grand jury which found the same, was at the time he was summoned and sworn, the owner of a water grist-mill situated in Chesterfield; *Second*, That one of the grand jury was, at the time of finding the indictment, the owner of a water grist-mill (without saying where the mill is situated). On demurrer to the pleas. Held: Neither of them is sufficient.

In *Wysor's Case*, 6 Grat., 711, decided December, 1849, by the General Court, it was held: The part ownership of a tract of land on which there is a mill, which land has been allotted to, and is, with the mill, in the possession of a widow, as her dower, is not a disqualification to act as a grand juror.

The references to 10 Grat., 519, 527, are erroneous.

In *Mesmer's Case*, 26 Grat., 976, decided October 9, 1875. On September 18, 1874, S., judge of the Corporation Court of W., issued his order in vacation to the clerk of the court, directing that a grand jury of ten citizens, etc., be summoned to attend the court on September 21. Upon the order the clerk issued his warrant to the sergeant to summon certain grand jurors, naming them. Of the list furnished the sergeant, nine attended the court.

At the September term of the court an order was entered as follows: This day came a grand jury, to-wit: naming six of those who had been summoned by the sergeant, who being elected, etc. Held: It is not a valid objection to this grand

jury that the list of the jurors was not made out and delivered to the sergeant five days before the term.

The statute does not require the order of court to be entered of record, and when it appears by the record that six were elected, etc., it must be presumed that all this was done by direction of the court.

The acts of the clerk, done in presence of the court and under its supervision, must be taken to be done by direction of the court, and is the act of the court. All the statute requires is, that the number of grand jurors may be limited to six by the direction of the court. It does not require that the direction shall be matter of record; nor is it a valid objection to the grand jury that it was composed of six of the nine summoned in vacation.

In *Hansenfluck's Case*, 85 Va., 702, decided January 31, 1889, it was held: This section is not repugnant to Articles V. and XIV. of the amendment to the United States Constitution.

SECTION 3979.

In *Burton's Case*, 4 Leigh, 645, decided by the General Court, December, 1832. On first day of term of circuit superior court a grand jury is impaneled and sworn, and proceeds in discharge of its duties, but next day it is discovered that one of the grand jurors wants legal qualification, upon which the court discharges him, and orders another to be sworn in his place. Held: This was regular, and the grand jury duly constituted.

SECTION 3984.

In *Burgess's Case*, 2 Va. Cases, 483, decided by the General Court, June, 1825, it was held: An indictment filled the whole of a sheet of paper, and was then folded in another half-sheet of the same size, on which half-sheet the attorney endorsed "*Commonwealth vs. Joseph Burgess, Indictment*," and immediately below, in the handwriting of the grand jury, was endorsed "a true bill," "Robert Hamilton, foreman." Although the said half-sheet of paper was blank, except the endorsements, and although it was not otherwise attached to the indictment than being folded around it, yet the indictment enveloped by it must be considered as the indictment on which the grand jury passed, and on which the jury found their verdict. If the objection were a good one it comes too late after verdict.

The caption of an indictment being, "Virginia, Prince William county, to-wit," is sufficient without its being entitled as of "the superior court of law for the county of Prince William."

It is not necessary that the indictment should show on its face the date when it was found.

In *Carwood's Case*, 2 Va. Cases, 527, decided by the General

Court, June, 1826, it was held: When a bill of indictment is found by a grand jury and endorsed "a true bill" by the foreman, it should be brought into court, presented by the grand jury, and then the finding should be recorded.

An omission to record the finding cannot be supplied by a paper purporting to be an indictment, with an endorsement, "a true bill," signed by the person who was foreman of the grand jury that term; nor can it be supplied by the recital in the record that he stands indicted, nor by his arraignment, nor by his plea of not guilty. It cannot be intended that he was indicted; it must be shown by the record of the finding. The recording of the finding of the grand jury is as essential as the recording of the verdict of the jury.

In *Teff's Case*, 8 Leigh, 721, decided by the General Court, June, 1837. The record of the finding of on indictment for retailing ardent spirits, without license, states that the grand jury presented an indictment against W. T. for retailing liquors. A true bill. Held: This is sufficient.

Though the name of the county be left blank in the margin of an indictment for misdemeanor, it is enough if the county be stated in the body of the indictment.

In *William's Case*, 5 Grat., 702, decided December, 1848, by the General Court, it was held: The omission by the grand jury to write the name of the witness on whose testimony an indictment is found at the foot thereof is no ground for quashing the indictment.

In *Price's Case*, 21 Grat., 846, decided January, 1872, it was held: P., having been indicted in February, 1871, for receiving a horse, knowing it to have been stolen, and also for the larceny of the horse, elects to be tried in the circuit court. In the circuit court he, in September, 1871, moves the court to send him back to the county court for trial, on the ground that the circuit court has no jurisdiction to try him. The act of February 12, 1866, which provides that horse-stealing may be punished with death or confinement in the penitentiary, at the discretion of the jury, has not been repealed, and the circuit court has jurisdiction to try the prisoner.

The record of the indictment against P. sent to the circuit court shows that it was found at the February term of the court by a grand jury of eight members, but it does not show that the February term was not one of the four regular terms of the said court, to which twenty-four citizens were required to be summoned to constitute a grand jury. In the absence of evidence to the contrary, it must be presumed that the indictment was found at a term when the grand jury might consist of only eight members.

The record does not show that the indictment was endorsed

a "true bill" by the grand jury, and signed by the foreman. Such endorsement, though usual, is not necessary, and the record of the finding of the jury upon the order-book of the court is the proper evidence of that fact.

In *Richardson's Case*, 76 Va., 1007. Plea in abatement will not lie to an indictment, for that the court, if a sufficient number of the jurors summoned are not in attendance, causes the required number to be returned *from the county at large*. Nor for that two or more of the grand jury which found the indictment had served on another grand jury at the same term. How they voted on the indictment as members of the first grand jury could not properly be inquired into. Nor for that the sheriff or his deputy were in the grand jury's room when they were deliberating and examining witnesses, upon whose testimony the indictment was found.

In *Shelton's Case*, 89 Va., 450, decided December 1, 1892, it was held: Code, Section 3984, requiring names of witnesses to be written at foot of indictment, is merely directory, and their omission is not fatal to its validity.

CHAPTER CXCVI.

SECTION 3989.

In *Towles's Case*, 5 Leigh, 743, decided by the General Court, July, 1835, it was held: Upon a presentment of a grand jury for an assault and battery, charging the offence with certainty, it is not irregular to summon the defendant to answer the presentment, and to try the case upon the presentment without filing any information.

In *Barrett's Case*, 9 Leigh, 665, decided by the General Court, December, 1839, it was held: A felony cannot be prosecuted by information.

In *Ayers's Case*, 6 Grat., 668, decided June, 1849, by the General Court, it was held: An indictment being quashed because one of the grand jurors who found it was not a freeholder, the indictment is not a sufficient foundation for a rule upon the party to show cause why an information should not be filed against him.

In *Christian's Case*, 7 Grat., 631, decided June, 1850, by the General Court, it was held, pp. 635-'37: An indictment may be founded upon a presentment, or the presentment may stand alone under the statute.

In *Bishop's Case*, 13 Grat., 785, decided February 11, 1856, it was held: A presentment of a grand jury to be a proper foundation for an information must contain every matter necessary to render the act imputed to the defendant unlawful, and

the supposed offence must be described with at least reasonable certainty.

Upon a rule to show cause why an information should not be filed, the defendant appears and moves the court to quash the presentment on the ground that it does not charge any offence against him, but the motion is overruled. The information is then filed, and he pleads "not guilty," and on the trial there is a verdict and judgment against him. Upon a writ of error to the appellate court he may object to the insufficiency of the presentment.

In *Bradshaw's Case*, 16 Grat., 507, decided September 3, 1860, it was held: In a prosecution for a felony or a misdemeanor, if the indictment is lost at any time before the trial, though after arraignment and plea, the party cannot be tried.

The act authorizing a lost record or paper to be substituted by an authenticated copy or proof of its contents applies only to civil cases, and does not extend to records or papers in criminal proceedings.

In *White's Case*, 29 Grat., 824, decided January 24, 1878. An indictment for a felony was endorsed "a true gun," which is signed by the foreman. The jury present the paper in court as an indictment, it is read to them by the clerk and assented to as their indictment, it is entered on the record as an indictment, and the prisoner is tried upon it upon the plea of not guilty. Upon a motion to arrest the judgment. Held: No endorsement is necessary on the indictment to constitute it such, and the mistaken endorsement cannot invalidate it.

SECTION 3990.

In *Matthew's Case*, 18 Grat., 989, decided January, 1868, it was held: The act of April 27, 1867, to revise and amend the criminal procedure, Session Acts 1866-'67, p. 915, Chapter 128, does not authorize the trial of a prisoner for felony, except upon an indictment found by a grand jury in a court of competent jurisdiction.

In *Wilson's Case*, 87 Va., 94, decided November 13, 1890, it was held: Under this section an information filed not upon the basis of a presentment, indictment, or complaint in writing, verified by the oath of a competent witness, is insufficient.

SECTION 3991.

In *Haught's Case*, 2 Va. Cases, 3, decided by the General Court, June, 1815, it was held: A plea in abatement of an indictment for a trespass, or misdemeanor, alleging that the prosecutor is not a laborer, but an husbandman, is bad on demurrer.

In *Dove's Case*, 2 Va. Cases, 29, decided by the General Court, November, 1815, it was held: After verdict the prosecutor can-

not be allowed to show by parol evidence that he was called on by the grand jury, and did not voluntarily give the information.

In *Baker's Case*, 2 Va. Cases, 353, decided by the General Court, June, 1823, it was held: A prosecutor in an information for assault and battery, who is liable for the costs, is a competent witness for the Commonwealth.

In *Wortham's Case*, 5 Rand., 669, decided by the General Court, November, 1827, it was held: In an indictment for a trespass or misdemeanor, it is not necessary to insert the name or the surname of a prosecutor at the foot of the indictment, if it appears that the indictment was found true on the evidence of a witness sent to the grand jury, either at their own request, or by direction of the court, and this whether there was a previous presentment or not.

In *Gilliam's Case*, 4 Leigh, 688, decided by the General Court, July, 1834, it was held: On an indictment for an assault and battery on the voluntary information of the person assaulted, the former and prosecutor, being the only witness for the prosecution, is a competent witness, though liable for costs in case defendant is acquitted.

In *Hill's Case*, 9 Leigh, 601, decided by the General Court, June, 1838, it was held: The prosecutor's insolvency, or inability to pay costs, is, ordinarily, good cause for ruling him to find security for such payment, but if, in the opinion of the court, public justice requires that the prosecution should proceed, it may refuse to dismiss the indictment, though the prosecutor be insolvent, and security for costs be not given. An indictment will not be dismissed, though the prosecutor be insolvent, if the court would *ex-officio* have directed a prosecution to have been instituted.

In *Dever's Case*, 10 Leigh, 685 (2d edition, 719), decided by the General Court, December, 1840, it was held: The omission to write the title or profession of the prosecutor at the foot of an information or indictment is no ground of exception, either by motion to quash or plea in abatement.

In *Thompson's Case*, 88 Va., 45, decided June 18, 1891, it was held: The statute does not require the name of prosecutor to be written at foot of indictment for felony, but only for misdemeanor.

SECTION 3992.

In *Wortham's Case*, 5 Rand., 669, decided by the General Court, November, 1827, it was held: A volunteer informer ought to be made a prosecutor, and liable for costs in case of failure; but one who is compelled to be an informer cannot be considered a prosecutor.

In *St. Claire's Case*, 1 Jrat., 556, decided December, 1844, by the General Court. In a prosecution for misdemeanor, at the

instance of a voluntary prosecutor, the defendant files a plea in abatement, that one of the grand jurors, who found the indictment, was not a freeholder; and the issue made up on that plea is found for the defendant, and the indictment quashed. Held: The court should give judgment for the costs against the prosecutor.

SECTION 3993.

See *Thomas's Case*, 2 Rob., 795, cited *ante*, Section 3741.

See *Roach's Case*, 1 Grat., 561, cited *ante*, Section 3741.

See *Roach's Case*, 2 Grat., 579, cited *ante*, Section 3741.

In *Pickering's Case*, 8 Grat., 628, decided December, 1851, by the General Court, it was held: An indictment for perjury must show that the evidence which the defendant gave was material. And therefore, if the evidence which the defendant gave before the grand jury is not shown clearly on the face of the indictment to relate to an offence committed within the county, the indictment is defective.

In *Rhodes's Case*, 78 Va., 692, decided March 13, 1884, it was held: As a general rule, time of commission of offence, as laid in indictment, is not material, and confines not proof to time laid; but where time laid is provable by record, and in indictment for perjury, time must be truly and precisely laid, and failure so to state renders indictment demurrable. Where an indictment is for swearing contradictorily on two occasions, prosecutor must elect which oath he holds to be perjured, and that oath he must affirmatively prove to be false. If defendant is shown to have sworn contradictory oaths, without more, *non constat*, which is false.

The matter of the false oath must be material. If it be not material, the fact that it is false will not sustain the conviction.

R. swore that M. had stolen bacon, and offered to sell it to him November 15, 1875. Later, R. swore that M. had stolen bacon and offered to sell it to him just before Christmas, December, 1875. On indictment against R. for perjury, it was not proved that M. did not steal bacon, but it was proved that R. made contradictory statements as to the date. R. was convicted. On error. Held: The stealing of the bacon was the material matter of the charge. The date of the offer to sell was not material to the offence.

The oath as to the date was not material as to the issue, and was not likely to induce the jury to give the readier credit to the substantial part of the evidence.

R. was not guilty of perjury.

SECTION 3994.

In *Dull's Case*, 25 Grat., 965, decided January, 1875, it was held: An indictment for the larceny of divers notes of the

"national currency of the United States" is equivalent to the phrase in the statute of "United States currency," and the indictment is sufficient.

There are two kinds of United States currency, both of which may be properly called national currency of the United States. Of these, one consists of treasury notes, and the other of national bank-notes. On an indictment for larceny, the clerk charges the jury in the usual form. If on trial it appears that the money charged to have been stolen was obtained under false pretences, another charge by the clerk is not necessary or proper.

See *Fay's Case*, 28 Grat., 912, cited *ante*, Section 3722.

SECTION 3996.

See *Jones's Case*, 17 Grat., 563, and *Hughes's Case*, 17 Grat., 565, cited *ante*, Section 3707.

SECTION 3997.

See *Ervin & Lewis's Case*, 2 Va. Cases, 337, cited *ante*, Section 3737.

SECTION 3998.

In *Lazier's Case*, 10 Grat., 708, decided July, 1853, it was held, p. 715: An indictment for murder charges the wound to have been inflicted on the 9th of December, of which wound she, on the said 14th of December, died. The word "said" is surplusage, and its insertion is not a fatal defect. In an indictment for murder it is not necessary to set out the length, breadth, or depth of the wound.

In *Sledd's Case*, 19 Grat., 813, decided May 26, 1870, it was held, p. 818: Since the statute no mode of stating the time of an offence in an indictment or presentment can vitiate it.

SECTION 3999.

In *McCaul's Case*, 1 Va. Cases, 271 and 301, decided by the General Court, it was held: Where the fact for which the examining court remanded the prisoner cannot be ascertained save by evidence *de hors* the record, the indictment should be quashed.

For this purpose the warrant of commitment is no part of the record.

In *Vance's Case*, 2 Va. Cases, 162, decided June, 1819, by the General Court, it was held: An indictment for murder need not conclude *contra formam statuti*, although a punishment variant from the common law punishment is prescribed by statute for the second degree of the offence.

In *Jackson's Case*, 2 Va. Cases, 501, decided June, 1826, by the General Court, it was held: In criminal cases defects of form in pleading may be taken advantage of by general demurrer.

In *Huffman's Case*, 6 Rand., 685, decided by the General Court, November, 1828, it was held: In a bill of indictment with three counts, if in the third count it is omitted to be stated that the grand jury "on their oaths" present (the first two counts being regular in that respect), the objection is obviated by the fact that the record states that the grand jury were sworn in open court.

See *Kerby's Case*, 7 Leigh, 747, cited *ante*, Section 3977.

See *Teff's Case*, 8 Leigh, 721, cited *ante*, Section 3984.

In *Kirk's Case*, 9 Leigh, 627, decided by the General Court, December, 1838, it was held: The defect of some of the counts in an indictment does not affect the validity of the rest, and if any count is good, judgment may be given against the accused.

In *Peas's Case*, 2 Grat., 629, decided June, 1834, by the General Court, pp. 636-'37: Indictment for feloniously and fraudulently taking and removing a slave from one county to another, with intent to defraud the owner and deprive him of his property. Held: Fatally defective after verdict for want of averment, that the slave was so taken and removed without the consent of the owner.

In *Carney's Case*, 4 Grat., 546, decided December, 1847, by the General Court, it was held: An indictment is defective for omitting the conclusion, "against the peace and dignity of the Commonwealth."

In *Buzzard's Case*, 5 Grat., 694, decided December, 1848, by the General Court, it was held: By mistake a wrong name is inserted in an indictment for a misdemeanor, though the record of the court and the endorsement on the indictment shows the correct name. The indictment cannot be amended by striking out the wrong name and inserting the name of the person intended.

In *Clark's Case*, 6 Grat., 675, decided December, 1849, by the General Court, it was held: An indictment for an attempt to commit an offence ought to allege some act done by the defendant of such a nature as to constitute an attempt to commit the offence mentioned in the indictment.

When an indictment does not charge a criminal offence, the court, may upon the motion of the defendant, quash it.

In *Bell's Case*, 8 Grat., 600, decided December, 1851, by the General Court, it was held: In prosecutions for felonies and other serious offences, the court will not, on the motion of the prisoner, quash the indictment unless where the court has no jurisdiction, where no indictable offence is charged, or where there is some other substantial and material defect. In other cases he will be left to his demurrer, motion in arrest of judgment, or writ of error.

Where the indictment in the caption names one county, and

in the body of it speaks of the defendant as of another county, the charging the offence to have been committed in the county aforesaid is error, it not being alleged with sufficient certainty that the offence was committed in the county in which the indictment was found.

In *Burner's Case*, 13 Grat., 778, decided February 11, 1856, it was held: An indictment which charges that the defendant, on a day and time specified, kept an ordinary without obtaining a license to do so, is sufficient, without setting out the facts of his furnishing for compensation lodgings or diet, etc.

Such an indictment, with the addition that he continued to keep the ordinary from the day stated to another subsequent day, the *continuando* is mere surplusage.

A person having a license to keep a house of private entertainment cannot be convicted of keeping an unlicensed ordinary by proving the sale by him of spirits to be drunk at the house of private entertainment, the place of sale, in addition to the furnishing for compensation diet, lodging, and provender at that place.

In *Young's Case*, 15 Grat., 664, decided January, 1860, it was held: In an indictment under the section for retailing ardent spirits, the words "not to be drunk where sold" not being in the statute need not be in the indictment.

In such indictment the words "without having a license therefor according to law" are not equivalent to the words "without paying such tax and obtaining such a certificate as is prescribed by the 14th section," which are the words used in the statute, and the indictment is defective.

In an indictment for a statutory offence it is generally proper and safest to describe the offence in the words used by the statute for the purpose. But it is sufficient to use in the indictment such terms of description as that, if true, the accused must of necessity be guilty of the offence described in the statute.

If the indictment may be true, and still the accused may be not guilty of the offence described in the statute, the indictment is insufficient.

See *Sledd's Case*, 19 Grat., 813, cited *ante*, Section 3998.

In *Thompson's Case*, 20 Grat., 724, decided November, 1870, it was held: Every count in an indictment must conclude, "against the peace and dignity of the Commonwealth," or the count which omits it is fatally defective.

The only proper endorsement on an indictment is "a true bill," or "not a true bill," with the name of the foreman, and anything else is not a part of the finding of the grand jury.

The record of the finding of the grand jury saying, "in commission of rape," which was on the indictment, is mere surplusage.

See *Randall's Case*, 24 Grat., 644, cited *ante*, Section 3671.

In *Helfrick's Case*, 29 Grat., 844, decided February 7, 1878, it was held: If an indictment for a statutory offence, by following the language of the statute, charges expressly or by necessary implication every fact necessary to constitute the offence, it is sufficient.

In *Robinson's Case*, 32 Grat., 866, decided January, 1879, it was held: An indictment charging the prisoner with stealing certain papers of the value of one hundred and ten dollars, not otherwise describing the papers charged to have been stolen, is fatally defective.

In *Baccigalupo's Case*, 33 Grat., 807, decided January, 1880. In such a case an indictment which has been made by the grand jury of the Hustings Court of the city of Richmond charges the assault to have been made at the said city, and within the jurisdiction of the said Hustings Court of the city of Richmond. Held: This is sufficient, and it is not necessary to state the place in the city where the assault was made.

See *Hawley's Case*, 75 Va., 847, cited *ante*, Section 3885.

In *Hendricks's Case*, 75 Va., 934, decided March, 1882, it was held: A demurrer to an indictment containing two counts, being general and not to each count thereof, if either is good, it is properly overruled; and the verdict, being general, if supported by either count, must stand.

In *Boyd's Case*, 77 Va., 52, decided January 25, 1883. An indictment under a statute must state all the circumstances which constitute the offence as defined in the statute. Though the offence, at common law or by statute, is defined in general terms, yet the indictment must charge it specifically, and must descend to particulars.

In an indictment for corrupt misbehavior in office, the act must be distinctly charged as done knowingly and with corrupt motives.

B., an election official, is indicted under the Code for acting unlawfully as such official. On motion to quash, held: Though he may have acted unlawfully, it does not follow that he was guilty of corrupt conduct, for the punishment whereof the statute was intended, and the indictment is insufficient.

In *Bailey's Case*, 78 Va., 19, decided November 15, 1883, it was held: In describing an offence under a statute the indictment must follow the statute, and any material variance will be fatal. In criminal procedure, an essential of the offence therein described is the *scienter*. Failure of the indictment to aver the *scienter* is fatal.

See *Rhodes's Case*, 78 Va., 692, cited *ante*, Section 3993.

In *Webster's Case*, 80 Va., 598, decided June 25, 1885, it was held: An indictment charging that the prisoner on, etc., a cer-

tain mill-house, not adjoining to, nor occupied with, the dwelling-house, of F., etc., sufficiently alleges the ownership of the mill-house to be in F., and is sufficient in law.

In *Sprouse's Case*, 81 Va., 374, decided January 21, 1886, it was held: The joining of two or more offences in one count is not permitted. But if the whole transaction be only parts of one fact of endeavor, all the parts may be stated together as one offence; *e. g.*, a man may be indicted for the battery of two or more persons in the same count, etc.; and so an indictment charging in one count the forgery of a check and of the endorsement thereof is not liable to the objection of duplicity or misjoinder.

In *Shelton's Case*, 89 Va., 450, decided December 8, 1892, it was held: An indictment is sufficiently certain as to the time when it alleges that an offence was committed on a certain day, about the hour of 12 o'clock in the night of that day, and means in the night after the sundown of that day.

SECTION 4000.

In *Taylor's Case*, 2 Va. Cases, 94, decided by the General Court, November, 1817, it was held: The omission to charge that the offence was committed "within the jurisdiction of the court," the county itself being named, is cured by the verdict. The caption of the indictment setting forth the county is sufficient, without entitling it of the superior court.

In *Barker's Case*, 2 Va. Cases, 122, decided November, 1817, by the General Court, it was held: In an indictment for stealing bank-notes it should be charged that they were feloniously stolen, although by the act it is not denominated a felony; and this error is not cured by the statute of *jeofails*.

If the indictment for stealing bank-notes does not charge that they are the bank-notes and belong to some person or persons by name, or of, or to, some person, to the jury unknown, the defect is fatal, and not cured by the statute of *jeofails*.

See *Trimble's Case*, 2 Va. Cases, 143, cited *ante*, Section 3671.

In the case of *Commonwealth vs. Ervin & Lewis*, 2 Va. Cases, 337, decided by the General Court, June, 1823, it was held, p. 340-41: In an indictment for the forgery of bank-notes, instead of setting out the tenor of the forged notes, the attorney, for the greater certainty as to their identity, referred to them as "being annexed" hereto, and actually did annex them. The prisoner did not move to quash the indictment, nor did he plead in abatement, but pleaded the general issue, and a verdict was rendered against him. Although this is a careless and irregular mode of counting, yet, after verdict, the irregularity is cured by the statute of *jeofails*.

A charge that a forgery of bank-notes was committed with

intent to injure "divers good citizens of the Commonwealth and others" to the jurors unknown, without setting out an intent to injure the president, directors, and company of those banks, or of any particular person, or body politic by name, is good after verdict.

So to charge that the prisoners willingly acted and assisted in false making and forging, without setting out in particular any person who was assisted; so to charge them with causing and procuring the forged notes to be passed, without setting out the persons whom the prisoners caused or procured to pass them, nor to whom; so to charge them with passing them to W. S., with intent to defraud the said W. S. and others; so, also, to charge them with causing them to be passed or exchanged.

In *Jacobs's Case*, 2 Leigh, 709, decided June, 1830. In an indictment against justices of the county court for misbehavior in office, it is necessary that the act imputed as misbehavior be distinctly and substantially charged to have been done with corrupt, partial, malicious or improper motives, and, above all, with knowledge that it was wrong, though there are no technical words indispensably required in which the charge of corruption, partiality, etc., shall be made.

An indictment in such case, not charging the corruption, partiality, etc., distinctly and substantially and not charging the *scienter*. Held: Naught after verdict of conviction, its defects not being cured by the statute.

In *Isreal's Case*, 4 Leigh, 675, decided by the General Court, December, 1833. Indictment at common law charging defendant with rescuing property that had been distrained by a sheriff for public dues from a bailee to whose safe-keeping the sheriff had committed it, without charging that the defendant knew in what right the bailee held it. Held: Indictment defective for not averring that the defendant had such knowledge.

And this defect is not cured by verdict, by the statute of *jeofails* in criminal cases.

In *Stephen's Case*, 4 Leigh, 679, decided by the General Court, December, 1833, it was held: Motion in arrest of judgment because several of the petty jury were not freeholders; this being matter of fact not appearing in the record, is not a good reason for arresting judgment.

In *Jones's Case*, 2 Grat., 555, decided June, 1845, it was held, by the General Court: In the case of a misdemeanor after the verdict of not guilty, and a trial and verdict upon that plea, it is not competent to arrest the judgment for any supposed variance between the information and presentment. A defendant may avail himself of such variance by showing it as a cause against the filing of the information or by motion to quash it.

See *Peas's Case*, 2 Grat., 629 and 637, cited *ante*, Section 3999.

In *Old's Case*, 18 Grat., 915, decided October, 1867, it was held: When the presentment does not charge the offence, the appellate court will reverse the judgment against the accused, though no motion in arrest of judgment was made in the court below. Where a pecuniary judgment has been rendered against a defendant in a criminal case and he pays it, and upon appeal the judgment is reversed, the cause will be remanded to the court below for an order of restitution to be made therein if the money is yet in the hands or power of the court.

In *Matthews's Case*, 18 Grat., 989, decided January, 1868, it was held: Anything which is good cause for arresting a judgment is good cause for reversing it, though no motion in arrest is made.

In *Cousins's Case*, 19 Grat., 807, decided April 29, 1870, it was held: An information under the act in relation to the assessment of taxes on licenses, must allege that the sale was "for profit or on commission, or for other compensation," or it will be fatally defective on demurrer, or on motion in arrest of judgment.

In *Randall's Case*, 24 Grat., 644, decided January, 1874, it was held: The indictment and verdict being fatally defective, the judgment may be reversed by the appellate court, though no motion in arrest of judgment was made in the court below.

In *Puryear's Case*, 11 Va. Law Journal, 532, decided March 24, 1887, it was held: A case in which the indictment charges the offence with sufficient certainty for judgment to be given thereon according to the very right of the case, and a motion in arrest of judgment, was properly overruled.

SECTION 4001.

In *Lovett's Case*, 2 Va. Cases, 74, decided June, 1817, by the General Court, it was held: A special session of the superior court of law held for the trial of offences is not the third term within the meaning of the act, but a substitute for it, and therefore, when there is a failure to hold two irregular terms, and then a special term was held, at which the prisoner was not tried, but being indicted at the regular term succeeding the special term, he ought not to be discharged for the crime, but may be tried.

In the case *Ex parte Joseph Santee*, 2 Va. Cases, 363, decided by the General Court, November, 1823, it was held: The word "term" ought to be construed to mean not the stated time when a court should meet, but the actual session of the court.

In *Bell's Case*, 8 Grat., 600, decided December, 1851, by the General Court, it was held: A prisoner being sent on for further trial by an examining court which sat during the session of the circuit court to which he is sent for further trial, that term of the circuit court is not one of the two at which the statute di-

rects that he shall be indicted, or that he shall be discharged from imprisonment.

In *Adock's Case*, 8 Grat., 661, decided December, 1851, by the General Court. A prisoner is indicted for embezzling the goods of W., and at the fifth term after he was examined for the offence he is tried and convicted, but the verdict is set aside for a variance between the allegation and the proof as to the ownership of the goods, and the case is continued. At the next term of the court the attorney for the Commonwealth enters a *nolle prosequi* upon the indictment, and the prisoner is indicted again for the same offence, the indictment being in the first count as in the former indictment, and another count charging the goods embezzled to be the goods of A. Upon his arraignment, he moves the court to discharge him from the offence on the ground that three regular terms of the court had been held since he was examined and remanded for trial without his being indicted. The attorney for the Commonwealth opposes the motion and offers the record of the proceedings of the circuit court upon the first indictment to show that he had been indicted, tried and convicted, which was objected to by the prisoner. Held: The record is competent, and the only competent evidence upon the question.

The second indictment being for the same act of embezzling as the first, and the prisoner having been indicted, tried and convicted in time, and the verdict set aside for the variance, the second indictment was proper and in time, and the prisoner is not entitled to be discharged.

The exceptions or excuses for failure to try the prisoner, enumerated in the statute, are not intended to exclude others of a similar nature, or *in pari ratione*, but only that if the Commonwealth was in default for three terms without any of the excuses for the failure enumerated in the statute, or such like excuses fairly implicable by the courts from the reason and spirit of the law, the prisoner should be entitled to his discharge.

In *Jones's Case*, 19 Grat., 478, decided October 17, 1868. In September, 1867, J. is committed to be tried for a felony at the October term of the county court, and at that term of the court an information is filed against him, and he elects to be tried in the circuit court and is remanded for trial in that court. He remains in jail until the April term of the court, 1868, no indictment having been found against him. The grand jury terms of the county court are November and June. At the April term of the circuit court, after the grand jury has been discharged, he applies for a writ of *habeas corpus* to obtain his discharge. Held: Having been committed for trial in the county court, that is the court in which he is held to answer, in the sense of the statute,

though he had been remanded for trial in the circuit court, and he should be indicted in the county court.

The second term of the court spoken of in the statute is the second term at which a grand jury is directed to be summoned. If it was so that the prisoner was held to answer in the circuit court, that would not be till he was remanded to that court; and, therefore, though the prisoner was committed for trial in the county court before the September term of the circuit court, that could not be one of the two terms spoken of by the statute. And if the November term in the county court could be connected with the April term in the circuit court, still, though the grand jury at the April term had been discharged before the application for the writ, the judge might have ordered another grand jury to be summoned during the term, and, therefore, the term could not be counted as one of the terms until it was ended.

The filing of the information being unauthorized in the case of a felony, is of no avail, and an indictment must be found within the time prescribed by statute.

In *Hall's Case*, 78 Va., 678, decided March 13, 1884. H. was examined before a justice for felony, May 9, 1883, and was remanded for trial in the Hustings Court of D. The court held terms May 10 and June 4, 1883, at both of which grand juries were impaneled; but H. was indicted for said felony not until October, 1883. Failure to indict did not arise from any of the causes excepted in the statute. To the indictment H. filed a special plea in bar, which was rejected. On error, held: The plea is good, and H. is entitled to be discharged from imprisonment.

In *Waller & Boggs's Case*, 84 Va., 492, decided February 9, 1888, it was held: Under this section, it suffices that any indictment be found against the accused before the end of the second term at which he is held to answer, though he be actually tried upon an indictment found after that time.

SECTION 4003.

In *Goode's Case*, 2 Va. Cases, 200, decided June, 1820, it was held: If a defendant be presented for a misdemeanor, and summoned to show cause why an information should not be filed, and, upon the return of that summons executed, the defendant fails to appear, and the rule be made absolute and the information be filed, the court cannot proceed to try it, but the defendant must be summoned to answer the information; or, if he be charged with an offence to which an infamous or corporal punishment is affixed, or may ensue, the court may award a *capias* instead of a summons.

In *Word's Case*, 3 Leigh, 743, decided November, 1827, by the General Court. Upon presentment for unlawful gaming at

cards at a particular place, within six months next preceding, process is issued summoning the defendant to answer a presentment for unlawful gaming at cards, generally without specifying time or place. Held: Such process is good and sufficient.

See *Towles's Case*, 5 Leigh, 743, cited *ante*, Section 3989.

In *Wright's Case*, 19 Grat., 626, decided January 24, 1870, by the military court of appeals, it was held: A prisoner is indicted for felony in the circuit court, he being in custody at the time. The circuit court has no jurisdiction to try him on this indictment, but he must be sent before a justice for examination, and committed for trial in the county court.

In *Shelly's Case*, 19 Grat., 653, decided February 16, 1870, by the military court of appeals, it was held: A prisoner in custody is indicted in the Hustings Court of L., held by a judge. He is not entitled to be sent before a justice for examination; but the court may proceed to try him on the indictment.

In *Chahoon's Case*, 20 Grat., 733 and 758, decided January, 1871, it was held: C. is indicted for felony in the Corporation Court of R., the proper court to try him for the offence. When indicted he is not in custody, and has been arrested or examined by the justice. *Quære*: If he should be arrested and sent before a justice to be examined, or whether he may be taken on a *capias* and tried upon the indictment without any examination by a justice?

In *Jackson's Case*, 23 Grat., 919, decided January, 1873. A jury of inquest find that the deceased was killed by J., and the justice, who acted as coroner, issues process, upon which J. is committed to prison. The grand jury in the county court find an indictment against J. for murder, and he is brought into court and arraigned, and on his arraignment elects to be tried in the circuit court. In the circuit court J. moves to quash the indictment because he had not been sent before a justice for examination; and that motion being overruled, and the cause continued to the next term on his motion, he at the next term files a plea in abatement to the indictment, on the ground that he had not had the benefit of an examination before a justice of the peace or other legally authorized officer for commitment. To this plea the attorney for the Commonwealth demurs, and the demurrer is sustained. Held: J. was not entitled to be sent before a justice for examination.

In *Stuart's Case*, 28 Grat., 950, decided July 26, 1877, it was held: Where a prisoner is arrested under a warrant of a justice, examined, and committed to jail, and indicted and tried, and afterwards that indictment quashed, and a new indictment found against him for the same offence, he is not then entitled to a new preliminary examination before a justice under the last indictment found against him.

The reference to 81 Va., 159, is an error.

In *Jones's Case*, 86 Va., 661, decided March 13, 1890, it was held: By the law in force before May 1, 1888, accused, when indicted, was required to be sent before a justice for examination. By this section that requirement is omitted, and accused indicted since then need not have such preliminary examination, though the offence was committed before then.

SECTION 4009.

In *Webb's Case*, 2 Leigh, 721, decided June, 1830, it was held: Upon a presentment in the circuit court for an offence for which the penalty prescribed by law exceeds not twenty dollars, the court cannot proceed by way of information, but only in a summary manner under the statute.

SECTION 4010.

See *Maddox's Case*, 2 Va. Cases, 19, cited *ante*, Section 3816.

SECTION 4011.

In *Adkinson's Case*, 2 Va. Cases, 513, decided by the General Court, June, 1826, it was held: A misnomer cannot be pleaded to a presentment, indictment, or information for unlawful gaming under our laws.

SECTION 4012.

In *Shifflett's Case*, 18 Southeastern Report, 838, decided January 11, 1894. Code, this section, declares that in prosecution for misdemeanors not embraced by Section 4010, after a summons has been executed ten days before the first day of the term, the court may award a *capias* or proceed to trial in the same manner as if the accused had appeared. Held: That it was proper to try defendants for a misdemeanor in their absence without first awarding a *capias* for their arrest when they had been duly summoned.

SECTION 4013.

In *Hill's Case*, 2 Va. Cases, 61, decided by the General Court, June, 1817, it was held: The omission to continue a cause in which there was a verdict, on the records of the county court for two quarterly terms, is no discontinuance of the prosecution.

The reference to 2 Va. Cases, 240, is an error.

In the case referred to, 21 Grat., 780, the statute is followed, not construed.

In *Bolanz's Case*, 24 Grat., 31, decided November, 1873, it was held: Prisoner charged with a felony in the county court appears at the August term, and on his motion his case is continued until the first day of the October term, passing over the September term. This is not error.

In *Harrison's Case*, 81 Va., 491, decided March 11, 1886, it was held: A case stands continued without any order, and failure to enter order of continuance works no discontinuance.

SECTION 4014.

The cases cited from 2 Va. Cases are in construction of the common law now abolished.

CHAPTER CXCVII.

SECTION 4016.

In *Whitehead's Case*, 19 Grat., 640, decided January 24, 1870, by the military court of appeals, it was held: The arraignment of a prisoner and his plea are distinct parts of the proceeding; and, therefore, upon his arraignment, and without pleading, he may elect to be tried in the circuit court.

Two prisoners may be arraigned together. This does not prevent their pleading separately and electing to be tried separately.

In *Jackson's Case*, 19 Grat., 656, decided February 16, 1870, by the military court of appeals, it was held: Upon a trial for felony it is the right of the prisoner, a right which he cannot waive, to be present from the arraignment to the verdict. And if the evidence of a witness on a trial, which has been reduced to writing, or any part of it is read to the jury in the absence of the prisoner, it is error, for which the verdict will be set aside.

See *Chahoon's Case*, 20 Grat., 733, cited *ante*, 4003.

In *Boswell's Case*, 20 Grat., 860, decided March, 1871, it was held: A prisoner indicted in a corporation court for murder, is not entitled to elect to be tried in the circuit court.

In *Bolanz's Case*, 24 Grat., 31, decided November, 1873, it was held: Prisoner charged with a felony in the county court appears at the August term, and, on his motion, his case is continued until the first day of the October term, passing over the September term. This is not error.

In *Joyce's Case*, 78 Va., 287, decided January 17, 1884. Upon application for change of *venue*, on ground that an impartial jury cannot be had in that county or brought thereto from another county or corporation, application is refused, and a jury obtained in the county. Held: Prisoner should first have asked for a jury from another county. Not having done so, and an impartial jury having in fact been obtained, the conclusive presumption is that the application for change of *venue* was unfounded. Prisoner may move for continuance before arraignment, but affidavits of prevalence of bitter and general prejudice against him, do not of themselves constitute good grounds for a continuance.

In *Anderson's Case*, 84 Va., 77, decided November 17, 1887. The county court wherein accused was indicted for a capital felony refused to consider, till after his arraignment, motion for continuance, on ground of absence of material, duly-summoned witness, and thereupon accused elected to be tried in the circuit court. Held: Such refusal deprived the accused of his right of free election of forum, and was error.

In *Stoneham's Case*, 86 Va., 523, decided November 14, 1889, it was held: A person charged with a felony that may be punished with death, may, when called to the bar to answer the indictment, elect to be tried in the circuit court, and when the record shows this, it is not error for the circuit court to refuse to remand the case to the county court for trial.

In *Howell's Case*, 86 Va., 817, decided April 10, 1890, it was held: Prisoner indicted for murder, on arraignment elected to be tried in circuit court, and was produced therein, but the record had not been certified, and he moved to be remanded to the county court for trial. The circuit court examined the uncertified record before it held there was error apparent therein, in that the county court had refused to hear prisoner's motion for a continuance before his arraignment, and remanded the case. When afterwards prisoner objected to trial in the county court because he had, upon his arraignment, elected to be tried in the circuit court, but his objection being overruled, the trial proceeded. Held: After election to be tried in circuit court, it alone had jurisdiction to try him, but it could not do so without a certified record of the case, but it had no jurisdiction to correct errors of court below. And so, prisoner has not been lawfully tried.

In *Early's Case*, 86 Va., 921, decided June 19, 1890, it was held: Where prisoner on arraignment, informed of his right to trial in circuit court, pleads "not guilty," and elects to be tried in county court, and counsel appointed to defend were sufferers by the offence charged, but appear to have been faithful and obtained continuance to prepare for trial, and at next term prisoner moves that another plea be substituted, and his election to be tried in the county court be withdrawn, the motion is overruled. Held: No error.

In *Mitchell's Case*, 89 Va., 826, decided March 30, 1893. Where on trial for a capital offence, accused elected to be tried in circuit court, the clerk of the county court failed to certify the copy of the record transmitted to the circuit court. Held: The circuit court acquired no jurisdiction of the case, and a judgment rendered therein was void.

In *Drier's Case*, 89 Va., 529, decided January 12, 1893, it was held: This section, providing that a defendant upon arraignment in the county court for a felony, may demand to be tried in the

circuit court, does not warrant the inference that it is the duty of the court or clerk to inform him of his right to be tried in the latter court.

In *Benton's Case*, 18 Southeastern Reporter, 282, decided November 23, 1893. Defendant had been imprisoned since September, 1892, during which time he was ready and anxious for a trial, and his case was set for trial on the 15th of February, 1893; the case was called, and he demanded a trial, but the Commonwealth's attorney announced that he had made no preparation for trial at that term, that he had recalled processes issued for witnesses, that he could offer no evidence at that term, though defendant offered to admit evidence taken at former trials, except that of one B., who being in prison for felony, was incompetent to testify, and that if ruled to trial a *nolle prosequi* would be entered. The court then continued the case to March 16, the day on which B.'s sentence would expire. Held: That the court erred in such continuance, as there was no good ground therefor, and under Constitution, Article 1, Section 10, and Code, this section, the prisoner was entitled to a speedy trial.

SECTION 4017.

In *Sperry's Case*, 9 Leigh, 623, decided by the General Court, December, 1838, it was held: In a prosecution for felony the accused must be arraigned and plead in person, and in all the subsequent proceedings he must appear in person, not by attorney; and such appearance in person must be shown by the record.

In *Hooker's Case*, 13 Grat., 763, decided November 23, 1855, it was held: A verdict having been found against a prisoner, he moves the court to set it aside as contrary to evidence, which motion is on another day overruled. On the day when the motion is made, and also when it is overruled, the record states that the prisoner appeared by attorney, and there is nothing in the record to show that he was present. This is error.

In *Pifer's Case*, 14 Grat., 710, decided August 20, 1858, it was held, p. 713: In misdemeanor the personal presence of the defendant is not necessary at the trial, but where a man is to receive any corporeal punishment, judgment cannot be given in his absence.

For the reference to 19 Grat., 656, see *supra*, Section 4016, *Jackson's Case*.

In *Boswell's Case*, 20 Grat., 860, decided March, 1871, it was held: The act which provides that a person tried for felony shall be personally present during the trial, does not apply before his arraignment, but before his arraignment an order may be made in his absence.

In *Lawrence's Case*, 30 Grat., 845, decided March 21, 1878, it was held: It is necessary that the prisoner shall be present in person when arraigned, and during his trial, but if it may be inferred from the record that he was present, that is sufficient, though it is not formally stated that he was present.

It is not necessary that the prisoner should be present when the jury, which had been sent out for the night, is brought in in the morning and sent to their room.

In *Price's Case*, 33 Grat., 819, decided January, 1880. Upon the trial of P. for murder, the jury found him not guilty of the murder, but guilty of involuntary manslaughter, and assessed upon him a fine of five hundred dollars, and the court thereon entered a judgment discharging him. At the same term of the court, in the absence of P., the court set aside the judgment and entered a judgment against him for the fine of five hundred dollars and six months imprisonment, and directed him to be arrested and committed to prison. Held: The first judgment was erroneous.

During the same term of the court the matter was under the control of the court, and it was competent for the court to set aside the first, and render the second judgment.

It was not necessary that P. should be present at the court when the second judgment was entered.

In *Jones's Case*, 79 Va., 213, decided July 24, 1884, it was held: It is not error wherefor a verdict of guilty will be set aside, that in the absence of the prisoner, on the morning of the second day of the trial, the jury is called and sent to their room to consider of their verdict, the jury afterwards returning into court and in the presence of prisoner returning their verdict.

In *Cluverius's Case*, 81 Va., 787, decided May 6, 1886, it was held: Where at the end of the record of the proceedings of the court on the day of conviction, it is stated and "Thereupon the accused was remanded to jail," is conclusive that he had been personally present during all the proceedings had that day.

In *Curtis's Case*, 87, Va., 589, decided April 2, 1891, it was held: Where trial interrupted by sudden fit and the removal of prisoner was resumed upon his restoration and return into court. Held: Not error.

In *Shelton's Case*, 89 Va., 450, decided December 1, 1892, it was held: A person indicted for felony must be shown from the record to have been personally present at every stage of the prosecution; nor can he waive the right to be present, and entry upon the record. "This case was continued for the defendant" does not show that he was personally present, as it is a settled principal that the presumption that a court of general jurisdiction acts rightly cannot supply an essential part of the record.

SECTION 4018.

In *Sprouce's Case*, 2 Va. Cases, 375, decided by the General Court, November, 1823, it was held: A *venireman*, who had heard a relation of what the principal witness for the prosecution had sworn to, and had said that if these things were true he believed the prisoner guilty; but who declared, on his *voir dire*, that he felt no prejudice, was open to conviction, and if the facts did not turn out as they had been represented he was ready to change his opinion, is a good juror, and the prisoner's challenge for cause was properly overruled.

In *Hughes's Case*, 5 Rand., 655, decided by the General Court, November, 1826, it was held: A hypothetical declaration (made by a juror before he was impaneled), that "if he (the prisoner) killed the man he ought to be hanged," is not a sufficient ground on which to grant a new trial, such declaration not being an opinion as to the prisoner's guilt.

In *Pollard's Case*, 5 Rand., 659, decided by the General Court, June, 1827, it was held: A juror, who having heard the testimony of a witness in the cause and then formed an opinion on it, and was doubtful whether he had expressed the opinion or not, though he thought it most probable he had expressed it, but declared that at the time of the trial he had no prejudice against the prisoner or his cause, and that he could, as he believed, give the prisoner as fair a trial as if he had not heard anything on the subject, is an impartial juror, and a challenge against him for cause ought to be overruled.

In *Jones's Case*, 1 Leigh, 598, decided November, 1829, it was held: By-standers are called as jurors in a capital case, and, at the instance of the accused, are sworn and examined touching their indifferency, and then elected by the prisoner and sworn of the jury; upon objections to the indifferency of these jurors, discovered after the trial, not directly inconsistent with what was disclosed by the jurors themselves on their examination touching their indifferency, the court ought not to set aside a verdict of guilty, just in itself, though the objections be such, that if known and disclosed before the jurors were elected and sworn, they might have been good cause of challenge to the jurors, much less if the objections be such as would not have been good cause of challenge.

In *Brown's Case*, 2 Leigh, 769 (erroneously quoted 778) decided by the General Court, November, 1830: A person being called as a juror in a case of felony, says on *voir dire*, "that he had expressed an opinion on the circumstances as he had heard them narrated in the country, but he had not heard any of the evidence given on the examination of the prisoner, or conversed with any of the witnesses or parties, and he did not think the opinion so formed would have any influence

on his mind in trying the case," and this juror is challenged for cause. Held: The challenge for cause rightly disallowed.

In *Osiander's Case*, 3 Leigh, 780, decided July, 1831. A person called as a juror in a criminal case, and examined as to his indifferency on his *voir dire*, declared he had heard reports concerning the case in the country, and a state of the circumstances from one of the witnesses, and had formed a hypothetical opinion, but he believed it would not influence his mind as a juror; he believed the account he had heard of the case at the time he heard it (and he did not now express any doubt of its truth) if the evidence at the trial should correspond with the account he had heard, his former opinion would remain, but if it should be different, he felt satisfied he would be able to decide the cause without being influenced by what he had before heard, and without prejudice; and it did not appear that the witness had ever before expressed the opinion he had so formed. Held: Such preconceived hypothetical opinion did not constitute good cause of challenge to the juror. To constitute good cause of challenge to a juror, on the ground of preconceived opinion of the case formed by him, it must appear that such preconceived opinion was a decided one.

In *Stephen's Case*, 4 Leigh, 679, decided by the General Court, December, 1833, it was held: Motion in arrest of judgment because several of the petty jurors were not freeholders, this being matter of fact not appearing in the record, is not a good reason for arresting judgment.

In *Hendrick's Case*, 5 Leigh, 708, decided by the General Court, December, 1834, it was held: A person called to serve as a juror in a criminal case, being examined on his *voir dire*, first says he is not a freeholder, but soon afterwards, before the panel is completed, returns into court and says he was mistaken, that he has been reminded of his mistake by a friend, and that he is a freeholder; the court holds him a good and lawful juror, and then the prisoner challenges him peremptorily. Held: The court was right in permitting such correction of the first mistaken statement and in holding him a good and lawful juror.

Persons called to serve as jurors in a criminal case, examined on their *voir dire*, say they have heard part of the evidence on a former investigation, and formed some opinion thereon, yet the opinion so formed would nowise incline their minds as jurors for or against the prisoner, but they could pass upon the case upon the whole evidence as impartially as if they had never heard of it. Held: Such persons are good and impartial jurors.

A person called to serve as a juror in a criminal case is elected by the prisoner, but before he is sworn the prisoner

retracts his election, and asks that he may be permitted to challenge him peremptorily; the court refused to permit such peremptory challenge, and the juror is sworn and serves on the jury. Held: This was error, the prisoner having an absolute right to challenge any juror peremptorily at any time before he is sworn.

In *Moran's Case*, 9 Leigh, 651, decided by the General Court, June, 1839. On a trial for murder, two jurors are severally examined on their *voir dire*: 1. One states that he was not present at the examination of the prisoner before the hustings court, and has heard no statement of the evidence from any witness or person who was present; that he has heard the case spoken of in the town, and rumors in regard to its circumstances, upon which he has expressed no opinion, though he believes those rumors to be true, and if they should turn out upon the trial to be true he has a decided opinion in regard to the case; but he feels no prejudice, and is satisfied that he shall be able to decide the case upon the evidence which may be given in, uninfluenced by the rumors he has heard; that the opinion he had formed was, that if the prisoner had stabbed the deceased under the circumstances which he had heard, he ought to be punished. 2. The other juror states that he has made up no decided opinion; that he has heard part of the evidence of one witness, and formed an impression, and if the balance of the testimony should run in that way, that impression would be confirmed; that as far as the evidence went he had a decided opinion, if the rest should not run against it; but that he has no prejudice, has not expressed any opinion, and is prepared to decide the case according to the evidence which may be given in, uninfluenced by the portion of evidence he had heard. Held: Both the jurors are competent.

In *Maile's Case*, 9 Leigh, 661, decided by the General Court, December, 1839. On a trial for felony, a juror, being examined on his *voir dire*, states that he was not present at the examining court, but has heard a report of some of the circumstances of the case; that he does not know that the report came from any one who heard the evidence at the examining court, nor does he believe it to be a full detail of all the circumstances, but he believes it to be true, and upon that belief has formed and expressed a decided opinion, which is still abiding on his mind; but he believes that, notwithstanding what he has heard, his mind is open to conviction; and he has no doubt that, if the facts should turn out to be different from what they have been represented to him, his opinion would be changed. Held: He is a competent juror.

In *Stockley's Case*, 10 Leigh, 678 (2d edition, 712), decided by the General Court, December, 1840, it was held: A circuit

court has the right and power, on the trial of an indictment for felony, to compel a venireman or bystander, called to serve as a juror on the trial, to be sworn on his *voir dire*, and to answer proper questions touching his fitness as a juror in the particular case.

In *Heath's Case*, 1 Rob., 735 (2d edition, 796), decided by the General Court. A person called as a juror upon a trial for felony, and sworn to answer questions touching his competency, having deposed that he has formed no opinion nor come to any conclusion on the case, prisoner's counsel is about to interrogate him further, and asks whether he has not conversed much about the case, when the court arrests the examination, and decides that no further question shall be put to the juror by the prisoner's counsel, and that he is a competent juror. Held: Such proceeding and decision of the court are erroneous, and judgment against the prisoner must be reversed therefor.

The doctrine laid down in *Osiander's Case*, 3 Leigh, 780, and in *Armistead's Case*, 11 Leigh, 657, as to the disqualification of jurors by preconceived opinions respecting the case of the accused is reaffirmed. A person is not rendered incompetent as a juror in a criminal case by the formation of a legal opinion upon facts previously presented to his mind, as he would be by the formation of previous convictions in respect to the facts themselves.

After a verdict of conviction for murder in the first degree, prisoner adduces testimony that two of the jurors who tried the case, and who, on the *voir dire*, declared that they had not formed or expressed any opinion as to the guilt or innocence of the prisoner, had, in fact, previous to the trial, expressed decided opinions that the prisoner was guilty, and ought to be hung; of which circumstance, the prisoner alleges, he had no knowledge until since the verdict was rendered; and on this ground he moves to set aside the verdict. Held:

Such inquiry was open, and the evidence admissible, for the purpose of showing perjury and corruption in the jurors; but, it belonged exclusively to the judge who presided at the trial to weigh the conflicting credibility of the witnesses adduced by the prisoner and of the jurors, and to decide whether, in justice to the prisoner, and upon all the circumstances of the case, a new trial ought or ought not to be awarded.

In *Overbee's Case*, 1 Rob. (2d edition) 819, decided by the General Court. Pending a trial for felony, and before the testimony closes, five of the jury having received permission to retire from the court-room accompanied by the sheriff, another juror thereupon leaves the jury-box without the knowledge of the court, passes out of the courthouse through a crowd of persons collected about the door, and remains absent a few min-

utes, after which he returns into court, having, as he deposes, held no communication whatever with any person during his absence, but not having been, during that period, in charge of the sheriff, or even seen by him. The trial proceeds, and the prisoner is convicted. Held: Such separation of the juror from his fellows is sufficient cause for setting aside the verdict.

The reference to 2 Rob., 77, is error.

In *Hailstock's Case*, 2 Grat., 564, decided December, 1845, by the General Court. A person called as a juror on a trial for a felony swears upon his *voir dire* that he has not formed an opinion as to the prisoner's guilt or innocence, and is challenged peremptorily by the prisoner, whereupon on getting out of the courthouse he remarks in a rather warm and excited manner, "It is well I was rejected, for if I were on the jury I would send the prisoner to the other side of Boston." Afterwards the prisoner, to make up the jury, elects this person as a juror, not then being informed of his remark. Held: No ground for a new trial.

In *Day's Case*, 3 Grat., 629, decided December, 1846, by the General Court, it was held: A juror in a criminal case must be a freeholder in the county to the officer of which the *venire facias* is directed.

In *Epes's Case*, 5 Grat., 676, decided December, 1848, it was held, by the General Court, p. 681: Several days being taken up in completing the panel in a trial for murder, it is not necessary that the jurors who have been sworn shall be committed to the custody of the sheriff until the whole number of the panel is completed.

The prisoner objecting to a juror on the ground that the *venire facias* was illegally executed, and the court sustaining the objection, it is proper to set aside the whole return and direct another *venire facias*.

In *Smith's Case*, 6 Grat., 696, decided December, 1849, by the General Court, it was held: A prisoner is examined before the Hustings Court of Richmond and sent on to the Circuit Court of Henrico to be tried, and the *venire facias* is directed to the sergeant of the corporation, who executes it and returns the panel for the trial of the prisoner. The *venire facias* is properly executed by the sergeant.

In *Smith's Case*, 7 Grat., 593, decided June, 1850, it was held, by the General Court: The entertaining a decided opinion of the prisoner's guilt, formed on the testimony as published in the newspapers, is not a valid objection to a juror if he thinks he can discard his opinion, and that it would not influence his judgment, and that he could give the prisoner a fair trial according to the law and the evidence submitted to the jury.

The prisoner was charged with having advised, etc., two

slaves to abscond at the same time; a *venireman* summoned on the first trial was stricken from the panel by the prisoner. This is not a valid objection to him as a juror on the second trial.

In *Curran's Case*, 7 Grat., 619, decided June, 1850, it was held, by the General Court: A juror having expressed himself before the jury was empaneled as determined to punish a prisoner if taken on a jury, not from any malice toward him, but from an opinion of his conduct, is no ground for setting aside the verdict and granting a new trial.

In *Clore's Case*, 8 Grat., 606, decided December, 1851, by the General Court, it was held: Upon trial for murder, a *venireman* when called states that he has conscientious scruples about the propriety of capital punishment, and is opposed to it, and being asked by the Commonwealth's attorney whether if the testimony in the cause proved the prisoner to be guilty of murder in the first degree he would convict him of it, replies, "I do not know." He is properly challenged for cause by the attorney, and set aside by the court.

A *venireman* when called stated "that he had not heard any of the evidence, nor had he heard any report of it from those who had heard it, but from the rumor of the neighborhood he had formed an opinion, which at the time he spoke was existing on his mind, and which he should stick to unless the evidence should turn out to be different from what rumor had reported it to be; that he had no prejudice or partiality for or against the prisoner, and believed he would give him a fair and impartial trial according to the evidence that should be given in." He is a competent juror, and challenge of him for cause by the prisoner was properly overruled.

In *Dowdy's Case*, 9 Grat., 727, decided August 16, 1852, it was held: It is good objection to a juror in a case of felony that he is not a freeholder.

If a prisoner's objection to a juror is improperly overruled, the error is not cured by the juror's name being stricken off from the panel by the prisoner, or his not being drawn as one of the twelve who are to try the prisoner.

In *Wormley's Case*, 10 Grat., 658, decided April, 1853, it was held: After the original *venire* is exhausted without completing the panel, the court may order any number of persons to be summoned it may think necessary, and if the sheriff, for want of time or other cause, fails to summon the whole number, his return is valid for as many as are summoned.

The prisoner objects to a juror, and his objection is overruled, and he excepts. After the panel is made up, but before the prisoner has exercised his right of challenge, the court, on the motion of the attorney for the Commonwealth, out of abundant caution, sets aside the juror. This is not error.

In *Jacques's Case*, 10 Grat., 690, decided April, 1853, it was held: On a trial for arson, the nephew of the deceased wife of the person whose house was burned, if she left children, is an incompetent juror.

Such relationship to a party on the record would be a cause of principal challenge. If it be not a cause of principal challenge because the person whose house was burned is not a party on the record, it is a case in which, a favor being apparent, he should be set aside.

In such case if the deceased wife left no issue, it is for the prosecution to show the fact, and that fact not being shown, the objection is valid.

In *Montague's Case*, 10 Grat., 767, decided October, 1853, it was held: On a trial for a felonious offence the court of its own motion, without the suggestion of either party, may examine all upon oath who have been summoned to serve upon the jury, touching any disability created by statute, such as infancy, want of freehold or, property qualifications, or in capital cases, conscientious scruples on the subject of capital punishment, and upon any such disability being thus made to appear, or if it be thus shown that any one summoned has been convicted of perjury, the court may, and should set aside any such juror of its own action, without objection made by either party.

On a trial for felony the court of its own motion, without the suggestion or consent of either party, may excuse or set aside a juror who, though in all other respects competent, is disabled physically or mentally, by disease, domestic affliction, ignorance of the vernacular tongue, loss of hearing, or other like cause from properly performing the duties of a juror. But the erroneous exercise of this power is a matter of exception by the prisoner, for which the judgment of the court may be reversed.

As no challenge to a juror is allowed to the Commonwealth except for cause when such challenge is made, the cause should be shown, and should be a good and legal cause for the exclusion of the juror, otherwise it should be overruled.

The decision of a court allowing the challenge on the part of the Commonwealth, or disallowing a part of the challenge on the part of the accused, whether such challenge be a principal challenge or a challenge to the favor, is a matter of exception on the part of the accused, which it is his right to have reviewed in the appellate court.

The court cannot, of its own motion, whether no challenge is made without good cause, set aside a juror except where he is disabled physically or mentally from properly performing the duties of a juror or is disqualified by statute.

Though in all cases great weight is justly due to the opinion of the court before whom the jurors are questioned and exam-

ined, yet upon exception taken the appellate court must judge from the facts therein stated whether the reason for setting aside a juror is good and sufficient or contrary.

A talesman when examined on his *voir dire* said that he had heard a great deal about the case, but he had not heard or read the evidence given at the examinations before the mayor or hustings court, and that he had formed no opinion on the subject. He then stated that since the prisoner had been in jail his wife and family had moved to the lot adjoining his residence, and had lived there; they were often at his house, and that there was great intimacy between the families, and on that account he would rather not sit in the case, that his mind might be influenced; and in answer to a question from the court, he said he was unwilling to trust himself under the circumstances; he thought he would give the prisoner a fair trial on the evidence; that he had no prejudice for or against the prisoner; there was no connection by blood or marriage between them, and that he had never spoke to the prisoner's wife or family about the trial. He is a competent juror, and it is error to set him aside, for which the prisoner may except and have the judgment reversed.

The appellate court will not inquire whether injury has been done to the prisoner by improperly setting aside a competent juror, but the law will intend prejudice to the prisoner.

In *Dilworth's Case*, 12 Grat., 689, decided March 5, 1855, it was held: On a trial for a felony, a member of the grand jury which found the indictment against the prisoner is not a competent juror to try him. If the prisoner does not know, or might not with due diligence have known, that one of the jury was a member of the grand jury which found the indictment against him, until after the jury is impaneled and sworn, he may make the objection to the juror, if made before any of the evidence is introduced.

The statute only relates to those disabilities created by our statutes, and does not refer to other causes of challenge which exist at common law, and as to which our statutes are silent.

In *Bristow's Case*, 15 Grat., 634, decided July, 1859, it was held, p. 648: It is a principal cause of challenge to a juror that he was one of the grand jury that found the indictment. But if the objection is not taken until after the verdict, it will not be set aside on this ground, unless it appears from the whole case that the juror was biased against the prisoner, who had not therefore had a fair and impartial trial.

An objection to the mode of selecting a jury in a trial for murder must be made at the time the jury are chosen, and prisoner cannot avail himself of it after verdict.

After the panel has been completed, and the prisoner has

struck off the eight, the jury may be selected from the remaining sixteen, either by drawing by lot, four who shall be discharged, or the twelve who shall constitute the jury.

In *Booth's Case*, 16 Grat., 519, decided April 18, 1861, it was held: Persons over sixty years of age are not disqualified from serving on grand juries, though they are exempted from the service if they choose to claim the exemption.

In *Wash's Case*, 16 Grat., 530, decided October 29, 1861, it was held: The acts directing the issue of a *venire facias* are merely directory to the officer, and the prisoner cannot object to the writ because the acts have not been complied with.

Jurors in case of felony are not now required to own estate, real or personal, of the value of one hundred dollars, and if the writ of *venire facias* requires the officers to summon jurors with this qualification, it will be quashed on motion of the prisoner.

If there is an error on the face of the writ of *venire facias*, and the prisoner moves to quash it, though he does not specify the error, it may be taken advantage of in the appellate court.

In *Whitehead's Case*, 19 Grat., 640, decided January 24, 1870, by the military court of appeals, it was held: The statute requires the *venire* men to be persons "residing remote from the place where the offence is charged to have been committed." This direction is mandatory; and the writ is defective, and should be quashed if it is omitted; and it is not in violation of the Bill of Rights.

In *Sands's Case*, 21 Grat., 871, decided January, 1871, it was held: The list given by the judge to an officer who is to summon jurors for the trial of a prisoner for felony, contains but twenty-four names, and the officer returns the names of nineteen of them whom he has summoned, and of five as not found. Though it would be best for the judge to put more than twenty-four names on the list, it is not error to give but twenty-four, and the return of the officer that he has summoned less than the twenty-four, and that the others were not found, is a valid return.

The court before which a prisoner is arraigned for trial, if qualified jurors who are not exempt from serving cannot be conveniently found in the county or corporation, may send to another county or corporation for such jurors.

A person who is qualified to vote by the Constitution of Virginia is a competent juror, though he is disabled from holding office by the Fourteenth Amendment to the Constitution of the United States. The provision in the State Constitution, Article III., Section 3, has reference to the disability to hold office under that Constitution by that provision which was stricken out by the vote of the people.

In *Craft's Case*, 24 Grat., 602, decided November, 1873, it

was held: If a person has the constitutional qualifications of a voter, though he has not been registered and has not voted, he is a qualified juror.

In *Poindexter's Case*, 33 Grat., 766, decided January, 1880. Upon an indictment of P. for the murder of C., before the jury is called the prisoner moves the court to quash the *venire facias* and the return thereon for errors and irregularities appearing thereon. The only ground of error is, that the act requires the jurors to be summoned, etc., "remote from the place where the offence is charged to have been committed," and the language of the *venire facias* is, "where the felony was committed." Held: This was error.

A jury not having been obtained from the twenty-four persons summoned under the first *venire facias*, a *tales* is issued directing the persons named by the judge to be summoned, "who reside remote from the place where the felony was committed." Held: The introduction of these words into the *tales*, if not required by the statute, is in accordance with the policy of the law, and does not invalidate the *venire*; and in a *venire facias* sent to a distant city the insertion of these words is immaterial.

In *Baccigalupo's Case*, 33 Grat., 807, decided January, 1880, it was held: In a criminal prosecution for felonious stabbing with intent to kill, the first *venire facias* and the return thereon having been exhausted without getting a jury, it is not error to insert in the second *venire facias* a direction that persons be summoned who reside remote from the place where the felony was committed.

In *Mitchell's Case*, 33 Grat., 845, decided March, 1880. M. and two others are indicted for murder in the County Court of L., and on their arraignment they elect to be tried in the circuit court. A writ of *venire* is issued by the county court for the summoning of a jury, returnable to the circuit court, and the twenty-four men summoned by the county court are summoned to the circuit court. On the motion of the prisoner this *venire* is quashed by the circuit court, and the court directs another *venire* of twenty-four to be summoned, and names the twenty-four summoned on the first *venire*. Held: The directing the same twenty-four men to be summoned is not error.

In *Richards's Case*, 81 Va., 110, decided November 19, 1885, it was held: In case where death may be the punishment, writ shall require to be summoned twenty-four persons of the county or corporation, to be taken from a list to be furnished by the judge, residing remote from the place where the offence is charged to have been committed, and qualified in other respects to serve as jurors. From these shall be selected a panel of sixteen, free from exception, and from this panel the accused may

strike four, and the remaining twelve may constitute the jury. Omission to comply with these provisions is fatal error.

In *Honesty's Case*, 81 Va., 283, decided January 7, 1886, it was held: In a case where death may be the punishment, the writ shall require to be summoned twenty-four persons of the county or corporation, to be taken from a list to be furnished by the judge, residing remote from the place where offence is charged to have been committed, and qualified in other respects to serve as jurors. From these shall be selected a panel of sixteen, free from exception, and from this panel the accused may strike four, and the remaining twelve shall constitute a jury.

In *Lawrence's Case*, 81 Va., 484, decided February 25, 1886, it was held: A man of color indicted for a felony is not entitled to demand to be tried by a mixed jury.

In legal sense all parts of adjoining county are remote from scene of crime, where it is alleged it was committed within a corporation. When one juror has been summoned from too near the scene of crime, objection should be made to him and not to the array.

In *Coleman's Case*, 84 Va., 1, decided November 17, 1887. The writ of *venire facias* commands sheriff to summon twenty-four persons from list to be furnished by county judge, and to have "there" this writ and the judge's list of said jurors, is followed in the record by the "list of *venire*" referred to above, and is signed by the name of the county judge with nothing to indicate his official capacity, and is endorsed "executed by summoning the within-mentioned parties" and signed by the sheriff. Held: The record conclusively shows that the persons were summoned from a list furnished and signed by the county judge.

In *Vawter's Case*, 87 Va., 245, decided December 11, 1890, it was held: Ordering persons to be summoned without a writ of *venire facias* is ground for motion in arrest of judgment, though the objection was not made before the jury were sworn.

In *Robinson's Case*, 88 Va., 900, decided March 17, 1892, it was held: Where the record is silent, this court will presume that an order to summon a grand jury was duly made.

Objection is waived, when not made till after verdict, that without writ of *venire facias* grand jury was summoned from list furnished by the judge. Moreover, by Section 3978 a special grand jury may be summoned without such list.

In *Prince's Case*, 89 Va., 330, decided September 22, 1892, it was held: Where a *venire facias* was issued for a jury for a trial during the term of each of three felony cases, including that of the defendant, and defendant was tried by a jury composed of persons thus summoned, held: Such proceeding sufficiently complies with Code.

A juror's residing at place of alleged commission of the offence charged cannot be availed of by challenge to the array, but by objection to the individual juror.

In *Clarke's Case*, 18 Southeastern Reporter, 440, decided December 7, 1893, it was held: Where in a criminal case a *venire facias* is ordered to be directed to the sergeant of another county to summon jurors, under the authority of Section 4024, it is not necessary that a list be furnished such officer, as is required by Sections 4018 and 4019, when jurors are summoned from the county in which the case is tried.

SECTION 4019.

In *Williams's Case*, 85 Va., 607, decided January 10, 1889, it was held: Under this section, where persons from the bystanders are ordered to be summoned to complete the panel on trial of a felony, the list is not required to be signed by the judge.

See the case of *Clarke vs. The Commonwealth*, 18 S. E. Rep., 440, cited *supra*, Section 4018.

SECTION 4020.

In *Wormley's Case*, 10 Grat., 658 and 684, decided April, 1853. The regular term of the court having been spent, and only one of the *veniremen* summoned to try the prisoner having been found free from exception, the court discharges him, and being of the opinion that jurors qualified to serve cannot be gotten in the county, makes an order directing the sheriff to summon thirty persons from each of two corporations, to attend as jurors for the trial of the prisoner at a special term of the court appointed to be held, and to which time the court adjourns. Held: It was not necessary to have another *venire facias* for summoning jurors from the county returnable to the special term, before making the order to summon jurors from abroad; and there was no error in directing jurors to be summoned from two counties or two corporations at the same time.

SECTION 4021.

See *Clore's Case*, 8 Grat., 606, cited *ante*, Section 4018; see *Montague's Case*, 10 Grat., 767, cited *ante*, Section 4018.

SECTION 4022.

See *Clore's Case*, 8 Grat., 606, cited *ante*, Section 4018.

SECTION 4023.

In *Gibson's Case*, 2 Va. Cases, 111, decided by the General Court, November, 1817, it was held: If a jury cannot be formed from the original panel, nor from the bystanders, in consequence of the prisoner's challenges, the court may award a *venire facias* commanding the sheriff to summon a specified

number to attend the court then in session; and, upon the return of the process, the prisoner may be compelled to elect a jury, saving his right of challenge. Such process may be awarded on the report of the sheriff that there are no other bystanders. Nor will the court, at a subsequent time, hear proof that there were other qualified bystanders who had not been called.

See *Dowdy's Case*, 9 Grat., 727, cited *ante*, Section 4018; see *Bristow's Case*, 15 Grat., 634, cited *ante*, Section 4018. The reference to 21 Grat., 571, is error; it should be 871; see *ante*, Section 4018. See *Mitchell's Case*, 33 Grat., 845, cited *ante*, Section 4018.

In *Hall's Case*, 80 Va., 555, decided June 18, 1885, it was held: The statutory provisions are imperative and essential. The accused is entitled to demand strict compliance with them. Omission of such compliance is error.

In a case where death may be the punishment, the writ shall require to be summoned twenty-four persons of the county or corporation, to be taken from a list to be furnished by the judge, residing remote from the place where the offence is charged to have been committed, and qualified in other respects to serve as jurors. From these shall be selected a panel of sixteen, free from exception, and from the panel the accused may strike four, and the remaining twelve shall constitute the jury.

In a felony case, where from those summoned and in attendance a sufficient number of jurors cannot be had, a new *venire facias* must be directed, requiring to be summoned from the bystanders, or from a list to be furnished by the court, as many persons as may be deemed necessary.

Omission to direct a new *venire facias*, or omission of any statutory essential apparent on the face of the record, is error, and may be taken advantage of after the verdict by motion in arrest of judgment, failure of the accused to make the objection before the jury is sworn being no waiver.

Cluverius's Case, 81 Va., 787, decided May 6, 1886, it was held: It is not error in the trial court to discharge a *venireman* who had previously expressed opinions repugnant to inflicting capital punishment on circumstantial evidence, or who had made a bet on the result of the trial.

Hall's Case, 80 Va., 555, approved as to mode of selecting a jury.

SECTION 4024.

The reference to 7 Grat., 673, is an error. See *Dowdy's Case*, 9 Grat., 727, cited *ante*, Section 4018; see *Wormley's Case*, 10 Grat., 658 and 672, cited *ante*, Section 4020.

In *Chahoon's Case*, 21 Grat., 822, decided November, 1871, it

was held: The court before which a prisoner is arraigned for trial, if qualified jurors not exempt from serving cannot be conveniently found in the county or corporation, may send to another county or corporation for such jurors; and in acting in such a case the court must have a large discretion.

See *Sands's Case*, 21 Grat., 871, cited *ante*, Section 4018.

In *Craft's Case*, 24 Grat., 602, decided November, 1873, it was held: In directing jurors to be summoned from another county, the court may make an order directing its officer to summon them, or may direct the clerk to issue a *venire facias* requiring the officer to summon them.

A corporation court has authority to direct jurors to be summoned from without the limits of the corporation for the trial of a prisoner indicted in that court, when an impartial jury cannot be obtained within the corporation.

In the sense of the law all parts of the adjoining county outside of the limits of the corporation are remote from the place where the offence is alleged to have been committed, if it is alleged to have been committed within the limits of the corporation. Where jurors are directed to be summoned from an adjoining county, and it appeared that one of the panel had been summoned by mistake or misapprehension of the law or otherwise from a place near to instead of remote from the vicinage, the objection, if valid, instead of being made to the array of jurors, should be made to the individual juror summoned.

See *Page's Case*, 27 Grat., 954, cited *ante*, Section 3894; see *Clarke's Case*, 18 S. E. Rep., 440, cited *ante*, Section 4018.

SECTION 4025.

In *Bennett's Case*, 8 Leigh, 745, decided by the General Court, December, 1837, it was held: The sheriff is *ex-officio* bound to keep the jury when adjourned in a criminal cause, and it is not indispensably necessary that he should be sworn, but if it were necessary to swear him, it would be presumed that he was sworn, in a case where the record does not show the contrary.

In *McCarter's Case*, 11 Leigh, 633, decided by the General Court, June, 1841. Upon trial of indictment for murder the jury not agreeing on a verdict, are, after dark, adjourned over till next morning, and committed to two sheriffs to be inclosed in a room to be prepared for them; in conducting them from the courthouse to their room, one juror separates from his fellows, gets twenty-five yards from them and the sheriffs having them in charges tells a servant whom he meets to take care of his horse, say nothing else to any one, and no one speaks to him; he is immediately pursued by one of the sheriffs and brought back to the rest of the jury, his separation does not exceed a minute, and he was a yet shorter time out of sight of the sheriffs.

Next morning the jury finds the prisoner guilty of murder in the first degree and court passed sentence of death. Held: Such separation of the juror from his fellows is no cause for setting aside the verdict.

In *Tooe's Case*, 11 Leigh, 714, decided by the General Court, December, 1841, it was held: In impaneling for trial of an indictment for felony, there is no necessity to keep the jurymen who have been elected and sworn together and separate from other persons, under charge of the sheriff, until the whole number shall be elected and sworn.

In impaneling a jury for trial of an indictment for felony, eight are elected and sworn, and three elected but not sworn; one who has been sworn separates from the rest, goes some miles off and stays some hours; the other ten are put in charge of the sheriff, to be kept together and separate from other persons till ensuing morning; upon attachment against the absconding juror, he is taken the same night and put and kept in the same room with the other jurymen till next morning, but there appears to have been no conversation on the subject of the prosecution; next morning, by allowance of the court, this jurymen is challenged by the prisoner for cause, and set aside; the jury is then completed, and find the prisoner guilty. Held: The separation of the absconding juror from his fellows, and his subsequent association with them, though he was afterwards struck from the panel, does not vitiate the verdict, and is no good reason for a new trial.

After a jurymen has been elected and sworn, the court may, in its discretion, allow the prisoner to challenge him for cause, and strike him from the panel.

In *Williams's Case*, 2 Grat., 567, decided December, 1845, it was held, by the General Court: On a trial for felony, the court has no authority to discharge the jury without the consent of the prisoner, merely because the court is of opinion that the jury will not be able to agree. There must be a necessity for the discharge of the jury to authorize it. If the court improperly discharge the jury without the consent of the prisoner, he is entitled to be discharged from the prosecution.

The practice of finally adjourning the court, without noticing the jury, whereby it is discharged by operation of law, or of discharging them simultaneously with the final adjournment of the court, approved.

In *Thompson's Case*., 8 Grat., 637, decided December, 1851, by the General Court: A juror called by the prisoner as a witness, states that on a certain morning during the progress of the trial, before the rest of the jury had risen, he rose, dressed himself and went down stairs to the pavement before the door of the hotel where the jury were lodged for the night, for the

purpose of meeting with a passer-by to send a message to his family, and after remaining there about five minutes and seeing no one passing, he returned to the rest of the jury. Held: That the only proof of separation of the jury being that of the juror, the prisoner's witness, who negatives all abuse, tampering or improper influence, the act of the juror is not sufficient grounds for setting aside the verdict and granting a new trial.

In the progress of a trial which lasts several days, upon the adjournment of the court at night the jury are committed to the sheriff to be kept until next day. The most convenient and suitable accommodation which can be provided for the jury is in the third story of a large hotel, where they are placed in five different rooms opening upon a common passage which communicates with the street below by flights of stairs, the doors of their chambers being unlocked during the night, the jurors being unwilling to have them locked from apprehension of fire during the night, and there being no doors or other fastenings at either ends of the passage. Held: This is not a separation of the jury for which the prisoner is entitled to a new trial.

In the morning before the court meets, the jury are walking out, accompanied by the sheriff, for relaxation and exercise, and pass the boundary line separating the county in which the trial is progressing from an adjoining county, and remain in the adjoining county a few minutes, but there is no separation or communication with any one by any of the jurors. Held: This is not a separation of the jury, and the prisoner is not entitled to a new trial.

A jury in a criminal trial concur in opinion as to the guilt of the prisoner, but differ as to the length of time for which he should be sentenced to the penitentiary; and they agree that each one shall state the time for which he will send him to the penitentiary, and that the aggregate of these periods, divided by twelve, shall be the verdict. After it is done they strike off the odd months, and all agree to the verdict, understanding what it is. Held: This is not misbehavior in the jury for which the verdict will be set aside and a new trial awarded.

Is it not misbehavior in a juror between the adjournment of the court in the evening and its meeting next morning to drink spirituous liquors in moderation.

A medical witness for the Commonwealth being accidentally present at the hotel when the jury are brought there by the sheriff to be lodged for the night, invites the jury, in the presence of the sheriff, to drink with him, and some of them accept the invitation. The act was inadvertent, but intended only as an act of courtesy, and it was all in the presence of the sheriff. This is not sufficient to set aside the verdict and award a new trial.

In *Trim's Case*, 18 Grat., 983, decided January, 1868, it was held: On a trial for murder, during a recess, the jury is committed to the keeping of the high-sheriff, who is sworn to keep them, but his deputy is not sworn. The high-sheriff goes out with a part of the jury, leaving the others in the jury-room with the deputy, and with the door locked or closed. This is not misconduct of the jury which will entitle the prisoner to a new trial.

In *Phillips's Case*, 19 Grat., 485, decided November 4, 1868, it was held: The authority of a judge, who presides at a criminal trial, extends over the jury not only during the day while they are in court, but after the adjournment for the day; and it is not illegal or improper for the judge to take charge of a juror in the temporary absence of the sheriff to whom the jury has been committed.

Separation of a juror out of the custody and control of the officers having charge of the jury, is *prima facie* sufficient to vitiate the verdict; and it is incumbent on the Commonwealth to refute that presumption by disproving all probabilities or suspicions of tampering.

In *Read's Case*, 22 Grat., 924, decided December 11, 1872, it was held: On the trial of a prisoner for a felony, which lasts several days, the sheriffs are sworn to keep the jury and not allow them to be spoken to, or to speak to them themselves in relation to the case. In the progress of the trial one of the deputies is called by the Commonwealth, and gives evidence of a fact which had occurred in his presence, and the same fact had been proven by other witnesses. This is not sufficient ground for setting aside the verdict.

In *Jones's Case*, 31 Grat., 830, decided November, 1878, it was held: The statute having dispensed with the necessity of keeping the jury together in prosecutions where the penalty cannot be death or confinement in the penitentiary for ten years if the jury in prosecution for malicious stabbing, etc., with intent to kill, etc., find the prisoner guilty of unlawful cutting with intent, etc. Upon a motion to set aside the verdict and grant a new trial on the ground of the separation of the jury before the verdict was rendered, the court is not bound to set aside the verdict for that cause, if it approved the verdict and is satisfied it is fairly and honestly rendered, and that neither the Commonwealth nor the prisoner had been damnified by the separation.

Upon a motion to set aside the verdict on the ground of the separation of the jury, the prisoner must prove the separation by affidavits or proof in court, and the offer to prove, which the court refuses under the circumstances to hear, is not sufficient to enable the appellate court to act on the question. The exception should show the proof.

In *Jones's Case*, 79 Va., 213, decided July 24, 1884, it was held: Where the offence tried is not punishable with death or ten years confinement in the penitentiary, an objection that the jury was allowed to separate has no merit, though the court may have ordered that they be boarded at a hotel during the trial.

SECTION 4026.

In *Fell's Case*, 9 Leigh, 613, decided by the General Court, June, 1838, it was held: In any criminal case, whether capital or other, the court has power for good cause to discharge the jury and put the accused upon his trial before a new jury.

Such power held to have been properly exercised in a capital case where the jury had been kept together for nine days without agreeing on a verdict, and the health of one of the jurors was suffering from confinement, while the personal attentions of another juror were required by the situation of his wife.

Williams's Case, 2 Grat., 567, is given *supra*, Section 4025.

In *Dye's Case*, 7 Grat., 662, decided June, 1851, by the General Court, it was held: If it does not appear on the record that the defendant objected, it will be presumed in the appellate court that the court below discharged the jury impaneled and sworn in the case for sufficient cause, and with the consent or acquiescence of the defendant. In cases of misdemeanor, the court has authority to discharge without or against the consent of the defendant.

The reference to 32 Grat., 872, is to a case in which the statute is not construed, but only quoted as a final disposition of questions raised.

SECTION 4027.

In *Mc Whirt's Case*, 3 Grat., 594, decided June, 1846, by the General Court, it was held: Where several persons are proceeded against jointly for a felony before an examining court, and are sent on to the superior court for trial, the clerk of the county court should issue a separate *venire facias* for summoning a *venire* for the trial of each of them separately. Hence the statute.

The reference to 18 Grat., 981, does not apply to the Code of 1887; it was a construction of a previous act.

In *Jones's Case*, 31 Grat., 836, decided November 14, 1878, it was held: Where two persons are indicted jointly for conspiracy to prosecute another for larceny, neither of them is entitled to a separate trial.

In such case, both the defendants having been found guilty, one of them applies for a new trial, which is overruled, and he obtains a writ of error. The other does not apply for a new trial, and there is a judgment against him. The judgment may

be reversed as to the one who appeals, without reversing the judgment against the other, who did not apply for a new trial.

SECTION 4028.

The reference to 7 Grat., 619, is an error.

SECTION 4029.

See *Mc Whirt's Case*, 3 Grat., 594, cited *ante*, Section 4027; see *Curran's Case*, 7 Grat., 619, cited *ante*, Section 4028.

The reference to 18 Grat., 981, does not apply to the Code of 1887; it was a construction of a previous act.

In *Lewis and Divinney's Case*, 25 Grat., 938, decided December 10, 1874, it was held: Where two persons have been indicted jointly for a misdemeanor, they cannot claim any right to be tried separately.

SECTION 4036.

In *Vance's Case*, 2 Va. Cases, 162, decided by the General Court, June, 1819, it was held: The venue being changed from the county of R. to that of W., a plea that the murder was committed in R., and that, therefore, the court of W. has no jurisdiction, is bad on demurrer. Nor can the array of the jury be challenged because they were summoned by the sheriff of W.

A prisoner having been arraigned, and having pleaded in the county in which the offence was committed, need not be arraigned, nor be required to plead, in the county to which the venue is changed.

In the case of *Boswell vs. Flockheart*, 8 Leigh, 364, decided May, 1837, it was held: An application by a defendant for a change of venue, on the ground of general prejudices existing against him in the town where the cause is to be tried, should be supported by the affidavits of disinterested individuals.

See *Wormley's Case*, 10 Grat., 658, cited *ante*, Section 4020.

In *Wright's Case*, 33 Grat., 880, decided July, 1880. Upon an application of the prisoner to change the venue, upon the ground that an impartial jury cannot be had in the county, the application is refused, and a jury is obtained in the county. Held: If the prisoner feared that he could not get an impartial jury in the county, he should first have asked that the jurors should be sent for from another county; and he not having done this, and an impartial jury having been, in fact, obtained, the appellate court will not set aside a verdict for the refusal of the court to change the venue.

See *Joyce's Case*, 78 Va., 287, cited *ante*, Section 4016.

SECTION 4037.

In *Vance's Case*, 2 Va. Cases, 162, decided by the General

Court, June, 1819: It was held: If a prisoner has been tried and convicted of a crime, and a new trial awarded to him, although he should not be again tried till after the third term (subsequent to his examination) he is not entitled to a discharge.

SECTION 4038.

In *Vance's Case*, 2 Va. Cases, 162, decided June, 1819, by the General Court, it was held: This section does not require the clerk to certify of the record of the examining court.

SECTION 4039.

In the case of *Boswell vs. Flockheart*, 8 Leigh, 364, decided May, 1837, it was held: When a judge of the circuit court is so situated to render it improper in his judgment for him to preside at the trial of a cause, the statute makes it lawful for him to remove the cause to another circuit. In such case, however, the propriety of removing or refusing to remove depends upon the selfconsciousness of the judge, and an appellate court cannot revise his decision.

SECTION 4040.

In *Kirk's Case*, 9 Leigh, 627, decided by the General Court, December, 1838, it was held: Where a verdict finds a prisoner guilty upon some of the counts in an indictment, saying nothing of others, judgment of acquittal should be entered upon those counts of which the verdict takes no notice.

In *Hardy & Curry's Case*, 17 Grat., 592, decided January 26, 1867, it was held, pp. 599 and 615: When assault is a necessary ingredient of a felony charged, the prisoner may be acquitted of the felony and convicted of the assault.

See *Canada's Case*, 22 Grat., 899, cited *ante*, Section 3671.

In *Page's Case*, 26 Grat., 943, decided April 1, 1875, it was held: An indictment for felony contains three counts, and on the trial of the prisoner he is found guilty on the third count. He is entitled to a judgment of acquittal on the first and second counts.

In *Stuart's Case*, 28 Grat., 950, decided July 26, 1877, it was held: It is settled law in this State that where there are several counts in an indictment, and the jury find the accused guilty upon one of the counts, saying nothing as to the others, the verdict operates as an acquittal upon the counts of which the verdict takes no notice, and the court should enter a judgment accordingly.

In such a case if the accused applies for and obtains a new trial he does not thereby waive the advantage of the acquittal thus obtained; but he must be tried, and can only be tried again

on the count on which he was convicted, and not on the counts on which he has been before acquitted; and the rule is the same whether the new trial is granted because the verdict is contrary to the evidence, or because the verdict is so defective or uncertain, that legally no judgment can be pronounced thereon.

In *Briggs's Case*, 82 Va., 554, decided November 18, 1886, it was held: So much of this section as declares that, "If a verdict be set aside on the motion of the accused and a new trial be awarded, on such new trial the accused shall be tried, and such verdict may be found and sentence pronounced as if a former verdict had not been found," is not unconstitutional.

On indictment for murder at first trial accused is convicted of murder in the second degree, and gets verdict set aside, at the second trial he pleads that he has been before acquitted of murder in the first degree by virtue of his conviction of murder in the second degree, and moves that the jury be instructed to exclude a finding of murder in the first degree. It is not error to reject the plea nor to deny the instruction.

This is the case cited from 11 Va. Law Journal, 139.

In *Prather's Case*, 85 Va., 122, decided July 19, 1888, it was held: On motion to set aside a verdict of conviction and award a new trial in a criminal case, the sole question is, is the verdict plainly insufficient to support the verdict?

In *Muscoe's Case*, 86 Va., 443, decided January 9, 1890, it was held: The accused is entitled to a full and correct statement of the law applicable to the evidence in his case, and any misdirection by the court in point of law on matters material to the issue, is ground for a new trial.

SECTION 4041.

Reference to 2 Va. cases, 210, is error.

SECTION 4042.

Livingstone's Case, 14 Grat., 592, is a query as to whether, on indictment for murder, verdict of manslaughter on second trial, a verdict of higher grade than manslaughter may be entered; since decided that it can not.

See *Hardy & Curry's Case*, 17 Grat., 592, cited *ante*, Section 3674; see *Canada's Case*, 22 Grat., 899, cited *ante*, Section 3671; see *Hoback's Case*, 28 Grat., 922, cited *ante*, Section 3671.

SECTION 4043.

See *Poindexter's Case*, 6 Rand., 667, cited *ante*, Section 3707.

The reference here given to 1 Leigh, 625, is an error, as 1 Leigh has not that number of pages.

SECTION 4044.

See *Nardy & Curry's Case*, 17 Grat., 592, cited *ante*, Section 3674.

In *Glover's Case*, 86 Va., 382, decided November 21, 1889, it was held: Refusal to instruct jury that, if they believe from the evidence that prisoner intended to commit a felony, but before committing it voluntarily abandoned it, they were to find him not guilty, and instructing them that on an indictment for felony prisoner might be found guilty of an attempt to commit a felony. Held: Not error.

SECTION 4045.

See *Kirk's Case*, 9 Leigh, 627, cited *ante*, 4040.

In *Page's Case*, 9 Leigh, 683, decided by the General Court, December, 1839. An indictment (described in the record of the finding and in the entry of the arraignment as an indictment for forgery) contains: *First*, a count for forging and counterfeiting a note; and *second*, a count for feloniously using and employing as true a counterfeit note. Verdict finds the prisoner guilty of forgery, as alleged in the indictment. Held: An acquittal must be entered on the second count.

In *Mowbray's Case*, 11 Leigh, 643, decided June, 1841, by the General Court, it was held: The rule of practice in criminal cases, that if an indictment contain several counts, some good and others faulty, and a general verdict of guilty be found, the bad counts will not affect the validity of the good, and judgment will be given on those which are good, is not applicable to cases of penitentiary crimes in Virginia, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by the verdict.

In *Clere's Case*, 3 Grat., 615, decided December, 1846, by the General Court. An examining court sends on a prisoner to the superior court to be tried for the larceny of a slave. The indictment against him in the superior court is not only for the larceny, but for carrying the slave from one county to another, without the master's consent, and with intent to defraud him; and also for aiding and enticing the slave to abscond. Held: It is error.

If the indictment includes offences for which the prisoner has not been tried and sent on by the examining court for farther trial, it is error, and the court should, upon the motion of the prisoner, quash the counts of the indictment which charge these offences.

The common-law rule, that a good count in the indictment, where the other counts are bad, will support a general verdict of guilty, is overruled in Virginia as to offences which are punishable by confinement in the penitentiary.

In *Shifflet's Case*, 14 Grat., 652, decided March 9, 1858, it was held, p. 672: If it appears from the record returned with the *certiorari* that the prisoner had appeared, and that the court had, on his motion, quashed one of the counts in the indictment, though on his trial he pleaded to the whole indictment, and was tried on the count which was quashed as well as on the others, yet this is not cause for reversing the judgment.

See *Canada's Case*, 22 Grat., 899, cited *ante*, Section 3671. See *Page's Case*, 26 Grat., 943, cited *ante*, Section 4040. See *Stuart's Case*, 28 Grat., 950, cited *ante*, Section 4040.

In *Richards's Case*, 81 Va., 110, decided November 19, 1885, it was held: When of two counts the second is bad, but jury finds a general verdict of guilty, and fixes a punishment that should not be fixed under the first count, the verdict must be set aside, and a new trial awarded. Accused is entitle to acquittal under the first count, as the verdict must have been under the second.

SECTION 4046.

In *Kemp's Case*, 18 Grat., 969, decided January, 1868, it was held: Several prisoners having been tried together for the same felony, and found guilty, the court may grant a new trial to one of them, and render a judgment against the others.

In *Jones's Case*, 31 Grat., 836, decided November 14, 1878, it was held: On an indictment for conspiracy the jury cannot find either party guilty unless they believe from the evidence that there was an agreement of mind between the two to do and perform the matters and things as charged in the indictment.

SECTION 4047.

See *Vance's Case*, 2 Va. Cases, 162, cited *ante*, Section 3737.

In *Ex-parte Santee*, 2 Va. Cases, 363, decided by the General Court, November, 1823, it was held: The word "term" ought to be construed to mean not the stated time when a court should meet, but the actual sessions of the court.

In *Carwood's Case*, 2 Va. Cases, 527 (erroneous reference to 546), decided by the General Court, June, 1826, it was held: If after the prisoner has been examined by the county court for an offence, two actual sessions of a superior court thereafter occur, and it does not appear from the records of the superior court that an indictment has been found against him, he is entitled under our statute to be discharged from imprisonment, although he has been in fact arraigned on and has pleaded to an indictment not appearing by the record to have been found by the grand jury, and if a third actual term has passed without such record of the finding, he is entitled under the statute to be discharged from the crime.

In *Green's Case*, 1 Rob., 736 (2d edition, 791), decided by the General Court. A prisoner charged with felony being indicted at the term of the circuit court after his examination, the case is continued at that term for the want of time to try it. At the second term the case is continued on the motion of the prisoner upon the ground of the absence of a material witness for him. At each of the three succeeding terms the case is again continued for the want of time to try it. Held: That upon the expiration of the last of the five terms, the prisoner became entitled under the statute to be forever discharged of the crime imputed to him.

In *Bell's Case*, 8 Grat., 600, decided December, 1851, by the General Court, it was held: A prisoner being sent on for further trial by an examining court which sat during the session of the circuit court to which he is sent for further trial, that term of the circuit court is not one of the two at which the statute directs that he shall be indicted or that he shall be discharged from imprisonment.

In *Adock's Case*, 8 Grat., 661, decided December, 1851, by the General Court. A prisoner is indicted for embezzling the goods of W., and at the fifth term after he was examined for the offence he is tried and convicted, but the verdict is set aside for a variance between the allegation and the proof as to the ownership of the goods, and the case is continued. At the next term of the court the attorney for the Commonwealth enters a *nolle prosequi* upon the indictment, and the prisoner is indicted again for the same offence; the indictment being in the first count as in the former indictment, and another count charging the goods embezzled to be the goods of A. Upon his arraignment he moves the court to discharge him from the offence, on the ground that three regular terms of the court had been held since he was examined and remanded for trial without his being indicted. The attorney for the Commonwealth opposes the motion, and offers the record of the proceedings of the circuit court upon the first indictment to show that he had been indicted, tried, and convicted, which was objected to by the prisoner. Held: The record is competent, and the only competent evidence upon the question.

The second indictment being for the same act of embezzling as the first, and the prisoner having been indicted, tried, and convicted in time, and the verdict set aside for the variance, the second indictment was proper and in time; and the prisoner is not entitled to be discharged.

The exceptions or excuses for failure to try the prisoner, enumerated in the statute, are not intended to exclude others of a similar nature, or in *pari ratione*, but only that if the Commonwealth was in default for three terms without any of the

excuses for the failure enumerated in the statute, or such like excuses fairly implicable by the courts from the reason and spirit of the law, the prisoner should be entitled to his discharge.

In *Jones's Case*, 19 Grat., 478, decided October 17, 1868. In September, J. is committed to be tried for a felony at the October term of the county court, and at that term of the court an information is filed against him, and he elects to be tried in the circuit court, and is remanded for trial in that court. He remains in jail until the April term of the court, 1868, no indictment having been found against him. The grand jury terms of the county court are November and June. At the April term of the circuit court, after the grand jury has been discharged, he applies for a writ of *habeas corpus* to obtain his discharge. Held: Having been committed for trial in the county court, that is the court in which he is held to answer in the sense of the statute, though he may have been remanded for trial in the circuit court; and he should be indicted in the county court. The second term of the court spoken of in the statute is the second term at which a grand jury is directed to be summoned. If it was so that the prisoner was held to answer in the circuit court, that would not be until he was remanded to that court; and therefore, though the prisoner was committed for trial in the county court, before the September term of the circuit court, that could not be one of the two terms spoken of by the statute. And if the November term in the county could be connected with the April term in the circuit court, still, though the grand jury at the April term had been discharged before the application for the writ, the judge might have ordered another grand jury to be summoned during the term, and therefore the term could not be counted as one of the terms until it was ended.

In *Sands's Case*, 20 Grat., 800, decided January, 1871, it was held: The three terms spoken of in the act are three terms after that at which the prisoner is first held for trial: And though a prisoner has been arrested and committed to jail, or gives bail to appear, or does appear, or is brought into court on the first day of a term of a court, that term is not to be counted as one of the three terms aforesaid.

In *Hall's Case*, 78 Va., 678, decided March 13, 1884. H. was examined before a justice of the peace for felony, May 9, 1883, and was remanded for trial in the Hustings Court of D. That court held terms May 10 and June 4, 1883, at both of which grand juries were impaneled. But H. was indicted for the said felony not until October, 1883. Failure to indict did not arise from any of the causes excepted in the statute. To the indictment H. filed a special plea in bar, which was rejected. On

error, held: The plea is good, and H. is entitled to his discharge from imprisonment.

In *Smith's Case*, 85 Va., 924, decided March 21, 1889. The prisoner plead that he had been held for trial more than four terms after indictment. Replication that during that period prisoner had been convicted, and the conviction reversed; and that he had been held, till reversal, for punishment, not for trial. Held: Sufficient.

In *Davis's Case*, 89 Va., 132, decided June 23, 1892, it was held: Code, Section 4047, providing that accused shall be tried within four terms of the county court after indictment, is satisfied by trial at the fourth term after he was indicted.

CHAPTER CXCVIII.

SECTION 4050.

In *Crowe's Case*, 1 Va. Cases, 125, decided by the General Court, it was held: The right of appeal does not extend to criminal cases, or prosecutions by indictment in behalf of the Commonwealth.

In *Vawter's Case*, 1 Va. Cases, 127, decided by the General Court, it was held: No appeal or writ of *supersedeas* is grantable in any case wherein the Commonwealth is plaintiff upon a penal statute which is considered in the nature of a criminal prosecution.

In *Temple's Case*, 1 Va. Cases, 163, decided by the General Court, it was held: No judgment of an inferior court on a presentment for a misdemeanor can be reviewed and reversed by a superior court either upon appeal or *supersedeas*, the common-law writ of error being the only way in which such judgments can be reviewed and reversed, which writ of error may issue without any regard to the costs, or the value of the judgment, and without the assent of the attorney for the Commonwealth.

See *Page vs. Clopton*, 30 Grat., 415, cited *ante*, Section 3385.

SECTION 4052.

In *Harrison's Case*, 2 Va. Cases, 202, decided by the General Court, it was held: No writ of error lies for the Commonwealth in a gaming or any other criminal case.

In *White vs. King & McCall*, 5 Leigh, 726, decided July, 1835, it was held: An act of assembly empowers a county court to issue a writ of *ad quod damnum*, and to give leave to an individual to make a dam across a river which is a public highway, as if it was not a public highway, provided he shall not be entitled to the benefit of the act unless he make in his dam and keep in repair a lock or slope for the passage of fish, boats, etc., and the act constitutes the county court judge of the sufficiency

of the lock or slope, with power to abate the dam as a nuisance, if, after three months notice, entered of record, the lock or slope shall in its opinion be insufficient; the dam is erected by leave of the court, notice is given by two individuals and entered of record of a motion to abate the dam as a nuisance, because raised higher than authorized, and because of no sufficient lock or slope, and on that motion the county court orders the dam to be abated as a nuisance, and the circuit superior court affirms the order. Held: This is a criminal prosecution, and a writ of error lies from this court to the order of the circuit court affirming the order of the county court.

In *Abraham's Case*, 11 Leigh, 675, decided by the General Court, December, 1841, it was held: The General Court has no jurisdiction to award a writ of error to a refusal of a judge of a circuit superior court in vacation to award a writ of error to a judgment of an inferior court; nor has this court jurisdiction to award a writ of error to an inferior court.

In *Scott's Case*, 10 Grat., 749, decided November 23, 1853, it was held, p. 754: In a prosecution for selling ardent spirits at retail to be drunk at the place where sold, without having first obtained a license to keep an ordinary, a writ of error lies for the Commonwealth from the judgment of an inferior court.

In *Lewis & Diviney's Case*, 25 Grat., 938, decided December 10, 1874, it was held: On a trial for a misdemeanor in a county court, there is a verdict and judgment against the defendants, and they take the case to the circuit court where the judgment is reversed, and the cause retained for a new trial. There may be a writ of error to the court of appeals from the judgment of the circuit court.

SECTION 4053.

In *Stokely's Case*, 1 Va. Cases, 330, decided by the General Court, it was held: The superior court of law of a county has jurisdiction of appeals from judgments for contempt of court rendered in the county court.

Dandridge's Case, 2 Va. Cases, 408, decided by the General Court, June, 1824, was appealed by the defendant from the district circuit court to the General Court.

In *Wells's Case*, 21 Grat., 500, decided November, 1871, it was held: An appeal may be taken to the court of appeals from the judgment of the circuit court imposing a fine upon a person for a contempt of the court, in aiding to obstruct the execution of a decree of the court.

SECTION 4055.

In *Lazier's Case*, 10 Grat., 708, decided July, 1853, it was held: A writ of error awarded during term to a judgment in a case of felony may be made returnable to any day of the term.

SECTION 4056.

In *Connor's Case*, 2 Va. Cases, 30, decided by the General Court, November, 1815, it was held: A writ of error in a criminal case does not of itself have the effect of a *supersedeas*, in each case the court will direct by an endorsement that it shall have that effect if it be proper.

SECTION 4058.

This reference, 2 Va. Cases, 122, is to a case which is so vague that no authority can be derived from it.

In *Brook's Case*, 4 Leigh, 669, decided by the General Court, July, 1833, it was held: A circuit superior court not averting to the statute of 1832-'33, sentences a convict to solitary confinement in the penitentiary for one-sixth of the term of imprisonment fixed by the verdict; judgment reversed for this cause, but the General Court proceeds to enter judgment, that the solitary confinement shall be one-twelfth of the term, according to that statute.

The reference to 2 Grat., 538, is an error.

In *Nemo's Case*, 2 Grat., 558, decided June, 1845, it was held by the General Court: The statute gives no authority to the General Court to correct the judgment of an inferior court.

In *Marshall's Case*, 5 Grat., 663, decided June, 1848, by the General Court, it was held: On an indictment for unlawful stabbing under the statute of Virginia, a verdict of "guilty of unlawful stabbing" will not authorize a judgment, but the court should direct a new trial.

In *Old's Case*, 18 Grat., 915, decided October, 1867, it was held: Where the presentment does not charge the offence, the appellate court will reverse the judgment against the accused, though no motion in arrest of judgment was made in the court below.

Where a pecuniary judgment has been rendered against a defendant in a criminal case, and he pays it, and upon appeal the judgment is reversed, the cause will be remanded to the court below for an order of restitution to be made therein, if the money is yet in the hands or in the power of the court.

In *Chahoon's Case*, 21 Grat., 822, decided November, 1871, it was held: A point in the cause in which the judges of the court of appeals are equally divided stands affirmed by virtue of the act, as well where it is a ruling of the court below in the progress of the cause as where it is the final judgment of the court in the case; and this decision is final and irreversible, and cannot be changed upon a second appeal in the cause.

SECTION 4071.

In *Quinling's Case*, 2 Va. Cases, 494, decided by the General Court, June, 1826, it was held: If a defendant against whom a

judgment has been rendered for a fine or amercement in a prosecution for a misdemeanor, being in custody under a *capias pro fine* or a *capias ad satisfaciendum*, take the oath of an insolvent debtor, surrendering his property, and be thereupon discharged, such discharge is an exoneration from all further liability on such judgment as to said fine or amercement. No other *ca. sa.* can afterwards be obtained against him, by motion to the court or otherwise, nor can a *fi. fa.* be issued against his after-acquired goods and chattels.

SECTION 4074.

In *Webster's Case*, 8 Grat., 702, decided June, 1852, by the General Court, it was held: Where a party is imprisoned upon a *capias pro fine* for a fine and costs, he can only obtain his discharge from imprisonment. But the term of his imprisonment under such *capias* is limited by the provision in the Code.

In *Wilkerson (Sheriff) vs. Allan*, 23 Grat., 10, and p. 20, decided January 22, 1873, it was held: A. is indicted for a misdemeanor, and the jury find him guilty and assess his fine at five hundred dollars, and the court sentences him to be imprisoned for four months and until he pays the fine. The governor remits so much of the sentence as orders A.'s imprisonment for four months, and the jailer discharges him from custody. The Commonwealth then sues out a *capias pro fine*, under which A. is taken into custody by the sheriff; and he then applies for a writ of *habeas corpus*, and asks for his discharge. Held: The governor has no authority to remit the fine, and does not intend it by his pardon. The effect of the pardon was to remit the four months imprisonment, but it did not affect the remaining part of the judgment. The discharge of A. by the sheriff did not discharge his liability for the fine to the Commonwealth; and he may be taken in execution by a *capias pro fine*.

SECTION 4076.

In *Shifflett's Case*, 18 Southeastern Reporter, 838, decided January 11, 1894, it was held: It is not error to enter a judgment calling for imprisonment in jail, in the absence of defendants charged with a misdemeanor, the rule of the common law requiring their presence having been changed by Code, this section.

CHAPTER CXCIX.

SECTION 4081.

In *St. Claire's Case*, 1 Grat., 556, decided December, 1844, by the General Court. In a prosecution for a misdemeanor at the instance of a voluntary prosecutor, the defendant files a plea in abatement, that one of the grand jurors who found the indictment was not a freeholder; and the issue made upon that

plea is found for the defendant, and the indictment quashed. Held: The courts should give judgment for the costs against the prosecutor.

SECTION 4087.

In *Webster's Case*, 8 Grat., 702, decided June, 1852, by the General Court, it was held: Where there is a judgment in favor of the Commonwealth for a fine and costs of prosecution, the writ may issue for the fine and the costs; but where the judgment is for costs without a fine, the writ is not a proper process to enforce the judgment.

In *Anglea's Case*, 10 Grat., 696, decided April, 1853. A person convicted and sentenced for felony is afterwards pardoned by the executive, releasing him from all pains, penalties, and forfeitures incurred in his prosecution by the Commonwealth. The statute only subjects the prisoner for such costs as the Commonwealth is bound to pay, and, therefore, does not embrace the fees of the clerks, sheriffs, or attorneys for the Commonwealth. Held: That the pardon did not release him from these costs.

In *Finch's Case*, 14 Grat., 643, decided January 27, 1858, it was held: A prisoner convicted of a felony, and obtaining a writ of error to the court of appeals, where the judgment is affirmed, is not responsible for the fees of the clerk or the attorney-general.

CHAPTER CC.

SECTION 4090.

In *Scott's Case*, 10 Grat., 749, decided October, 1853, it was held, p. 755: The presentment in such a case describes the defendant as a free negro. As, for this offence, white persons, Indians, and free negroes are to be prosecuted and punished in the same manner, a plea that the defendant is an Indian and not a free negro is an immaterial plea, and was properly excluded.

SECTION 4093.

See *Craig's Case*, 6 Rand., 731, cited *ante*, Section 3965; see *Bias vs. Floyd (Governor)*, 7 Leigh, 640, cited *ante*, Section 3965.

In *Welling's Case*, 6 Grat., 670, decided December, 1849, by the General Court, it was held: The county court has the authority to require a party to enter into a recognizance to keep the peace, at least where the proceeding was commenced before the act of 1848.

In *Archer's Case*, 10 Grat., 627, decided January, 1854, it was held: In the case of a *scire facias* against a bail upon a recognizance in a case of felony, a plea which alleges that at the time the recognizance was entered into the principal was by law acquitted and discharged of the said several supposed offences of

which he stood charged presents no defence for the bail; and this, whether the plea is to be considered as averring an acquittal of the principal upon the trial had, or discharged by operation of law for the failure to try him within three terms of the court.

In such case that at the time of entering the recognizance the principal was unlawfully imprisoned by the Commonwealth, and detained in prison until by force and duress of imprisonment he and his security entered into the cognizance, presents no defence for the bail.

Where a recognizance has a condition to do some act for the doing of which an obligation may be properly taken, and the court or officer taking it had the authority of law to act in cases of that general description, the recognizance is valid, though it does not recite the special circumstances under which it was taken; and in declaring upon such a recognizance it is not necessary to aver the existence of the particular facts which show that the court or officer had authority to take it.

The condition of the recognizance being that the principal shall make his appearance on the first day of the next term of the court to which he was recognized, but that the judge who presided on the first said day of the court would not sit in his case or make any order therein, does not present a defence for the bail.

A plea that a previous prosecution against the principal for the same offences to which, by the recognizance he had undertaken to appear, had been terminated by a *nolle prosequi* presents no defence to the action.

See *Gedney's Case*, 14 Grat., 318, cited *ante*, Section 3965.

SECTION 4097.

In the case of *Randolph (Governor) vs. Brown et als.*, 2 Va. Cases, 351, decided by the General Court, June, 1823, it was held: A recognizance has been entered into by the defendant to keep the peace generally, and particularly towards J. S. The *sci. fa.* issued on this recognizance merely set forth that the defendant had failed to perform the conditions of the said recognizance. This *sci. fa.* is defective in not stating how, or in what, he had broken his recognizance, and it ought to be quashed.

In the case of *Garland vs. Ellis*, 2 Leigh, 555, decided March, 1831. A demurrer to a *sci. fa.* upon a recognizance of special bail is regular practice. In a joint action of debt against three obligors, three persons severally undertake, by several recognizances, as special bail for each of the three defendants; after judgment, creditor sues out one *sci. fa.* against the three bailors upon their several recognizances. Held: They cannot be joined in one *sci. fa.*, and that the *sci. fa.* is naught, and ought to be quashed.

See *Bolanz's Case*, 24 Grat., 31 and 38, cited *ante*, Section 3965.

SECTION 4099.

See *Craig's Case*, 6 Rand., 731, cited *ante*, Section 3965.

In *Caldwell's Case*, 14 Grat., 698, decided August 26, 1858, it was held, p. 707: It appears clear that the courts of *oyer* and *terminer* have the right at any time before a recognizance is estreated either to estreat or spare it. This is a discretion vested in them for the obvious purpose of remitting the obligation in a hard case. The statute has extended this power.

SECTION 4100.

In *Hamlett's Case*, 3 Grat., 82, decided April, 1846, it was held: The recognizance of bail taken by a justice of a prisoner sent on for trial by the examining court must show on its face that the examining court had entered of record that the prisoner was bailable, and had fixed the amount in which bail should be taken.

In *Allen's Case*, 18 Southeastern Reporter, 437, decided December 7, 1893, it was held: Under this section it is no objection to the issue of a *scire facias*, on a bail bond given by one accused of felonious assault, that the condition of bond was that defendant should appear to answer the charge against him instead of to answer the felony whereof he stands charged.

SECTION 4104.

In the case of *Morris vs. Creel*, 1 Va. Cases, 333, decided by the General Court, it was held: Attachment ought not to issue for contempt until a rule is served upon the person in contempt to show cause why it should not.

See *Deskins's Case*, 4 Leigh, 685, cited *ante*, Section 3768.

TITLE LIV.

CHAPTER CCI.

SECTION 4106.

In *Wolverton's Case*, 75 Va., 909, it was held: A justice of the peace has jurisdiction either to try and punish a prisoner charged with petit larceny or to examine and send him on to the county court to be indicted and tried therefor; and where he exercises only the latter jurisdiction, on the trial in the county court the plea of "twice in jeopardy" will not lie.

In *Miller's Case*, 88 Va., 618, decided January 15, 1892, it was held: This section, conferring upon justices jurisdiction concurrent with that of the county and corporation courts over the offence of keeping a bawdy house, is repugnant to Article I.,

Section 10, Virginia Constitution, and Sections 4107 and 4108. Giving in such cases the right of appeal and trial by jury in the appellate court does not relieve Section 4106 of its repugnancy.

SECTION 4107.

In *Read's Case*, 24 Grat., 618, decided November, 1873, it was held: When a person is tried by a justice of the peace for a petit larceny and convicted he has an absolute right of appeal to the county court; and in that court the cause is to be heard *de novo* upon the evidence; and the accused is entitled to be tried by a jury, as in like cases originating in that court. In such a case it is error in the county court to reverse the judgment of the justice and remand the case to the justice to be tried; and any subsequent trial of the case by the justice is null and void. In such case the justice again tries and convicts the accused, and he again appeals to the county court. The proceedings before the justice on the second trial being null, the accused is in the county court upon the first appeal, and is to be tried by a jury as if the case had originated in that court. The accused having been tried by a jury in the county court, and found guilty and sentenced, the errors in the proceedings of the justice on his second trial cannot affect the judgment of the county court.

TITLE LV.

CHAPTER CCII.

CHAPTER CCIII.

SECTION 4174.

The reference to 2 Va. Cases, 467, has no bearing on the present statute, but had on the statute in force at the time of the decision, a very different law.

In *Ruffin's Case*, 21 Grat., 790, decided November, 1871, it was held: A penitentiary convict is hired to work on a railroad, and in Bath county, in attempting to escape, he kills the man put by the contractor to guard him. He may be tried for the offence before the Circuit Court of the city of Richmond, and by a jury summoned from the city.

The Bill of Rights, though made a part of the present Constitution, has the same force and authority, and no more, that it has always had; and the principles which it declares have reference to free-men, and not to convicted felons. A convicted felon has only such rights as the statutes may give him.

A person convicted of a felony and sentenced to confinement in the penitentiary is, until the time of his imprisonment has

expired, or he has been pardoned, in contemplation of law, in the penitentiary, though he may have been hired out to work on the railroad, or the like, in a distant county; and the laws relating to convicts in a penitentiary apply to him.

SECTION 4176.

See *Ruffin's Case*, 21 Grat., 790, cited *supra*, Section 4174.

CHAPTER CCIV.

SECTION 4179.

This reference to 2 Va. Cases, 465, has no bearing on this statute, but construes an old one placing this jurisdiction in the Superior Court for Henrico county.

In the case of *King vs. Lynn (Penitentiary Superintendent)*, 18 Southeastern Reporter, 439, decided November 23, 1893. Code 1887, Sections 4179, 4182, provide that if a person sentenced to the penitentiary, and received therein, shall have been before sentenced to like punishment, and the record of his conviction does not show that he was sentenced under Sections 3905, 3906, requiring a sentence for an increased term, in such cases the superintendent of the penitentiary shall file an information in the Circuit Court of Richmond to require the convict to say whether he is the person formerly convicted and sentenced, and if he remain silent and deny such identity, a jury of bystanders shall be summoned to try the issue thus raised, and upon a verdict against the prisoner, the court shall sentence him to such further confinement as is prescribed by the Chapter 190 in case of a second or third conviction. Held: That such provisions are constitutional, as such prisoner is not in the position of one charged with a crime for the first time, with all the presumptions of law in favor of his innocence.

SECTION 4180.

In *Brooks's Case*, 2 Rob., 845, decided by the General Court, December, 1843. A report being made by the superintendent of the penitentiary that a convict received into the penitentiary is the same person mentioned in the record of a former conviction, and that he has not been sentenced to the punishment prescribed by law for his second offence, the court continues the case at several successive terms, in the absence and without the consent of the convict; after which he is brought into court for the first time, and his identity being duly ascertained, he is sentenced to the proper punishment for his second offence. Held: Such continuance of the case furnishes no ground of objection to the judgment.

SECTION 4181.

For *Brooks's Case*, 2 Rob., 845, see *ante*, Section 4180.

SECTION 4182.

In *Brooks's Case*, 2 Rob., 845, decided by the General Court, December, 1843. Upon an inquiry whether a convict received into the penitentiary be the same person mentioned in the record of a former conviction, the prisoner has no right to challenge peremptorily any person called as a juror.

See *King vs. Lynn*, 18 S. E. Rep., 439, cited *ante*, Section 4179.

SECTION 4183.

In *Bryant's Case*, 2 Va. Cases, 465, decided by the General Court, June, 1825, it was held: A convict ascertained to be serving a second term, may, on his being identified, either by verdict or by confession, be sentenced by said court to a portion of confinement in solitary cells.

SECTION 4185.

See *Ruffin's Case*, 21 Grat., 790, cited *ante*, Section 4174.

SECTION 4187.

In *Johnson's Case*, 2 Grat., 581, decided December, 1845, it was held, by the General Court: On the trial of a convict from the penitentiary for a felony, a convict confined there for felony is a competent witness for the prosecution.

 TITLE LVI.

CHAPTER CCV.

SECTION 4198.

In the case of *Lee (Sergeant) vs. Murphy*, 22 Grat., 789, decided December 4, 1872, it was held: The governor of Virginia has authority under the Constitution to grant a conditional pardon to a prisoner convicted of felony. The condition annexed to a pardon must not be impossible, immoral or illegal, but it may, with the consent of the prisoner, be any punishment recognized by statute, or by the common law as enforced in this State. Though the warrant of the governor speaks as commuting the punishment, yet as it substitutes a less for a greater punishment, and is intended to be done, and is done, with the consent of the prisoner, it will be considered a pardon, and not a commutation of the punishment.

In the case of *Wilkerson (Sheriff, for, etc.) vs. Allen*, 23 Grat., 10 and 20, decided January, 1873. A. is indicted for a misdemeanor, and the jury find him guilty and assess his fine at five hundred dollars, and the court sentences him to be imprisoned for four months, and until he pays the fine. The governor re-

mits so much of the sentence as orders A.'s imprisonment for four months, and the jailer discharges him from custody. The Commonwealth then sues out a *capias pro fine*, under which A. is taken into custody by the sheriff; and he then applies for a writ of *habeas corpus*, and asks for his discharge. Held: The governor has no authority to remit the fine, and does not intend it by his pardon. The effect of the pardon was to remit the four months imprisonment; but did not affect the remaining part of the judgment.

In *Blair's Case*, 25 Grat., 850, decided March 12, 1874, it was held: Under the Constitution of Virginia, the governor has authority to pardon a person convicted of a felony by the verdict of a jury, before sentence is passed upon him by the court.

SECTION 4199.

See *Wilkerson (Sheriff) vs. Allen*, 23 Grat., 10 and 20, cited *ante*, Section 4198.

TITLE LVII.

CHAPTER CCVI.

SECTION 4202.

In the case of *Carter's Heirs vs. Edwards*, 88 Va., 205, decided July 2, 1891, it was held: This section repealed the act of March 9, 1880, as to actions of ejectment in certain counties, the said act being a general law.

SECTION 4204.

In *Scott's Case*, 2 Va. Cases, 54, decided by the General Court, June, 1817, it was held: Where an offence is made a felony by statute, and the statute be afterwards repealed, no proceedings can be had after the repeal for an offence committed under it, unless the repealing statute have a proviso enabling the proceedings for offences committed before. This rule is applicable to cases where the repealing statute has a clause describing the offence and prescribing the punishment, in all respects the same with the statute repealed.

In *Attoo's Case*, 2 Va. Cases, 382, decided by the General Court, November, 1823, it was held: The passage of an act which prescribes a new punishment for old offences, and repeals all laws coming within the purview of it, without providing that offences committed before the operation of the new law shall be punished under the old, operates as a discharge to all who have committed such offences and have not been tried previous to the new law going into effect.

In *Pegram's Case*, 1 Leigh, 569, decided June, 1829, it was

held: A statute passed in the Assembly of 1827-'28, prescribing a new punishment for an offence committed after May 1, 1828, does not repeal former statutes, defining the offence and prescribing other punishment for the same, as to such offence committed before May 1, 1828.

In *Allen's Case*, 2 Leigh, 727, decided June, 1830. By statute of 1819 grand larceny is defined as stealing goods to the value of four dollars and upwards, and punished by imprisonment, etc., not less than one nor more than three years; by statute of 1824 larceny committed after May 1, 1824, to the value of ten dollars and upwards, is defined grand larceny, and punished as grand larceny theretofore was, and larceny of goods of less value than ten dollars is defined petit larceny, and punished as petit larceny theretofore was; and the latter statute neither makes provisions as to larcenies committed before May 1, 1824, nor contains any express repeal of the former statute. Held: The latter statute does not repeal the former as to larcenies committed before May 1, 1824.

In the case of *Curran et als. vs. Spraul et als.*, 10 Grat., 145, decided July 18, 1853, it was held, p. 148: If a party shows a defence valid at the time it is passed on by the court, a subsequent change in the law cannot deprive him thereof.

In the case of *Hogan vs. Guigon (Judge)*, 29 Grat., 705, decided January 31, 1878, it was held: A statute will not be repealed by implication, unless the latter statute is so inconsistent with the first that they cannot stand together, or the latter statute embraces the whole subject-matter of the first.

In the case of *Davies & Co. vs. Creighton*, 33 Grat., 696, decided September, 1880, it was held: The act of May 29, 1852, which authorizes the organization of building fund associations, has not been repealed by any of the subsequent statutes, and a building fund association organized under that statute on the 8th of September, 1872, is a legally organized association.

In *Ryan's Case*, 80 Va., 385, decided April 2, 1885, it was held: Unless a statute by its language, expressly or by necessary implication, demands such construction, it will not be construed as repealing a previous statute, or as being retrospective.

INDEX.

CONSTITUTION.

	PAGE.
Article 1, Section 21,	1
Article 4, Section 5,	1
Article 4, Section 8,	2
Article 5, Sections 14 and 15,	2
Article 5, Sections 17 and 22,	4
Article 6, Section 2,	4
Article 6, Sections 3, 8, and 14,	8
Article 6, Sections 20 and 22,	9
Article 6, Section 25,	10
Article 7, Section 5,	10
Article 10, Sections 1, 4, and 10,	11
Article 11, Section 1,	12
Article 11, Section 1, Paragraph 2,	13
Article 11, Section 9,	13

CODE.

TITLE I.

CHAPTER I.

TITLE II.

CHAPTER II.

Section 3,	14
Section 5, Paragraphs, 3, 4, 8, and 9,	14
Section 5, Paragraphs 12 and 13,	15
Section 6,	16
Section 7,	17

TITLE III.

CHAPTER III.

Section 13, Paragraph 8,	17
------------------------------------	----

CHAPTERS IV., V.

TITLE IV.

CHAPTER VI.

Sections 43, 49,	18
----------------------------	----

TITLE V.

CHAPTER VII.

CHAPTER VIII.

Sections 83, 84,	19
----------------------------	----

CHAPTERS IX., X.

Section 117,	19
------------------------	----

CHAPTER XI.

Section 160,	19
------------------------	----

TITLE VI.

CHAPTER XII.

	PAGE.
Sections 162 and 163,	20
Sections 165, 167,	21

TITLE VII.

CHAPTER XIII.

Sections 168 and 177,	21
Sections 179 and 180,	22
Section 181,	23

TITLE VIII.

23

CHAPTER XIV.

Section 183, Paragraph 2,	25
Section 185, Paragraph 3,	26
Section 192,	26

TITLE IX.

CHAPTER XV.

Section 207,	26
------------------------	----

TITLE X.

CHAPTERS XVI., XVII., XVIII., XIX., XX.

TITLE XI.

CHAPTER XXI.

TITLE XII.

CHAPTER XXII.

Section 399,	27
Sections 402 and 406,	28
Section 408,	31
Sections 409 to 412,	32
Sections 414 to 434,	33

TITLE XIII.

CHAPTERS XXIII., XXIV.

Sections 457 to 485,	34
Sections 489 to 574,	35
Section 579,	36

CHAPTER XXV.

Sections 581 to 597,	40
--------------------------------	----

CHAPTER XXVI.

Section 590,	41
------------------------	----

CHAPTER XXVII.

Section 619,	41
------------------------	----

CHAPTER XXVIII.		PAGE.	Sections 1042 to 1048,	75
Section 635,	41		CHAPTER XLV.	
Section 642,	43		Section 1060,	76
Sections 651 to 653,	44		TITLE XVII.	
Sections 654 and 655,	45		CHAPTER XLVI.	
Section 661,	46		Section 1068,	76
CHAPTERS XXIX., XXX.			Section 1069,	78
Sections 682 to 685,	47		Sections 1072 to 1074,	81
Sections 684 to 702,	48		Sections 1075 and 1076,	83
CHAPTER XXXI.			Section 1078,	84
Sections 712 to 717,	48		Sections 1079 and 1080,	86
Sections 724 to 735,	49		Section 1081,	87
TITLE XIV.			Sections 1093 and 1094,	90
CHAPTER XXXII.			Section 1103,	91
Section 746,	49		TITLE XVIII.	
Section 751,	50		CHAPTER XLVII.	
TITLE XV.			Section 1106,	92
CHAPTER XXXIII.			Sections 1107 to 1122,	93
Sections 755 to 780,	51		Section 1125,	94
TITLE XVI.			Section 1127,	95
CHAPTER XXXIV.			Section 1128,	96
Section 802,	51		Sections 1130 to 1145,	97
CHAPTER XXXV.			Section 1149,	98
Sections 812 and 813,	52		CHAPTER XLVIII.	
CHAPTER XXXVI.			Section 1159,	100
Section 833, Paragraph 2,	52		Section 1161,	101
Sections 834 to 838,	53		CHAPTERS XLIX., L.	
Sections 843 and 844,	54		Section 1181,	102
CHAPTER XXXVII.			Section 1182,	103
Sections 859 to 864,	54		CHAPTER LI.	
Section 865,	55		Sections 1185 to 1201,	103
CHAPTER XXXVIII.			Sections 1202 to 1233,	104
Section 869,	56		Sections 1234 to 1243,	105
Section 881,	57		CHAPTER LII.	
CHAPTER XXXIX.			Section 1264,	107
Sections 893 to 895,	57		CHAPTER LIII.	
Sections 897 to 901,	58		Sections 1265 to 1271,	108
Sections 907 to 909,	59		Section 1276,	109
Section 910,	60		CHAPTER LIV.	
Section 911,	65		Sections 1287 to 1291,	110
CHAPTERS XL., XLI., XLII.			Section 1292,	112
Section 925,	65		CHAPTER LV.	
CHAPTER XLIII.			Section 1295,	112
Sections 946 to 948,	66		Section 1296,	114
Section 950,	67		CHAPTER LVI.	
Section 951,	68		TITLE XIX.	
Section 955,	71		CHAPTER LVII.	
Sections 989 and 990,	72		Section 1315,	115
CHAPTER XLIV.			CHAPTERS LVIII., LIX.	
Sections 1016 to 1038,	73		TITLE XX.	
			CHAPTER LX.	
			Section 1338,	116

CHAPTER LXI.

	PAGE.
Section 1347,	117
Sections 1348 to 1350,	121
Section 1353,	123
Section 1354,	127
Section 1358,	128

CHAPTER LXII.

Sections 1374 and 1375,	131
Section 1376,	132
Sections 1381 to 1388,	133

TITLE XXI.

CHAPTER LXIII.

Section 1394,	134
-------------------------	-----

CHAPTER LXIV.

Section 1396,	135
Sections 1397 and 1398,	136
Sections 1399 to 1405,	138
Section 1408,	139

TITLE XXII.

CHAPTER LXV.

Section 1420,	139
-------------------------	-----

CHAPTER LXVI.

Sections 1429 to 1437,	140
Sections 1441 to 1455,	141

CHAPTER LXVII.

Sections 1523 to 1528,	142
----------------------------------	-----

CHAPTERS LXVIII., LXIX.

Section 1563,	142
-------------------------	-----

CHAPTERS LXX., LXXI., LXXII., LXXIII.

Section 1651,	142
-------------------------	-----

CHAPTER LXXIV.

TITLE XXIII.

CHAPTER LXXV.

Section 1669,	143
Sections 1688 to 1701,	144
Section 1702,	145
Section 1703,	147

TITLE XXIV.

CHAPTER LXXVI.

Sections 1719 to 1721,	148
----------------------------------	-----

CHAPTERS LXXVII., LXXVIII., LXXIX., LXXX.

TITLE XXV.

CHAPTER LXXXI.

Section 1788,	148
Section 1789,	149

CHAPTERS LXXXII., LXXXIII.

Sections 1797 to 1816,	149
----------------------------------	-----

CHAPTER LXXXIV.

	PAGE.
Sections 1864 to 1878,	150
Section 1891,	152

CHAPTERS LXXXV., LXXXVI., LXXXVII.

TITLE XXVI.

CHAPTERS LXXXVIII., LXXXIX., XC., XCI.

Section 2004,	153
-------------------------	-----

CHAPTER XCII.

Section 2007,	153
-------------------------	-----

TITLE XXVII.

CHAPTERS XCIII., XCIV., XCV., XCVI.

Section 2091,	154
Section 2092,	155

CHAPTER XCVII.

Sections 2137 to 2147,	155
----------------------------------	-----

CHAPTER XCVIII.

Section 2179,	156
-------------------------	-----

CHAPTER XCIX.

TITLE XXVIII.

CHAPTER C.

Sections 2218 to 2224,	157
Section 2227,	158
Section 2229,	159

CHAPTER CI.

Section 2252,	159
Section 2257,	160
Section 2258,	161
Section 2260,	162
Section 2261,	164
Sections 2262 and 2263,	165
Sections 2264 and 2265,	168

CHAPTER CII.

Section 2267,	169
Section 2269,	175
Section 2270,	176
Section 2271,	177
Section 2274,	179
Section 2275,	180
Section 2276,	181
Sections 2277 to 2281,	184

CHAPTER CIII.

Sections 2284 to 2286,	185
Sections 2285 to 2288,	186
Sections 2289 to 2297,	187

TITLE XXIX.

CHAPTER CIV.

Section 2304,	187
Sections 2321 to 2327,	189
Sections 2336 to 2339,	196

Sections 2340 to 2349,	PAGE. 197
Sections 2351 to 2368,	198

CHAPTER CV.

Sections 2375 to 2388,	200
Sections 2397 and 2398,	202
Section 2399,	204

CHAPTER CVI.

TITLE XXX.

CHAPTER CVII.

Section 2413,	204
Section 2414,	207
Section 2415,	212
Section 2416,	213
Section 2418,	214
Section 2419,	216
Section 2420,	218
Section 2421,	220
Sections 2422 to 2426,	232
Sections 2428 and 2429,	234
Section 2430,	236
Section 2432,	237
Section 2434,	238

CHAPTER CVIII.

Sections 2440 to 2442,	238
Section 2446,	244
Sections 2449 to 2455,	248
Section 2456,	250

CHAPTER CIX.

Section 2458,	251
Section 2459,	263
Section 2460,	266
Section 2461,	267
Sections 2462 and 2463,	271
Section 2465,	273
Sections 2466 and 2467,	278
Section 2468,	279
Sections 2469 and 2470,	281
Section 2472,	282
Section 2473,	284

CHAPTER CX.

Section 2474,	284
Section 2475,	286
Section 2476,	291
Sections 2479 to 2484,	293
Section 2498,	294

CHAPTER CXI.

Section 2500,	294
Sections 2501 to 2510,	296

CHAPTER CXII.

Section 2512,	296
Sections 2513 and 2514,	297
Section 2515,	305
Sections 2517 and 2518,	307
Sections 2519 to 2521,	310
Section 2522,	311
Sections 2523 to 2526,	313

Section 2528,	PAGE. 314
Section 2529,	315
Sections 2531 and 2532,	316
Section 2533,	317
Section 2534,	320
Sections 2536 and 2537,	321
Section 2542,	322
Section 2544,	323
Section 2546,	327

CHAPTER CXIII.

Section 2549,	327
Section 2550,	328
Sections 2551 and 2552,	329
Section 2553,	330
Sections 2554 to 2556,	331
Section 2557,	332
Section 2559,	335
Section 2561,	337

TITLE XXXI.

CHAPTER CXIV.

Section 2562,	342
Section 2563,	347
Sections 2564 to 2569,	348

TITLE XXXII.

CHAPTER CXV.

Section 2581,	348
Sections 2585 to 2587,	349
Section 2592,	350

CHAPTER CXVI.

Sections 2597 to 2600,	350
Sections 2601 to 2603,	351
Section 2604,	354
Sections 2605 and 2606,	357
Section 2608,	358
Section 2609,	359
Sections 2610 to 2614,	361

TITLE XXXIII.

CHAPTER CXVII.

Section 2616,	361
Section 2618,	364
Sections 2620 and 2621,	365
Sections 2622 to 2626,	366

TITLE XXXIV.

CHAPTER CXVIII.

Sections 2629 to 2632,	367
----------------------------------	-----

TITLE XXXV.

CHAPTER CXIX.

Section 2636,	367
Section 2637,	368
Section 2639,	369
Section 2641,	371
Sections 2642 to 2645,	373
Sections 2646 to 2648,	375
Section 2651,	378
Section 2652,	379
Section 2654,	380

	PAGE.		PAGE.
Sections 2655 to 2658,	381	Sections 2792 to 2797,	459
Section 2659,	382	Section 2800,	460
Section 2660,	383	CHAPTERS CXXVIII., CXXIX.	
Section 2662,	386	TITLE XXXIX.	
CHAPTER CXX.		CHAPTER CXXX. 460	
Section 2663,	386	Section 2816,	481
Section 2664,	389	Sections 2818 to 2821,	482
Section 2665,	390	Section 2822,	483
Section 2666,	392	Sections 2823 to 2825,	488
Section 2667,	393	TITLE XL.	
Section 2668,	394	CHAPTER CXXXI.	
TITLE XXXVI.		Section 2830,	488
CHAPTER CXXI.		CHAPTER CXXXII.	
Section 2676,	395	Section 2836,	489
Section 2678,	399	CHAPTER CXXXIII.	
Section 2679,	400	Section 2840,	492
Section 2687,	401	Section 2841,	504
Sections 2693 to 2695,	403	CHAPTER CXXXIV.	
Sections 2697 to 2699,	413	Section 2842,	504
Sections 2700 to 2706,	416	Section 2845,	506
Section 2707,	417	Section 2848,	507
TITLE XXXVII.		Section 2849,	508
CHAPTER CXXII.		Section 2850,	509
Section 2713,	417	Section 2852,	510
CHAPTER CXXIII.		Section 2853,	511
Section 2716,	418	Sections 2854 and 2855,	512
Sections 2718 and 2719,	430	Sections 2856 to 2858,	514
Section 2720,	431	Section 2860,	515
CHAPTER CXXIV.		Section 2862,	531
Section 2722,	431	CHAPTER CXXXIV.*	
Section 2723,	432	Section 2863,	531
Sections 2725 and 2726,	433	Section 2874,	532
Section 2727,	434	Section 2877,	533
Sections 2728 and 2729,	435	CHAPTER CXXXV.†	
Sections 2730 to 2735,	437	Section 2890,	533
Section 2736,	441	Section 2891,	535
Sections 2738 to 2740,	442	Section 2893,	536
Section 2741,	443	Section 2895,	551
Section 2742,	444	TITLE XLI.	
Section 2744,	445	CHAPTER CXXXVII.	
Section 2746,	446	Section 2896,	553
Sections 2749 and 2750,	447	Section 2897,	554
Sections 2751 and 2752,	448	Sections 2898 to 2900,	558
Sections 2754 to 2757,	449	Section 2901,	559
CHAPTER CXXV. 450		Section 2902,	560
Section 2760,	450	Sections 2903 and 2904,	566
Sections 2770 and 2771,	451	CHAPTER CXXXVIII. 566	
CHAPTER CXXVI. 451		Section 2912,	570
Section 2775,	453	TITLE XLII.	
Section 2776,	454	CHAPTER CXXXIX.	
TITLE XXXVIII.		Section 2915,	570
CHAPTER CXXVII.		Section 2917,	581
Sections 2782 and 2783,	454	Sections 2918 and 2919,	582
Sections 2785 to 2787,	455		
Section 2791,	457		

* This corresponds with Ch. CXXXV. in Code.

† This corresponds with Ch. CXXXVI. in Code.

	PAGE.		PAGE.
Section 2920,	583	Sections 3073 to 3079,	659
Section 2921,	598	CHAPTER CL.	
Section 2922,	600	Section 3086,	659
Sections 2923 and 2924,	602	CHAPTER CLI.	
Section 2927,	603	Sections 3111 to 3114,	659
Section 2929,	605	Sections 3122 to 3124,	660
Sections 2930 and 2931,	606	Section 3126,	661
Section 2932,	607	CHAPTER CLII.	
Section 2933,	608	Sections 3139 to 3156,	661
Sections 2934 to 2936,	610	Sections 3166 to 3168,	662
Section 2937,	611	TITLE XLVII.	
TITLE XLIII.		CHAPTERS CLIII., CLIV.	
CHAPTER CXL.		Sections 3193 to 3198,	663
Sections 2939 to 2952,	611	Sections 3199 and 3200,	664
Section 2953,	612	Section 3201,	667
CHAPTER CXLI.		Section 3202,	668
Section 2959,	613	CHAPTER CLV.	
Sections 2961 and 2962,	617	TITLE XLVIII.	
Section 2964,	618	CHAPTER CLVI.	
Section 2967,	620	Section 3207,	669
Section 2968,	622	Sections 3209 to 3211,	672
Sections 2969 to 2971,	623	Section 3212,	673
Sections 2975 and 2976,	626	Section 3213,	674
Sections 2979 to 2981,	628	CHAPTER CLVII.	
Section 2982,	630	Section 3214,	675
Sections 2983 and 2984,	631	Section 3215,	676
Section 2986,	632	CHAPTER CLVIII.	
Sections 2989 to 2991,	634	Section 3220,	676
Section 2995,	636	Sections 3224 and 3225,	677
TITLE XLIV.		Sections 3227 to 3230,	679
CHAPTER CXLII.		Sections 3231 and 3232,	680
Section 2998,	636	Section 3233,	682
Sections 2999 to 3001,	638	CHAPTER CLIX.	
Section 3003,	640	Sections 3236 to 3242,	683
CHAPTER CXLIII.		Sections 3243 and 3244,	684
Section 3006,	641	Section 3248,	685
Sections 3007 to 3009,	643	Section 3251,	686
Section 3010,	652	Sections 3253 and 3254,	687
TITLE XLV.		Section 3255,	688
CHAPTER CXLIV.		Sections 3259 and 3260,	690
Section 3012,	653	Sections 3261 and 3262,	693
CHAPTER CXLV.	653	Section 3264,	694
Section 3023,	655	Sections 3266 to 3268,	696
CHAPTER CXLVI.		Sections 3271 and 3272,	697
Section 3029,	656	Sections 3273 and 3274,	700
Section 3035,	657	Section 3275,	701
TITLE XLVI.		Sections 3276 to 3278,	702
CHAPTER CXLVII.		Section 3279,	706
Sections 3045 to 3049,	657	Sections 3280 and 3281,	707
Sections 3054 and 3055,	658	Section 3283,	708
CHAPTER CXLVIII.		Section 3284,	709
Sections 3060 to 3062,	658	Section 3285,	710
CHAPTER CXLIX.		Sections 3286 and 3287,	711
Section 3069,	658	Section 3288,	715
		Sections 3290 and 3291,	716

	PAGE.		PAGE.
Section 3292,	717	Section 3436,	837
Sections 3293 and 3294,	718	Sections 3437 and 3438,	838
CHAPTER CLX.	719	Sections 3441 and 3442,	839
Sections 3295 to 3298,	725	Section 3444,	842
Section 3299,	736	Section 3445,	843
Section 3303,	740	Section 3446,	845
CHAPTER CLXI.		CHAPTER CLXIX.	
Section 3306,	740	Sections 3447 and 3448,	846
Sections 3307 and 3308,	741	Section 3449,	847
Section 3309,	745	Section 3450,	848
CHAPTER CLXII.		Section 3451,	849
Section 3316,	745	CHAPTER CLXX.	852
Section 3317,	747	Section 3453,	853
CHAPTER CLXIII.		Section 3454,	856
Section 3320,	747	Section 3455,	861
Sections 3322 to 3325,	752	Section 3457,	870
CHAPTER CLXIV.		Sections 3458 to 3469,	871
Sections 3328 to 3330,	752	Section 3470,	872
Section 3334,	753	Section 3474,	877
Sections 3336 to 3339,	755	Section 3475,	878
Sections 3340 to 3342,	756	Section 3482,	879
Sections 3344 to 3346,	757	Section 3484,	880
Sections 3347 to 3358,	766	Section 3485,	887
Sections 3359 to 3362,	767	Sections 3486 to 3488,	888
Sections 3364 and 3365,	771	Section 3490,	889
Section 3366,	772	Section 3492,	892
Section 3370,	773	CHAPTER CLXXI.	
Sections 3373 to 3375,	775	Sections 3493 to 3495,	892
CHAPTER CLXV.		TITLE XLIX.	
Section 3376,	776	CHAPTER CLXXII.	
CHAPTER CLXVI.		Section 3520,	893
Section 3378,	777	CHAPTER CLXXIII.	
Sections 3380 and 3381,	778	Section 3539,	893
Section 3383,	785	Sections 3543 to 3546,	894
Section 3384,	786	Sections 3552 to 3554,	895
Section 3385,	788	TITLE L.	
Section 3387,	790	CHAPTER CLXXIV.	
Section 3388,	791	Sections 3557 to 3561,	896
Section 3390,	792	Section 3566,	897
Section 3391,	795	Section 3567,	899
Section 3392,	799	Sections 3569 and 3570,	905
Section 3393,	804	Section 3571,	908
Section 3394,	806	Section 3573,	910
Section 3395,	807	Sections 3574 and 3575,	911
Section 3396,	808	Sections 3576 and 3577,	913
CHAPTER CLXVII.		CHAPTER CLXXV.	
Section 3397,	810	Section 3583,	918
Sections 3398 to 3405,	821	Section 3585,	919
Sections 3409 to 3418,	823	Sections 3586 and 3587,	920
Section 3420,	825	Section 3591,	925
Section 3421,	826	Sections 3594 to 3596,	927
Sections 3422 to 3424,	827	Section 3597,	928
Section 3425,	828	Section 3599,	929
Section 3426,	830	Section 3600,	931
CHAPTER CLXVIII.		CHAPTER CLXXVI.	
Section 3435,	831	Section 3601,	932

Sections 3602 to 3608,	PAGE. 933
Sections 3609 to 3614,	934

CHAPTER CLXXVII. 935

Sections 3620 to 3621,	945
----------------------------------	-----

TITLE LI.

CHAPTER CLXXVIII.

Section 3630,	947
Section 3634,	949
Sections 3635 to 3649,	950
Sections 3652 to 3657,	951

TITLE LII.

CHAPTERS CLXXIX., CLXXX.

Section 3662,	952
Sections 3664 to 3671,	965
Section 3673,	968
Sections 3674 and 3675,	969
Sections 3678 and 3680,	970
Sections 3681 to 3691,	973
Section 3692,	974

CHAPTER CLXXXI.

Section 3695,	975
Sections 3696 to 3699,	976
Sections 3701 to 3704,	977
Sections 3705 to 3707,	979
Section 3708,	986
Sections 3714 to 3717,	987
Sections 3720 to 3722,	988
Section 3729,	989

CHAPTER CLXXXII.

Section 3733,	990
Section 3735,	993
Section 3737,	996
Section 3738,	998

CHAPTER CLXXXIII.

Section 3741,	999
Sections 3742 to 3744,	1001
Sections 3749 to 3755,	1002
Sections 3767 and 3768,	1003

CHAPTER CLXXXIV.

Sections 3774 to 3780,	1005
----------------------------------	------

CHAPTER CLXXXV.

Section 3781,	1005
Section 3783,	1007
Sections 3784 to 3786,	1008
Sections 3787 and 3788,	1009
Sections 3799 to 3805,	1010

CHAPS. CLXXXVI., CLXXXVII.

Section 3815,	1011
Sections 3816 to 3818,	1012
Sections 3820,	1014
Sections 3824 to 3837,	1015

CHAPTER CLXXXVIII.

Section 3853,	1015
-------------------------	------

CHAPTER CLXXXIX.

Section 3856,	PAGE. 1016
-------------------------	---------------

CHAPTER CXC.

Sections 3879 to 3885,	1016
Section 3886,	1018
Sections 3887 to 3889,	1019
Sections 3892 and 3893,	1020
Section 3894,	1021
Section 3895,	1024
Sections 3897 to 3900,	1027
Sections 3901 to 3904,	1028
Sections 3905 to 3908,	1029

TITLE LIII.

CHAPTER CXCI.

Sections 3913 to 3916,	1030
Section 3927,	1031

CHAPTER CXCI.

Sections 3942 to 3945,	1031
Section 3948,	1032

CHAPTER CXCI.

Section 3951,	1032
-------------------------	------

CHAPTER CXCI.

Sections 3956 to 3960,	1032
Section 3965,	1034
Sections 3966 to 3970,	1037

CHAPTER CXCV.

Section 3977,	1037
Sections 3979 to 3984,	1039

CHAPTER CXCVI.

Section 3989,	1041
Sections 3990 and 3991,	1042
Section 3992,	1043
Sections 3993 and 3994,	1044
Sections 3996 to 3999,	1045
Section 4000,	1049
Section 4001,	1051
Section 4003,	1053
Sections 4009 to 4013,	1055
Section 4014,	1056

CHAPTER CXCVII.

Section 4016,	1656
Section 4017,	1058
Section 4018,	1060
Sections 4019 to 4023,	1071
Section 4024,	1072
Section 4025,	1073
Sections 4026 and 4027,	1073
Sections 4028 to 4037,	1078
Sections 4038 to 4040,	1079
Sections 4041 to 4043,	1080
Sections 4044 and 4045,	1081
Sections 4046 and 4047,	1082

CHAPTER CXCVIII.

Sections 4050 to 4052,	1085
Sections 4053 to 4055,	1086

	PAGE.
Sections 4056 to 4071,	1087
Sections 4074 to 4076,	1088

CHAPTER CXCI.

Section 4081,	1088
Section 4087,	1089

CHAPTER CC.

Sections 4090 to 4093,	1089
Section 4097,	1090
Sections 4099 to 4104,	1091

TITLE LIV.

CHAPTER CCI.

Section 4106,	1091
Section 4107,	1092

TITLE LV.
CHAPTERS CCII., CCIII.

	PAGE.
Section 4174,	1092
Section 4176,	1093

CHAPTER CCIV.

Sections 4179 to 4181,	1093
Sections 4182 to 4187,	1094

TITLE LVI.

CHAPTER CCV.

Section 4198,	1094
Section 4199,	1095

TITLE LVII.

CHAPTER CCVI.

Sections 4202 to 4204,	1095
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